Neutral Citation: [2016] IEHC 293

THE HIGH COURT

[2012 No. 169 CA]

BETWEEN/

DANNY PRUNTY

PLAINTIFF

AND

ANNE CROWLEY AS LEGAL REPRESENTATIVE OF THE ESTATE OF FRANK CROWLEY (DECEASED) AND CFO CONSTRUCTION LIMITED

DEFENDANTS

JUDGMENT of Ms. Justice Iseult O'Malley delivered on the 30th day of May, 2016

Introduction

1. This is an appeal from an order of the Circuit Court in relation to a claim for specific performance. It turns on the status of contractual negotiations between the parties, for the sale of a property belonging to the plaintiff, and on the effect of certain steps taken in the course of those negotiations.

2. The plaintiff's case is that the correspondence evidences a concluded contract. The doctrine of part performance is also relied upon, because of the fact that the plaintiff abandoned a claim against another individual, allegedly at the request of the first named defendant. It is also argued that the defendants are estopped from denying the existence of a contract on the basis that it would be unconscionable were they to do so.

3. The background to the case was a proposal to develop a new shopping centre in Longford town. Those involved in the project included the defendant, Mr. Crowley, who was an architect and is now deceased, and Mr. Clem Kenny, a developer. The hope at the time was that Dunnes Stores would invest a sum of around €12 million in the development. Mr. Crowley, who acted as architect and also put some of his own money into the project, is said to have had good contacts with key personnel in that firm.

4. According to the uncontradicted evidence of Mr. Kenny, Mr. Crowley's role was to act as architect to the development on a no-foal-no-fee basis. He was also to provide the money for the deposits necessary to purchase the lands needed for the site.

5. The plan to assemble a site for the shopping centre envisaged, amongst other aspects, the acquisition of certain properties in the town including three adjacent residential properties. One of these was a house belonging to a Mr. Stokes, who was agreeable to disposing of his home but wanted a house to be built on a particular site in exchange. The site, which is outside the town and was not part of the development plan, belonged to the plaintiff. The plaintiff was agreeable to the sale of his property. He says that Mr. Kenny executed a contract with him in 2004, and he and Mr. Kenny both say that in so doing Mr. Kenny was purchasing in trust for himself and Mr. Crowley. The price agreed was €110,000 and a deposit of €11,000 was paid.

6. Mr. Kenny did not complete the purchase and the plaintiff commenced specific performance proceedings against him in the High Court in February, 2005.

7. Mr. Crowley and Mr. Kenny fell out, and the plaintiff says that he was contacted by Mr. Crowley with an offer to take over the contract. Mr. Crowley proposed, and the plaintiff agreed, that the plaintiff should serve a notice of forfeiture on Mr. Kenny and discontinue the proceedings against him. This was done (at least to the extent that the solicitor thought that he had filed a notice of discontinuance, gave notice that he had done so and did serve a notice of forfeiture), and the deposit paid by Mr. Kenny was then credited to Mr. Crowley for the purposes of the sale.

8. The balance of the purchase monies, amounting to €99,000, was subsequently transferred by Mr. Crowley's solicitor to the plaintiff's solicitor.

9. Meanwhile, one of the other property owners whose site was required for the proposed development decided that she did not want to sell her house.

10. Mr. Crowley's solicitor subsequently wrote to the plaintiff denying that there was any contract. A counterclaim in these proceedings seeks the return of the money.

The evidence

The contract with Mr. Kenny

11. In late July, 2004 Mr. Mark Connellan, the plaintiff's solicitor, received a sales advice note from a firm of auctioneers on foot of which he prepared the documentation for the sale of the plaintiff's house. The proposed purchaser was "The Blayney Partnership", with an address care of Keans Solicitors in Dublin. The purchase price was €110,000 and a booking deposit of €5,000 had already been paid. It was requested that the sale be closed as quickly as possible.

12. It is common case that the agreed price represented the market value of the property and was in no sense a "ransom" price.

13. On the 3rd August, 2004, Mr. Connellan wrote to Mr. Donal King at Keans, enclosing various documents relating to the property and contracts in duplicate. Mr. King responded with certain queries, in a letter headed "Subject to contract/contract denied" which contained a statement that the firm had no authority to bind its client and that the letter was sent without prejudice and strictly subject to formal exchange of contracts.

14. Correspondence continued over the next few weeks. All letters from both solicitors continued to be headed "Subject to contract/contract denied".

15. On the 7th September, 2004, Mr. Connellan wrote a letter in which he said that unless he received a signed contract with the balance of the deposit by close of business on the following day his client would sell the property to another interested party.

16. The following day Mr. Connellan received an email from a Mr. Michael J. Blayney of the Blayney Partnership. This gentleman said that he had assured the plaintiff earlier that day that it was still proposed to acquire the property at the agreed price. He apologised for what he termed a "hiccup" and said that he hoped to sign the contract on the next day.

17. Ultimately, Keans forwarded a signed contract, dated the 23rd September, 2004, and a deposit cheque in the sum of €11,000 under cover of a letter dated the 22nd September, 2004. The letter was headed "Subject to contract/contract denied". There was a request for a reply to the non-title queries and for one part signed contract.

18. The contract refers to the plaintiff as the vendor. The purchaser appears to have originally been described as "The Blayney Partnership" (in typewriting) but this was crossed out and the words "Clem Kenny (in trust)" were written in by hand. The document was signed "Clem Kenny (in trust)". Mr. Connellan said in evidence that he knew who Mr. Kenny was, and that at that stage he knew why the property was being acquired.

19. The closing date was to be four weeks later.

20. Mr. Connellan replied on the 29th September, 2004, enclosing the contract as signed by the plaintiff together with the replies to the requisitions.

21. The closing date came and went. After further correspondence Mr. Connellan served a completion notice on Keans under cover of a registered letter dated the 22nd November, 2004. Clause 4 of the notice stated that if the sale was not completed, and the balance of the purchase monies plus interest paid, within twenty-eight days, the deposit would be forfeited and the vendor would either rescind the contract or re-sell the property.

22. On the 7th January, 2005, Mr. Connellan wrote to Keans observing that the completion notice had expired. He noted that Mr. Kenny had signed the contract in trust, and called for identification of the principal. This letter was described in evidence by Mr. Connellan as an attempt by him to ratchet up the pressure, in that he could not have forfeited the deposit without serving a formal forfeiture notice.

23. The letter, and follow-up correspondence, was not responded to and on the 21st February, 2005, Mr. Connellan sent a plenary summons to Keans, inquiring whether they had authority to accept service. The proceedings sought an order for specific performance against Mr. Kenny.

24. On the 7th March, 2005, Mr. Gerald Kean, the principal of Keans Solicitors, sent a fax to Mr. Connellan in which he said that his clients were proceeding to complete the purchase. He apologised for the delay and asked Mr. Connellan to send him an apportionment account. He said that he would arrange for the funds to complete the purchase without any further problems.

25. Mr. Connellan responded on the 10th March, 2005. He said that he awaited requisitions and draft deed, and that he would deal with the requisitions although not obliged to do so. If the sale was closed without further delay he would not charge a professional fee in respect of the High Court proceedings, but he insisted that court stamp duty, counsel's drafting fee and interest on the balance of the purchase money would have to be paid.

26. There does not appear to have been a reply to this letter. On the 7th April, 2005, Mr. Connellan wrote again, consenting to the late filing of an appearance within 21 days.

27. Apart from a letter resulting in a telephone conversation between Mr. Connellan and Mr. Kean on the 5th or 6th May, and despite further letters from Mr. Connellan stating that he was still willing to complete, there was no further movement from Mr. Kenny's side. The proceedings had still not been formally served.

28. Mr. Connellan described this situation as "mildly unsatisfactory". However, he said that he had no doubt that the plaintiff would get his money "either the easy way or the hard way". Mr. Connellan accepted in evidence that he was told later by Mr. Crowley that Mr. Kenny was not good for the money. However he believed, then and now, that Mr. Kenny was a mark. He had been involved in a very successful housing development in Longford, and Mr. Connellan knew him to be a man of means. Secondly, Mr. Kenny had signed the contract in trust and if the matter went to litigation the principals would have to be disclosed and the money could come from there.

29. Mr. Kenny, who has given evidence on behalf of the plaintiff in these proceedings, agreed that the money for the deposit had come from Mr. Crowley. In negotiating with the plaintiff he was acting on behalf of himself, Frank Crowley and "whoever we deemed would be necessary" to progress the development. There was a recognition at the time that they needed another partner, and a particular individual was being considered. He said that he had no recollection now of the reason why the name "the Blayney partnership" was used, and he did not recall an individual named Blayney. There might have been a vehicle set up by Keans that was ready to use. Alternatively it might have been a shelf company used by Dunnes Stores. He had no difficulty signing the contract "in trust" for that entity. He said that he understood that Mr. Crowley to be the person ultimately responsible, as the person who had made the financial contributions pending the taking on of a new partner.

30. This, Mr. Kenny said, was not because he did not have money of his own – he said that his net asset value in 2006 was about €6.5 million. However, he did not intend putting his own money into this development at this stage.

31. Mr. Kenny said that he could recall being pressed by Mr. Connellan to complete the purchase from the plaintiff. At that time he was also engaged in parallel discussions with the other landowners. At a certain stage, which he put as being around November 2005, he received a phone call from Mr. Crowley telling him that he was being excluded from the project and that Mr. Crowley and the new partner would carry on with the development.

The negotiations between the plaintiff and the defendant

32. On the 8th (or possibly the 10th) June, 2005, (nothing seems to turn on the exact date) Mr. Connellan received a phone call from Ms. Fiona Roche of M. Roche & Co. Solicitors. Ms. Roche told him that she acted for Mr. Crowley, and that Mr. Kenny had been acting on behalf of Mr. Crowley. In the knowledge that proceedings against Mr. Kenny were pending, Mr. Crowley wanted to take over the transaction relating to this plaintiff and the negotiations with the other two landowners. Mr. Connellan said that he told Ms. Roche that his client would not mind who paid so long as he got his money, but that there were High Court proceedings out and he would have to be sure of the money before he could complete with Mr. Crowley.

33. Mr. Connellan accepted that Ms. Roche was only making a proposal, and agreed that he needed to take instructions before the matter could progress. However, he had given a clear indication that if he could be certain of the money he would be happy to complete with Mr. Crowley.

34. Later on the 10th June, 2005, Ms. Roche faxed a letter to him. This is headed "Without Prejudice" and the client is referred to as "Frank Crowley (In Trust)". Ms. Roche said that her understanding was that "without prejudice" meant "something that was not binding in negotiations". She used the phrase "in trust" because it was not clear to her yet whether Mr. Crowley was proposing to buy in his own name or on behalf of another person or entity.

35. The letter stated that her client had invested money in the development project and was keen to "finalise" the transaction with Mr. Prunty. It continued:

> *"We understand your client is agreeable to conclude the transaction and we have received instructions that our client is agreeable to take over the contractual matters, on the terms previously agreed with Clem Kenny, with a proposed closing date of 16th July, 2005. We await receipt of files and documents from Keans, Solicitors. We understand that there is a High Court matter pending in relation to this transaction and it was previously agreed with Keans, Solicitors that your reasonable costs would also be discharged and we should be obliged to receive a note of same."*

36. Mr. Connellan also received a letter from Ms. Roche in his capacity as solicitor to Ms. Celine Barry, one of the other two property owners with whom Mr. Kenny had been negotiating. That letter said that the writer had been instructed to take over the contractual negotiations and was awaiting files from Keans.

37. Mr. Connellan replied to Ms. Roche on the 15th June, 2005. This letter was headed simply "Danny Prunty to Clem Kenny". He stated that the High Court proceedings against Mr. Kenny had issued, and that he had instructions to go ahead with them. However, if Ms. Roche could confirm that she was in funds, and could provide a draft deed and a list of documents required for closing, he would "of course" furnish the deed duly executed together with an estimate of Mr. Prunty's reasonable costs.

38. On the 24th June, 2005, Ms. Roche responded in an open letter headed only "Our Client: Frank Crowley (In Trust)/ Danny Prunty –to- Clem Kenny/Danny Prunty –v- Clem Kenny". In relevant part the letter reads:

> *"Please note that our client is presently finalising his funding and subject thereto, intends to complete with your client within two weeks.*
>
> *Please note that we still await the formal hand over of files from Keans, Solicitors but in anticipation of same and the writer reviewing the contract documentation we should be obliged to receive details of your reasonable costs.*
>
> *We hope to hear further from our client within the next 7 days with confirmation of the funding and the Lending Institution and shall revert to you then."*

39. It may be noted here that Mr. Kenny has said that he never gave instructions to Keans for his files to be sent to Ms. Roche. He was also unaware that the file was then returned by Ms. Roche to Keans. Ms. Roche said that possibly she had requested sight of the contract documents but that she had no recollection of a "formal handover" of files. She said that she presumed that the question of the client's authorisation did not arise, but that this was not as much an issue in those days as it would be now.40. Mr. Connellan observes in relation to this letter that there was no suggestion of a new contract to be executed by Mr. Crowley. The purpose of the correspondence, he believes, was to finalise with Mr. Crowley the contract which had been negotiated by Mr. Kenny. Ms. Roche emphasises the reference in the letter to the need to obtain confirmation of funding, and points out that at that stage she had still not seen the contract documentation.

41. Ms. Roche wrote again on the 20th July, 2005. Again, the letter is not headed "subject to contract" or any cognate words. She stated that the firm had "finally" received the files from Keans, and arising therefrom she raised certain queries in relation to the title. She said that "subject thereto", she was awaiting confirmation from the client as to whether the property was to be in his own name or in the name of a company. "Subject thereto" she furnished a draft deed for approval. She asked for details of the reasonable costs due to the plaintiff, and noted that a contract deposit of €11,000 had been paid and that the balance of the consideration due was €99,000.

42. Mr. Connellan says that it was not at that stage clear what entity would complete the purchase, so the fact that the transferee on the draft deed was left blank was "perfectly in order". It was clear to him that the original contract was being taken over, with the deposit being availed of and the balance due under the contract to be paid. Ms. Roche says that what she was doing was raising pre-contract requisitions and that this is not an uncommon practice. It did not mean that there was a binding contract in place.

43. On the same day, Ms. Roche also wrote to Mr. Connellan in relation to Ms. Barry, inquiring whether he had instructions. This letter was headed "subject to contract/contract denied".

44. On the 25th July, 2005, Mr. Connellan responded on behalf of Mr. Prunty. He objected to the raising of requisitions at this stage but dealt with them nonetheless. He requested a draft deed.

45. Under cover of an open letter headed referring to her client as "Frank Crowley (In Trust)", Ms. Roche forwarded a draft deed of transfer on the 27th July, 2005. She said that the client was still deciding whether or not to purchase in his own name. The draft was approved by Mr. Connellan by letter dated the 2nd August, 2005.

46. Also on the 2nd August, 2005, Mr. Kean wrote to Mr. Connellan on behalf of Mr. Kenny, requesting a letter consenting to late entry of appearance in the High Court proceedings. Mr. Connellan responded by asking for clarification – he said that he had been advised by M. Roche & Co. that they were taking over the matter and had obtained the file from Keans. He copied this letter to Ms. Roche.

47. Mr. Kean's reply to this was that he was taking instructions. There was no response to the suggestion that the file had been transferred.

48. On or about the 10th August, 2005, Ms. Roche telephoned Mr. Connellan. She says that she was anxious to clear up any misunderstanding there may have been that Mr. Crowley would be willing to take over the court proceedings – what he was willing to do was to pay the costs, or something towards the costs, in relation to the matter. She was concerned to ensure that there would be no comeback from Mr. Kenny, and therefore she wanted the proceedings against him discontinued and a forfeiture notice served on him. As things stood, if Mr. Kenny had offered to pay the balance the transaction would have to have been completed with him. She told Mr. Connellan that she was arranging to furnish monies, to be held in trust, as a good faith gesture.

49. According to Mr. Connellan, Ms. Roche said that he would be receiving a letter, and should not worry about it. It seemed to him that she was concerned to protect Mr. Crowley from possible litigation by Mr. Kenny. She wanted him to serve a forfeiture notice on Mr. Kenny to "clean out" the contract.

50. Ms. Roche faxed two letters to Mr. Connellan on the 16th August, 2005. One was an open letter in which Ms. Roche said that, given the existence of the High Court proceedings against Mr. Kenny and the forfeiture of the deposit, "we cannot take over the contractual obligations of Clem Kenny in this matter." She said that the file had been returned to Keans.

51. The other letter was headed "Subject to Contract/Contract Denied". This noted that separate correspondence had been sent on the same day and continued as follows:

> *"We note you continue to hold a forfeited Contract Deposit in the sum of €11,000, which Contract Deposit was solely funded by our client. Our client wishes to proceed with the acquisition of this site from your client.*
>
> *As we are not in a position to take over the contractual obligations of Clem Kenny in this matter, per our letter to you of even date, we suggest:-*
>
> *1. That a Notice of Discontinuance be served on Clem Kenny via Keans, Solicitors. We have already intimated that we will pay your reasonable costs in this matter and we should be obliged to receive a note of same.*
>
> *2. A Forfeiture Notice should be served on Clem Kenny via Keans, Solicitors. We note you served the Completion Notice under cover of registered post on Keans, Solicitors on or about the 22nd of November, 2004. We attach a draft Forfeiture Notice for your assistance.*
>
> *3. Please issue an up to date Contract with a sale consideration of €99,000 only. This Contract cannot be executed until the expiry of the Forfeiture Notice aforesaid. In the meantime, we shall arrange to forward you as a gesture of good faith the completion funds in the sum of €99,000 which completion funds will be held strictly on trust to be returned on demand to our firm if requested, prior to the expiry of the Forfeiture Notice. Upon expiry of the Forfeiture Notice, we shall arrange for completion of this matter with your client….*

52. The letter went on to make certain suggestions in relation to the contract. It concluded:

> *"We should be obliged to hear from you with confirmation of the above but in the meantime, please note that we have no authority, express or implied to bind our client to any Contract or Agreement. No contract or Agreement shall exist at law until such time as same have been executed and exchanged by all necessary parties and the Contract deposit paid. Furthermore, neither this nor any other correspondence shall be deemed a note or memorandum for the purpose of the Statute of Frauds."*

53. A draft forfeiture notice was enclosed.

54. Mr. Connellan replied on the 2nd September, 2005. In a letter headed "Strictly Without Prejudice" he said that his client required payment of the balance of the purchase money; the sum of €7,000 for interest; and the sum of €2,000 for the legal costs in respect of the proceedings against Mr. Kenny. He was also concerned that Mr. Prunty might be exposed to an application for costs by Mr. Kenny when the notice of discontinuance was served, and inquired as to Ms. Roche's view on whether or not an indemnity would be needed. He said that on satisfactory performance of these matters he would hold all monies in trust, immediately serve a forfeiture notice and complete with Mr. Crowley.

55. In evidence Mr. Connellan said that he had not been prepared to issue a new contract and walk away from the recourse he had against Mr. Kenny unless absolutely certain of the money from Mr. Crowley. Mr. Kenny was, so far as he knew, a mark.

56. There was no immediate response to this letter. After a reminder, Mr. Connellan wrote on the 8th November (a Tuesday) to say that he had strict instructions that, unless the full sum set out in the letter of the 2nd September, was paid on the terms set out in that letter by close of business on the following Friday (which was the 11thNovember), Mr. Prunty would end all discussions.

57. On the 11th November, 2005, Ms. Roche wrote a letter (headed "Subject to Contract/Contract denied") enclosing "on trust and to our order" the balance of the funds.

> *"This is paid to you on the understanding that you will now proceed to forward the Notice of Discontinuance and thereafter a Forfeiture Notice on Clem Kenny via Keans, Solicitors.*
>
> *Subject to our being in a position to freely complete this transaction with you the €99,000.00 can then be released to your client in this matter and we will then arrange to discharge the balance monies due to you being your costs and interest in the sum of €9,000.*
>
> *We note that in the event that Clem Kenny does not accept the Notice of Discontinuance in this matter and confirms that he intends to purchase this Site and furnishes you with the funds to so complete that the €99,000.00 paid by us on trust in this matter shall be refunded to us. We look forward to hearing from you further in the above but in the meantime, please note that we have no authority, express or implied to bind our client to any Contract or Agreement. No Contract or Agreement shall exist at law until such time as same have been executed and the Contract deposit paid. Furthermore, neither this nor any other correspondence shall be deemed a note or memorandum for the purpose of the Statute of Frauds."*

58. Mr. Connellan says that his understanding was that the transaction could be "freely completed" once the forfeiture notice expired without Mr. Kenny having come up with the purchase money. If Mr. Kenny did in fact produce the money within the time stipulated by the notice, the €99,000 would have to be returned to M. Roche & Co. If not, he was free to release it to his client.

59. Mr. Connellan said that on receipt of the letter of the 11th November, 2005, enclosing the payment, he served the forfeiture notice by fax on the 15th November, 2005. The letter, addressed to Keans, stated that proceedings had issued against Mr. Kenny; that he had not entered an appearance; that a notice of discontinuance had been lodged; that the plaintiff now proposed to sell the property on the open market; and that the deposit was now forfeit and would be released to the plaintiff. A period of 21 days was specified for response.

60. Mr. Kean replied on the 6th December, 2005, stating that he was taking instructions and would revert.

61. According to Mr. Connellan, he prepared a notice of discontinuance at the same time as serving the notice of forfeiture. He sent the notice of discontinuance to his town agent for filing. The letter of instructions to the town agent, dated the 15th November, 2005, has been produced. Apparently it became clear in the course of the Circuit Court hearing in this matter that the notice had not in fact been filed, and this omission was subsequently rectified by Mr. Connellan.

62. A letter from Mr. Kean, dated 14th February, 2014, has been produced in which he says that he was not aware that a notice of discontinuance was filed. He does not refer to the contents of the notice of forfeiture, which he undoubtedly did receive.

63. Mr. Kenny has given evidence that he received the notice of discontinuance, and has produced it in court.

64. On the 8th December, 2005, Mr. Connellan informed M. Roche & Co. that the forfeiture notice had expired and the sale could now be completed. He requested a draft deed of transfer, together with any closing requirements and the sum of €9,000 for the interest and the costs. On the 14th December, 2005, he replied to Mr. Kean's letter of the 6th, stating that the matter was now at an end and the plaintiff had sold the property.

65. On or about the 9th December, 2005, Mr. Connellan released the €99,000 to the plaintiff.

66. There was no response to Mr. Connellan's letter of the 8th December, 2005. He sent a reminder on the 10th January, 2006, and again there was no response.

67. Meanwhile, Mr. Connellan was continuing to act for Ms. Barry in relation to the proposal by Mr. Crowley to purchase her house, and was by now also acting for the third landowner, a Mr. Shanley. They were both reluctant to move, but Mr. Shanley eventually agreed to sell and signed a contract on the 17th November, 2005. It may be noted that his property was worth many multiples of the price of the plaintiff's site.

68. Ms. Barry appears to have been more reluctant. She would not sell without being sure of a house to move into and had looked at various alternative houses. She had given verbal instructions that she would sell. Mr. Connellan said that throughout this period he had frequent contact with Mr. Crowley, who had been very pleased with the Shanley transaction and was anxious to get Ms. Barry's agreement. He referred often to the plaintiff, saying "We delivered for Prunty and we will deliver for Mrs. Barry". However, in mid or late March Ms. Barry told Mr. Connellan that she had made up her mind not to sell. The deposit received by her was duly returned to M. Roche & Co.

69. On the 5th April, 2006, Ms. Roche wrote to Mr. Connellan to say that her firm had received instructions that the client did not intend to proceed with the negotiations for the purchase of the plaintiff's house and now required the return of the €99,000.

70. Further correspondence between the solicitors served merely as a prelude to litigation. In summary, Mr. Connellan asserted that the contract with Mr. Kenny had been terminated in reliance on the correspondence while Ms. Roche relied upon the contention that the correspondence was subject to contract. These positions have been maintained in evidence – Mr. Connellan says that at all times what was contemplated was that Mr. Crowley was to complete the contract entered into by Mr. Kenny on behalf of his principals, one of whom was Mr. Crowley. The €99,000 was forwarded to him on trust, with a covering letter specifying the terms on which it was to be held. Once the forfeiture period expired he was at liberty to release the money. That was the effective completion of the deal, while formal completion could take place at any time thereafter.

Submissions

71. On behalf of the plaintiff, Mr. Bland SC makes a number of alternative submissions.

72. It is argued that there had been a concluded contract between the plaintiff and Mr. Kenny, and that by virtue of the conversations and the correspondence in June 2005 Mr. Crowley had made an open offer to take it over. This latter contract was subsequently varied by the agreement on the part of Mr. Connellan to serve the notices and the agreement on the part of Mr. Crowley to pay the €99,000 in trust. The variations were necessary to clear Mr. Kenny out of the picture but it was still the same contractual vehicle. It is submitted that no matter, of the sort that could only have been determined by the parties, was left outstanding. The use of the phrase "subject to contract" could not, in the circumstances, have retrospective effect. *Per Hardiman J. in Supermacs Ireland Ltd. v. Katesan (Naas) Ltd*. [2000] 4 I.R. 273, the use of this rubric does not preclude the existence of a "done deal".

73. The plaintiff also relies on the decision of the Supreme Court in Mackie v. Wilde (No.2) [1998] 2 I.R. 578 in relation to the doctrine of part performance. It is contended that, in accordance with the criteria set out therein, there was a concluded contract, recorded in the correspondence and endorsed orally by Mr. Crowley; that the plaintiff acted in such a way that showed an intention to perform that contract; that the defendant induced such acts or stood by while they were being performed; and that it would be unconscionable and a breach of good faith to allow the defendant to rely upon the terms of the Statute of Frauds to prevent performance of the contract.

74. In further submissions on the applicability of proprietary estoppel, the plaintiff refers to the judgment of Hardiman J. in *Owens v. Duggan* (Unrep. High Court 2nd April, 2004) and to that of Edwards J. in *An Cumann Peile Boitheimach Teoranta (The Bohemian Football Club Ltd.) v. Albion Properties Ltd.* [2008] IEHC 447 ("the Bohemians case").

75. On behalf of the defendants, Mr. Ó'Scanaill SC submits that there was no concluded contract and that the doctrine of part performance cannot therefore apply.

76. In relation to proprietary estoppel, it is submitted that Owens v. Duggan can be distinguished on the basis that it concerned a purely oral agreement, and that the court did not have to consider the role of estoppel in circumstances where the negotiations took place by way of "subject to contract" correspondence. Reference is made to *Cobbe v. Yeoman's Row Management Ltd* [2006] 1 W.L.R. 2964, where Mummery LJ said that the position in such circumstances "might well be different" (albeit with a proviso considered below). The Bohemians case is distinguished on the basis that the defendants in that case had incurred significant expenditure. It is submitted that the plaintiff in the instant case did not in fact suffer any detriment, since the notice of discontinuance was not filed in court.

Discussion

77. In the first instance, I find that there was no concluded contract between the parties arising from the correspondence and

discussions in June 2005. I accept that the letter of the 10th June, 2005, from Ms. Roche could certainly be construed as an offer to take over the Kenny contract, on the same terms. However, it seems to me to be clear that Mr. Connellan was, throughout this period, very careful not to commit his client to a contract with Mr. Crowley, and thereby have to relinquish the claim against Mr. Kenny, until he was certain that Mr. Crowley would pay up. He was aware at all times that if Mr. Kenny came up with the money before the expiry of a forfeiture notice he would have to complete with him. He did not consider himself bound to Mr. Crowley, as the letter of the 8th November, 2005, demonstrates.

78. It also seems clear that Ms. Roche was reserving her position in that initially she wanted to see the documentation relating to the Kenny contract. She then adopted the position that Mr. Kenny would have to be cleared out of the picture, although Mr. Crowley was willing to pay the costs incurred by the plaintiff in pursuing Mr. Kenny.

79. However, matters took on a different aspect with Ms. Roche's letter of the 11th November, 2005. Despite the "subject to contract" formulation, this letter is in my view an unequivocal inducement to the plaintiff to surrender his claim against Mr. Kenny on the basis that, once he did so, he could have the €99,000. That, in my view, could only be seen as amounting to an implicit promise that the contract with Mr. Crowley would proceed and that the "subject to contract" phrase would not be relied upon.

80. At p. 32 of the judgment of Hardiman J. in *Owens v. Duggan* the authorities on the issue of proprietary estoppel are summarised in the following passage:

> *"In the English case of Re Basham [1986] 1 WLR 1498 proprietary estoppel was described as follows:-*
>
> *'Where one person, A, has acted to his detriment on the faith of a belief which was known to and encouraged by another person, B, that he either, has or is going to be given a right in or over B's property, B cannot insist on his strict legal rights if to do so would be inconsistent with that belief'.*
>
> *This view has a long pedigree going back to the classic statement of Lord Kingsdown in Ramsden v. Dyson [1866] LR 1 HL 129:-*
>
> *'If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out monies upon the land, a court of equity will compel the landlord to give effect to such promise or expectations…'.*
>
> *It will be seen that the first of these formulations is a more generalised form of what is said in the latter. The trend of judicial decisions since 1866 has to been towards a more generalised and less formulaic statement of the substance of promissory estoppel. In Taylors Fashions Ltd. v. Liverpool Trustee Company Ltd. [1982] QB 133 Oliver J. said:-*
>
> *'Furthermore, the more recent cases indicate… that the application of the Ramsden v. Dyson principle… requires a very much broader approach which is directed rather at ascertaining whether, in particular circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment rather than to enquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour'.*
>
> *In McMahon v. Kerry County Council [1981] ILRM 419 Finlay P. (as he then was) emphasised the notion of unconscionability in its most general form:-*
>
> *'If a court applying equitable principles is truly to act as a court of conscience, then it seems to me unavoidable that it should consider not only conduct on the part of the plaintiff with particular regard to whether it is wrong and wilful but also conduct on the part of the defendant and furthermore the consequences and the justice of the consequences both from the point of view of the plaintiff and the defendant.'*
>
> *All these expressions on the nature of promissory estoppel require that the plaintiff should have in some way suffered a detriment in reliance on the defendants' assurance. This detriment frequently consists of the expenditure of monies but, on the authorities, is not confined to that. See the unreported decision of Blayney J. in Haughan v. Rutledge (1988 High Court unreported Volume II at 314), where this is the first of the conditions required for proprietary estoppel."*

81. Hardiman J. stressed that the point at which the unconscionability must arise is not at the time of the making of the agreement, or the giving of the inducement, but at the point where it is repudiated.

82. The detriment relied upon in Owens v. Duggan was the act of the plaintiffs in refraining from objecting to an application for planning permission, in consideration of a right of way and a small portion of land. Hardiman J. held that this was a real detriment.

83. In *Cobbe v. Yeoman's Row Management Ltd*, Mummery LJ considered the interaction between "subject to contract" negotiations and the doctrine of proprietary estoppel in paragraph 57 as follows:

> *"Where that well understood expression is used an intention has been expressed to reserve the right for either party to withdraw from the negotiations at any time prior to the exchange of formal contracts. It is made clear that there are no legally enforceable rights before that happens. Even the use of the expression "subject to contract" would not, however, necessarily preclude proprietary estoppel if the claimant established that the defendant had subsequently made a representation and had encouraged on the part of the claimant a belief or expectation that he would not withdraw from the 'subject to contract' agreement …"*

84. In discontinuing the proceedings against Mr. Kenny, the plaintiff abandoned what must be considered to have been a strong case. Not only has there been no evidence that Mr. Kenny was not a mark, there has been uncontradicted evidence that he was contracting on behalf of a partnership of which Mr. Crowley was a member. The dropping of the case, therefore, was an act to the detriment of the plaintiff.

85. If the defendants' position were to be upheld in this case, the plaintiff would be left without either the claim that he had against Mr. Kenny (with the very real possibility that Mr. Crowley would ultimately have been found liable as a principal on foot of that claim) or against Mr. Crowley. That situation would have been brought about by the clear representation on behalf of Mr. Crowley that if the

case against Mr. Kenny was dropped and a forfeiture notice served, the monies held by him in trust could be released to the plaintiff.

86. I consider that it would, on the facts of the case, be unconscionable to permit that result. The fact that the notice of discontinuance was not actually lodged in court does not alter my view – all parties believed it had been, and Mr. Kenny and his solicitor were told that the matter was at an end. I do not think that the suggestion that Mr. Connellan could have revived those proceedings is realistic.

87. In the circumstances there will be an order in favour of the plaintiff.