Neutral Citation [2013] IEHC 109

THE HIGH COURT

[2009 No. 4623 P.]

BETWEEN

JOHN GIBBONS

PLAINTIFF

AND

DANIEL DOHERTY AND ADT INVESTMENTS LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Roderick Murphy delivered the 14th day of March 2013

1. Pleadings

By plenary summons dated the 21st May, 2009, the plaintiff sought an order for specific performance of contract dated the 21st December, 2006, entered into between the plaintiff as vendor and the first named defendant as purchaser in trust for the second named defendant, in relation to lands being part of Folio 1984F and part of Folio 17310F, both of the register of freeholders in the County of Donegal containing 7.93 hectares otherwise 19.595 acres or thereabouts. The plaintiff claimed damages for breach of contract in addition to, or alternative to, the reliefs claimed.

The statement of claim had referred to the total purchase price being €4 million with a deposit of €20,000 in respect of three separate lots.

The first lot contained 4.9 hectares for a consideration of €2 million. Completion was to take place fourteen days after the receipt by the purchaser of a facility letter from his lenders, provided that the vendor might rescind the agreement in its entirety should the facility letter not have been issued by the 16th March, 2007 (some three and a half months after the date of the contract) in which case even the purchaser's deposit was to be refunded.

The second lot containing 1.62 hectares for a consideration of €1 million provided for a completion date twelve months from the date from which the first completion took place.

The third lot containing 1.42 hectares for a sum of €1 million provided for completion to take place within 24 calendar months after the completion of lot 1.

The amended statement of claim delivered the 21st November 2011, referred to the first named defendant as purchaser and purportedly as trustee of the second named defendant who did not then exist.

The amended statement of claim stated specifically that:-

> "4. On the 21st day of December, 2006, the second named defendant did not exist and was not a legal entity and had not been brought into existence on the date that the said memorandum of agreement was entered into by the plaintiff and the first named defendant and, at all material times therefore, the purchase of the lands the subject matter of the proceedings as described was purchased on foot of a contract entered into personally by the first named defendant and, at all material times, the first named defendant was the actual purchaser of the said lands. At all material times the first named defendant was the beneficial owner of the interest in the contract for sale of the said lands.
>
> 5. At no material time therefore at the purchase/sale of the lands was the first named defendant a trustee for the second named defendant."

The amended statement of claim pleaded that, at all material times, the first named defendant was personally liable to perform the said contract as between the plaintiff and the first named defendant yet failed to do so.

The first named defendant completed the purchase of the first two lots. The third lot was due to be completed and paid for by the 29th March, 2009. It was further pleaded that there was one contract and that the lands were sold in lots to facilitate the defendant's request to allow ease of payment in relation to the purchase.

On the 8th October, 2008, it was pleaded that the first named defendant approached the plaintiff and informed him that he would not be in a position to complete the outstanding balance of the transaction notwithstanding the existence of the executed contract as between the parties, and he sought to resile from the contract.

The plaintiff pleaded that he was in a position to complete the said contract and served an undated completion notice on each of the defendants.

The amended defence delivered on the 22nd October, 2012, agreed the contract of the 21st December, 2006, and the particulars set out in the statement of claim, though the use of the word "purportedly" was disputed.

The plaintiff was put on full proof that there was one contract and that the lands were sold in lots to facilitate the defendants. Without prejudice, the first named defendant made it clear at all times that he was executing the contract in trust and, in due course, disclosed his principal. At all times thereafter the plaintiff dealt with the said principal, namely the second named defendant, and took no issue with any of the transactions.

It was not admitted that on the 8th October, 2008, that the first named defendant approached the plaintiff and informed him that he would not be in a position to complete. The defendant awaited proof thereof.

It was contested that the plaintiff was in a position to complete in relation to the said contract and, while it was accepted that the second named defendant had completed the purchase of the first two lots, the defendants awaited proof in relation to the distinction between the first two lots and the third lot.

It was admitted that the completion notice was served on the 3rd April, 2009, upon both defendants but the plaintiff was incorrect in serving a completion notice on the first named defendant, the second named defendant having been clearly identified as the purchaser in respect of lot 3. The first named defendant had no obligation to complete the contract. The plaintiff was not entitled to seek damages for breach of contract against the first named defendant who relied on condition 30 of the contract, which provided that a purchaser, although signing in trust, should not be personally liable to complete the sale once the name of the purchaser has been identified to the vendor.

The defence further pleaded that it was disputed that the first named defendant was personally liable to perform the contract and had failed to do so. It was pleaded that the defendant entered into the contract in trust and, in due course, disclosed his principal. The plaintiff continued in the course of dealing without raising any objections whatsoever and was now estopped from doing so.

The defendant pleaded that it would rely on s. 37 of the 1963 Companies Act that the first named defendant, purportedly on behalf of the second named defendant prior to its formation, was ratified by the second named defendant after its formation, and the ratification was accepted by the plaintiff in their dealings culminating in the execution of the transfers of March 2007, and April 2008.

2. Submissions on behalf of the plaintiff
The sale of the third lot was due to be completed by the 29th March, 2009, though neither defendant was willing to complete the purchase. The issue to be determined is whether the first named defendant is legally obliged to complete the sale. The defendants rely on s. 37 of the Companies Act 1963, on estoppel and on the construction of general condition 30 of the Law Society's General Conditions 2001, which pertain to the contract.

That general condition provided that:-

> "The purchaser who signs the memorandum "in trust", "as trustee" or "as agent" with any similar qualification or description without therein specifying the identity of the principal or other party from whom he so signs, shall be personally be liable to complete the sale and to fulfil all such further stipulations on the part of the purchaser as are contained in the conditions, unless and until he shall have disclosed to the vendor the name of his principal or other such party."

The plaintiff submitted that the defendants had misconstrued the meaning of general condition 30, by pleading that that condition "provides that a purchaser, although he signs in trust, shall not be personally liable to complete the sale once the name of the purchaser has been identified to the vendor".

The person signing the contract "in trust" must be acting in reality for or on behalf of another person whom he can truthfully later identify as the principal or other person on whose behalf, as a matter of law, he was truly acting at the time of signing the contract. Otherwise the signatory is personally liable as purchaser and in contract. The clause could not mean that a purchaser in trust had complete freedom to seek out any person of his choosing who might be willing to accept beneficial ownership of the purchaser's interest in the contract. If the purchaser were unwilling to complete, he could avoid his obligation to purchase by later "identifying" a man of straw or limited liability company with no assets.

The plaintiff referred to *Dublin Laundry Company v. Clarke* [1989] I.R.L.M. 29 at 37. 38 where Costello J. stated:-

> "It seems to me that this is not a case of a person entering into the contract on behalf of a principal whose name has not been disclosed. The defendant had no principal at the time of the contract and he did not enter into it in a representative capacity. It is the case of a person with the intention that the obligations and benefits would be taken over by third party, a limited company, which might not yet be in existence. In these circumstances condition 5 of the conditions of contract have no application to the facts of this case and it seems to me that even if the defendant had signed as agent he could not now claim to avoid a personal liability on the contract if he was not an agent, as I have found. Therefore, I think the pleas in the defence have not been established."

Condition 5, in that case, is equivalent to clause 30.

Clause 30 does not and could not avail a purchaser who openly states at the time of signing that the transaction may, at his option, be completed in his own name or in the name of a company yet to be formed or determined.

The first named defendant, in his evidence, stated and admitted that, although it was very probable that he would complete the contract in the name of the company to be formed, he nonetheless retained the option to complete it in his own name.

It was admitted that there could be no sense in which that the second named defendant was ever the principal of the first named defendant at the time of the contract when it did not exist. The contemporary letter written by the first named defendant solicitor on the 20th December, 2006, described the first named defendant as their "client" and made it clear that at the time of signing he had no "principal" but was, on the contrary, personally and absolutely entitled in his own right, legally and beneficially, to the purchasers interest under the contract. That letter stated:-

> "Kindly note that Daniel Doherty has signed the contract in trust for the present. The property may ultimately be acquired in his own name or in the name of a company to be determined."

The first named defendant solicitor informed solicitors for the vendor on the 28th February, 2007, that Mr. Doherty had incorporated "a new company", being the second named defendant "as a vehicle for the lands". It was submitted that this did not and could not, as a matter of law, retrospectively constitute the second named defendant as the first named defendant's principal. At no time in the correspondence exchanged between the parties on or after the 20th December, 2006, was the second named defendant ever described as "principal" or the first named defendant described as "agent, trustee or fiduciary" for the second named defendant. The second named defendant was merely described as the "property vehicle" incorporated by the first named defendant.

It was not claimed in the proceedings that as of the 21st December, 2006, the second named defendant had or could have had any legal or beneficial interest in the property in the contract of the sale of the property. Accordingly, it was submitted that the plaintiff was entitled to an order for specific performance of the contract as against the first named defendant.

It was submitted that, on signing the contract, the first named defendant was entitled to affect a subsale (Wiley, *Irish Conveyancing Law* (2nd Ed.) (Butterworths 1996 at 18.8).

There was no subsale involved.

Moreover, the first named defendant was entitled to sue the plaintiff for specific performance if the plaintiff refused to convey the property in accordance with the contract either to the first named defendant or to any other person nominated by him.

It was further submitted that the plaintiff had absolutely no right to object to dealing with the second named defendant nor any reason to object to it as long as the sales were closed by the first named defendant or his nominated transferee.

Section 37 of the Companies Act 1963, provides as follows:-

> "(1) Any contract or other transaction purporting to be entered into by a company prior to its formation or by any person on behalf of the company prior to its formation may be ratified by the company after its formation and thereupon the company shall become bound by it and entitled to the benefit thereof as if it had been in existence at the date of such contract or other transaction and had been a party thereto.
>
> (2) Prior to ratification by the company the person or persons who purported to act in the name or on behalf of the company shall in the absence of express agreement to the contrary be personally bound by the contract or other transaction and entitled to the benefit thereof."

This section, it was submitted refers to the common law position that required the contract entered into pre-incorporation to be one purporting to be entered into by the company or by a person on behalf of the company. It was not claimed that the contract purported in any sense to be made on behalf of the second named defendant.

The plaintiff's solicitors served separate completion notices on each of the defendants. It was clear that the first named defendant (and his solicitor) understood that he was personally being called upon to complete the contract and refused to do so.

It was submitted that the person who contracts "in trust" is personally liable on the Law Society contract if in fact there is no trust. Such a person is the absolute beneficial owner of the purchaser's interest under the contract as there was no trust or agency or principal at all, notwithstanding that the first named defendant represented himself as signing "in trust".

3. Submissions on behalf of the First Named Defendant
The completion notice dated the 3rd April, 2009, was purportedly served upon both defendants and referred to "Daniel Doherty in trust for ADT Investments Limited". The plaintiff was incorrect in serving completion notice on the first named defendant as the second named defendant had been clearly identified as the purchaser in respect of lot 3, which was known to the vendor's solicitor at that time.

The first named defendant was not personally liable to complete the sale, having made the necessary disclosure to the vendor as provided for under condition 30 of the contract for sale. He had no obligation to complete the contract and the plaintiff is not entitled to an order for specific performance against him or for damages for breach of contract claimed in the relief. He relied upon the provisions of general condition 30 and on s. 37 of the Companies Act 1963.

Under s. 37 there is no requirement that the company be named at the time of the pre-incorporation contract. If the court accepted a literal interpretation of the provision it was submitted that in order for the section to be effective, ratification was merely required to take place as otherwise the effect of the operation of the section would be unduly limited.

Courtney, *Private Companies*, (2nd Ed.) (Butterworths 2002) at para. 7.039 states:-

"So, it can be common knowledge to all contracting parties that at the time the contract was entered into there is no company in existence. However, it is important to note that an agent will be liable where the company is ultimately not formed and there is no express agreement that he is not to be liable."

ADT Investments Limited was incorporated on the 22nd February, 2007, as was communicated to the plaintiff's solicitor by letter dated the 28th February, 2007, some two months after the memorandum of the agreement of the 21st December, 2006.

General condition 30 requires the purchaser to fulfil all such further stipulations on the part of the purchaser as are contained in the conditions "unless and until he shall have disclosed to the vendor the name of his principal or other such part". The first named defendant had disclosed to the plaintiff that the situation was one of agency at the time the contract was entered into and confirmed this in the incorporation and identity of the company on the 28th February, 2007. It was submitted that there was no requirement that the company be in existence at the time of the pre-incorporation contract on the face of general condition 30. Subsequently, the sales of the two lots were completed in the name of the second named defendant and no objection was raised by the vendor or by his legal advisers.

It was submitted that *Dublin Laundry Company v. Clarke* [1989] I.L.R.M. 29, was clearly distinguishable upon the following five grounds:-

> (a) In that case the defendant/purchaser did not sign the contract as agent in trust:
>
> (b) The principal company was not incorporated post contract and pre-completion;
>
> (c) The principal company was not disclosed to the vendor post contract and pre-completion this year;
>
> (d) The contract was not retrospectively ratified pre-completion by the principal company as in the present case;
>
> (e) The vendor had not accepted the principal's company ratification with not one but two intervening transfers executed.

The sentence contained in the letter of the 20th December, 2006, from the defendants solicitors stating that "the property might ultimately be acquired in his own name or in the name of the company to be determined" (made the day previous to the signing of the

contract) did not form part of the contract and, in any event, was quite consistent with the post contractual right of the first named defendant to disclose to the vendor the name of the second named defendant.

Lavan v. Walsh [1964] I.R. 87, involved the sale of land where it was held that the court should not look only to the terms of the contract but the circumstances surrounding the contract. In that case, after considering the construction of the vital letters within which the terms of sale of land were agreed, Budd J. considered the surrounding circumstances and at p. 101 outlined that in the said case, the phrase "in trust for a client":-

> "It is, however, but part of the context and it must be construed in conjunction with what is said in the rest of the letter."

It was further submitted that if the court did not hold with the first named defendant's submission that the contract was one of agency, then that defendant was entitled to rely on the fact that the plaintiff was estopped from asserting that the purchase was with any party other than the second named defendant, as had been in the sale of the previous lots.

Phipson on Evidence (17th Ed), (Sweetman and Maxwell 2012) at para. 5.07 – 5.26, states:-

> "The operative provisions of the deed give rise to an estoppel by virtue of the fundamental principal of the common which precludes a grantor from disputing the validity or effect of his own grant."

Accordingly, the first named defendant submits that the plaintiff cannot dispute the validity or effect of the first and second transfers which arose out the same contract.

In addition to legal estoppel, the first named defendant relies on equitable estoppel. The common evidence was that both the plaintiff and the first named defendant would probably have walked away from the deal if the issue of identity of the purchaser had been raised at the time. The plaintiff's estate agent confirmed that there was an unprecedented interest in the lands from other potential purchasers.

The plaintiff submitted that the second named defendant was a nominated transferee of the first named defendant. The defendants submitted that that was not credible having regard to the inter party correspondence at the time of the signing of the contract, the execution of the two sales in respect of lots 1 and 2, the correspondence pre and post purported service of the completion notices and of the proceedings.

The claim that the second named defendant was only a nominated transferee was not pleaded in the original or amended statement of claim and was only raised on the first day of the hearing.

The evidence of the plaintiff's solicitor was that she did not know at the time of the contract that the company was not incorporated. However, this was not raised in correspondence. The plaintiff's solicitor ought to have been aware of the status of the second named defendant from the letter of the 20th December, 2006, and of the 28th February, 2007.

4. Decision of the Court

The facts in this case are clear. By contract of the 21st December, 2006, the plaintiff agreed with the first named defendant to purchase three lots of land pursuant to a single contract. The memorandum of agreement described the purchaser as Daniel Doherty (in trust). The second named defendant did not exist when the contract was signed.

The first two lots were purchased by the second named defendant without any issue being raised by the vendor.

It was pleaded that on the 8th October, 2008, almost two years after the contract, the first named defendant approached the plaintiff and informed him that the second named defendant would not be in a position to complete the purchase of the third lot because of the downturn in the market.

The valuer and auctioneer, Mr. James Gallagher, referred to the offers that he had in relation to the lands as well as the negotiations with the first named defendant, who made a revised offer which was agreed upon by the plaintiff.

The plaintiff described the negotiations and purchase of the land and his own commitment to purchase other lands on the strength of the contract which required a bridging loan.

He referred to the first named defendant surveying 15 acres and asking if he would sell more land. They agreed a price for the lots. The first named defendant had asked if he could pay by way of staged payments and Mr. Gibbons agreed.

He had not contracted to sell to a company. The contract being signed in trust did not worry him. He had no concern with the second named defendant.

He said that on the 8th October, 2008, he received the phone call from the first named defendant, six months before the last lot was due for completion. Mr. Doherty told him that he decided not to go ahead with the third tranche and would not be paying for it, that it was not for personal but business reasons and that he had money in the bank, but it was best that the two solicitors would deal with it. Mr. Gibbons said that he had bought land on the strength of the third tranche being completed. Mr. Doherty made him an offer by way of a golden handshake which he refused to complete though they shook hands. He said that at no point until Mr. Doherty refused to complete had he dealt with the second named defendant.

In cross examination the plaintiff said his solicitor had kept him informed and he had seen the correspondence, including a letter of the 16th June, 2006, which referred to the purchaser as "our client": GDC (Ireland) Limited. He said that he was led to believe that that company was a strong company. All correspondence at that time referred to that company. He said that on the 26th October, 2006, a reduced deposit was paid by a third party company. The bulk of correspondence referred to GDC Developments Limited or GDC (Ireland) Limited. The first letter of the 20th December, 2006, from the defendant's solicitor referred to GCD (Ireland) Limited as their client while the second letter of that date referred to the purchaser's client as Daniel Doherty, noting that Daniel Doherty had signed the contract in trust for the present and that "the property may ultimately be acquired in his own name or in the name of a company to be determined".

At the meeting of the 8th October, 2008, Mr. Doherty told Mr. Gibbons that he himself "was ok with the bank".

By the letter of the 20th November, 2008, the defendants solicitors referred to their client as ADT Investments Limited, the second named defendant, and wrote, without prejudice, to the plaintiff's solicitor as follows:-

> "We are informed by our client company that its principal had a meeting with your client on the 8th October, 2008, to advise him personally of the fact that due to the severe downturn in the economy and the general banking conditions now prevailing that the company would be unable to proceed with the further purchase as envisaged.
>
> You will appreciate that our client company has acted in good faith and that these are all matters which are totally beyond its control and that the company now finds itself in a situation where not only are the lands already acquired by it, but any lands remaining to be acquired have been greatly diminished in value in the eyes of its lenders rendering the company unable to raise any further funding.
>
> In view of the circumstances now prevailing we would invite you to take your clients instructions with a view to negation of the remainder of the agreement between our respective clients."
>
> The letter was adduced in evidence without objection.

Mr. Gibbons said that if there had been a breakdown at the time of the contract he would have put the property on the market. He agreed that the deal had gone through (for the first two lots).

Margaret Mulrine, solicitor for the plaintiff, had been in practice for 25 years and advised in relation to the sale from June 2006 onwards. She said that on the 20th December, 2006, the solicitors for the first named defendant had written to her asking her to "kindly note that Daniel Doherty has signed the contract in trust for the present. The property may ultimately be acquired in his own name or in the name of a company to be determined".

She said there was no indication of a subsale. She was aware that Mr. Gibbons was bound. The change of name on the defendants' solicitors' reference to their client was not significant.

She said that on the 8th October, 2008, Mr. Gibbons had telephoned her to say that Mr. Doherty was not going through with the third tranche. They met with counsel, took advice and proceeded with the completion notice.

The letter of the 20th November 2008, referred to a "negation of the remainder of the agreement". They had to wait six months to the closing date and then serve the completion notice, which was addressed to each of the defendants.

She said that it could not have been a trust or agency because ADT Limited was not in existence, therefore there was no legal trust. The amended statement of claim did not make any reference to the second named defendant being a transferee, and, in reality, it was a nominee of Mr. Doherty. This was not in the pleadings, in the completion notice nor in the correspondence.

Daniel Doherty referred to his directorship of ADT and George Doherty (Ireland) Limited, George Doherty Construction (Ireland) Limited and said that he had been in business since 1992/93. He described his offers for the property and said that during 2006 he was taking restructuring advice with regard to the companies and felt strongly that the land should be in separate company from a taxation point of view. GDC (Ireland) Limited was to be kept as a building company. The land banks were to be held by him personally or by another company. Accordingly, he signed in trust. He referred to the formation of ADT Limited and said that GDT (Ireland) Limited had a controlling interest in order to guarantee the loan. That loan in the sum of €2 million plus and additional €1 million and a further €1 million was funded by Bank of Ireland. He said that in April 2008 and March 2009, the banks would not support the purchase of the third lot. He rang Mr. Gibbons to inform him of this on the 8th October, 2008, and they shook hands.

He referred to the completion notice and the proceedings and said that Mr. Gibbons still owned lot 3 and that he had offered him €10,000 by way of a golden handshake.

He said it was not true that he had entered into the contract personally. Had he been told in March 2007, that the contract would not exist unless he was personally liable, this would have been against the advice he had received and he would have been unable to enter not such an agreement.

In cross examination Mr. Doherty said that he had received contracts which were subject to planning permission, which he believed was in progress. He said the biggest deception was not telling him that planning permission had been refused. He said James Gallagher, the auctioneer and valuer had telephoned him on the 21st September, 2006, saying that planning permission had been refused on the 24th August, 2006. The purchase price was then negotiated from €4.56 million to €4 million.

He said that the contract of the 20th December, 2006, was negotiated on the basis of it being subject to a loan, the term of which was not included. The contract was executed in trust primarily on tax advice. It was not his intention to acquire the property in his own name. He said the advice was not conclusive at that stage, but he agreed that he did not have to sign. He had received legal advice and knew what "in trust" meant, that is that it was on behalf of another company, but he reserved the right to opt for his own name. It was his choice, his intention to buy in trust for a company to be named at some future date. He was almost a 100% certain that it would be a company.

It was put to him that the option to buy himself meant that he could not be holding in trust. He said he was not signing on behalf of himself, he retained that option. He imagined that he could have three plots in different companies and that he could have so decided. He replied that the contract was binding on both parties on the 21st December, 2006. He believed that he would be regarded as a party on that date. He considered that he and Mr. Gibbons and another entity, at his option, were parties. He agreed that he was not obliged to act. He repeated that both options were available to him and that the principal was disclosed in February 2007. He believed that if Mr. Gibbons objected to the second named defendant in March 2007, the deal would have collapsed. He said he wanted the second named defendant to complete the third tranche, but the banks would not support it. He felt the contract was the company's – he could not have completed it at the time.

He sympathised with Mr. Gibbons and had respect for him. They had been courteous, but the company was unable to raise funds and that was the fact of the matter.

Mr. Philip D. White, solicitor for both the first and second named defendants had been 30 years in practice and had acted for GDC (Ireland) Limited in the Republic of Ireland. He referred to that company as his existing client. There was no lack of clarity at the pre-contract stage. On the 22nd November, 2006, the deposit was paid by that company. On the 19th December, 2006, his client was

taking tax advice and looking at the issue of stamp duty. It is common practice that the land bank would be separately owned from the trading entity. He referred to the facility letter. His client was confident that the company could acquire the property. The facility had to be available to conclude the contract, though he agreed that that was not a term in the first letter of the 20th December, 2006. In the second letter he referred to the fact that Mr. Doherty had signed the contract in trust for the purchaser. Mr. Doherty was never intended to be the purchaser.

The issue which arises in this case stems from a practice whereby contracts are entered into by purchasers as agents or in trust for development companies not yet incorporated. The purchaser could then determine, after the contract was signed, which company vehicle would be used in closing the sale. In some cases, a person purchasing in trust might be a solicitor for, or a director of a company formed or to be formed. Often the ultimate purchaser may, for legal or tax reasons, not be disclosed until the completion of the contract. In a bull market with rising development land prices, no issue would ordinarily arise as to who the ultimate purchaser was. There was also a practice whereby the purchaser, contracting in the purchaser's own name, might choose to sign the benefit of the contract by way of subsale to another purchaser or purchasers.

In some case, indeed, a purchaser in trust might proceed by way of subsale. There were, of course, tax considerations in relation to the Finance Acts where a purchaser contracted to acquire both freehold and leasehold land and arranged to extinguish the leasehold interest before completion of the freehold conveyance.

The court has also to consider the circumstances surrounding and the special general conditions of the Law Society contract and, in particular, general condition 30 which was the subject of the parties' submissions.

Special condition 5(2)(a) dealt with the completion to lot 1 for a consideration of €2 million in the following terms:-

> "Completion for which will take place fourteen days after the purchaser receives the facility letter from his lenders (provided that it is acknowledged that the vendor may rescind the within agreement in its entirety should facility letter not be issued by the 16th March, 2007, in which event the purchaser's deposit shall be refunded)."

There was no such condition with respect to lot 2 or lot 3 as completion was to take place respectively 12 months and 24 months from the date upon which the first completion took place.

Accordingly, the issue of the facilities is not material in relation to the subject matter of the litigation.

The contract of the 21st December, 2006, was made between John Gibbons (vendor) and Daniel Doherty (in trust) (purchaser) and signed by Mr. Gibbons as vendor and Mr. Doherty as purchaser, though not signed by him in trust or as agent. The court is satisfied however, that the description of the parties in the memorandum of agreement determines the capacity of the parties. Mr. Doherty's signature was, accordingly, as trustee.

Wylie's *Irish Conveyancing Law* at para. 18.18, states that the purchaser can require the vendors to convey the land to nominees as directed, e.g. where he has affected a subsale. This does not arise in the present case. However, the paragraph of Wylie continues as follows:-

> "If however, this would prejudice the vendor, e.g. where the purchaser has entered into personal obligations and his personality is fundamental to the transaction, the vendor may compel the purchaser to join in the conveyance to guarantee performance of those obligations."

Reference was made to *Curtis Moffat Limited v. Wheeler* [1929] 2 Ch. 224, which, however, referred to the purchaser's obligations towards the vendor as in the sale of leasehold property where there was a covenant not to assign without the under lessor's consent. However, the issue which is before this Court concerns a purchaser purporting to purchase registered freehold land in trust for an undisclosed principal.

Farrell, *Irish Law of Specific Performance* (Butterworths 1994) at 3.35 deals with the position of an agent contracting personally. Where an agent acting for an undisclosed principal is shown to have contracted merely as agent the true position and intention of the parties is recognised and the agent drops out of the transaction (*United Yeast Company Limited v. Cameo Investments Limited* [1975] 111 I.L.T.R. 13 at 16).

Save in a certain particular cases, the general rule of law is that no agent can maintain an action in his own name on any contract made by him as such, whether the principal be disclosed or undisclosed (*Lavan v. Walsh* [1964] I.R. 87 at 96).

Farrell distinguishes this from the case which can arise where the purchaser signs a contract "in trust" or "in trust for a client" and questions whether this means that since he is acting for a client, he is acting as agent only. Or does it mean that he as the buyer will hold what he buys in trust for another, that being a matter which only affects the rights *inter se* of the purchaser and his client? In the footnote he refers to Budd J. leaning towards the latter meaning in *Lavan* at pp. 100-1 but notes that he did not have to decide on that alone. In the *United Yeast Company* case, Butler J. was satisfied at p. 16 "that by common usage a solicitor who signs a contract to purchase in trust is clearly recognised as having acted merely as agent and, in the absence of a clear stipulation to the contrary, incurs no personal liability". However, in that case, the vendors knew at all times that the solicitors were acting for the particular principal.

Farrell refers to condition 30 of the Law Society General Conditions of Sale. Whether the agent is contracted personally depends on the intention of the parties as appearing from the terms of the written agreement as a whole. (*Dublin Laundry Company Limited v. Clarke* [1989] I.L.R.M. 29 at 38-9). Farrell is of the view that if a person agrees to buy property intending to put it into the hands of a company which does not exist in any contracts, he is likely to be held to have contracted personally. He refers to *Dublin Laundry Company Limited v. Clarke* and to *Park Grange Investments Limited v. Shandon Park Mills Limited* (Unreported, High Court, 2nd May, 1991, Carroll J) at pp. 2-3.

In *Mount Kennett Investment Company v. Patrick O'Meara and Others* [2007] I.E.H.C. 420, Smyth J. decreed a specific performance of a contract in writing dated the 28th January, 2003, made between the defendants and Tom Pollard (In Trust) for, or on behalf of the plaintiff, for property known as the showground in Clonmel, Co. Kilkenny, subject to leases from the Clonmel Horse Show, the Agricultural Society Limited and Thomas A. Morris. The defendants were not in a position to furnish implementation of the three special conditions and had contended that the contract was conditional but abandoned that plea. The consent of the Commissioners to facilitate the defendants to complete the contract was not a concern of the plaintiff as the contract was not made subject to the consent of the Commissioners.

Smyth J. was satisfied and found as a fact that on the evidence the defence of impossibility of performance was unsustainable. The evidence in the case was that the consent of the Commissioners was obtainable if and only if they were satisfied as to the amount or price that the Society received. If the defendants had paid a sufficiently adequate price, the court believed that the requisite consent would, on the balance of probabilities on the evidence, have been forthcoming.

Smyth J. referred to the statement by Farrell on specific performance at para. 3.27, that while a court of equity will not compel a person to do something which is impossible, it will have little sympathy for someone whose own neglect or default makes it impossible for him to perform his contract.

In his judgment the plaintiff was entitled to a decree for a specific performance.

In the present case the defendant's evidence was that it was no longer possible to have bank funding for the completion of the third lot. The court is satisfied that there was no neglect or default on the part of the defendants.

In *Murphy and Mackin v Ryan and Others* [2009] I.E.H.C. 305, Kelly J. decreed specific performance and commented on the suggestion that it was impossible for the defendants to complete the contract which was in some way frustrated. The defendants could not rely on having entered into an unconditional contract without the necessary finance to complete it.

However, the court has got to take into account the overall circumstances of the case.

In Park Grange Investments Limited v. Shandon Park Mills Limited (Unreported, High Court, 2nd May, 1991) an oral agreement was made in late February or early March 1988. The vendor's solicitor wrote to the purchaser's solicitor enclosing contracts and copy documents of title and asking for signed contracts and the deposit within seven days. The purchaser's solicitors replied on the 8th April, 1988, heading their letter "subject to contract" and proposing alterations to the contract.

The plaintiff was incorporated on the 28th June, 1988. It passed a resolution on the 3rd July, purporting to ratify the "pre-incorporation agreement". The contract was made on the 11th March, 1988, in the name of Ashford Industrial Limited. By letter of the 9th August, 1988, the purchaser solicitor notified the vendor solicitor that the purchaser would be the plaintiff company rather than Ashford Industrial Limited. The decision to form the plaintiff company following tax advice was not made until after the oral agreement was made. The contract was not in fact made for the benefit of the company to be formed. There was no evidence that there was any authority to bind the company to the sale of the property on an open contract.

The court was satisfied that no concluded contract was agreed up to the 22nd September, 1988, when the purchaser solicitor wrote enclosing signed contracts in duplicate making alterations to the contract in the body of the letter, notably the closing date, and adding a condition that the contract was to be subject to the vendor arranging with its insurers to insure the property in the purchasers name. The parties never reached an agreement.

Park Grange was decided on the basis of there being no concluded contract given the alterations.

The issue of pre-incorporation contracts being ratified by a company under s. 37 of the Companies Act 1963, is considered in the third edition of Courtney, *The Law of Companies* (3rd Ed) (Butterworths 2012) at 17.037 – 17.044.

Section 37 (1) provides as follows:-

> "Any contract or other transaction purporting to be entered into by a company prior to its formation or by any person on behalf of the company prior to its formation may be ratified by the company after its formation and thereupon the company shall become bound by it and *entitled to the benefit thereof as if it had been in existence at the date of such contract or other transaction and had been a party thereto*." (Italics added)

Such ratification may be informal (Costello J.) in *HKN Invest OY v. Incotrade PVT Limited et al* [1993] 3 I.R. 152.

The court is satisfied that the plaintiff accepted the second named defendant as purchaser in respect of lots 1 and 2. The completion of the purchase of lot 3 was not pursuant to a separate contract, but to the same contract of the 21st December, 2006.

The contract in question was in respect of freehold registered land, was of a commercial nature, the first named defendant had contracted in trust, the identity of the company was made known prior to the closing of the first lot, was not subject to loan approval and was closed by the second named defendant in respect of lots 1 and 2.

The court will, accordingly make an order for specific performance in respect of lot 3 as against the second named defendant.