Neutral Citation Number: [2006] IEHC 194

THE HIGH COURT

[2005 No. 2975 P]

BETWEEN

JOHN SHIEL

PLAINTIFF

AND
PETER McKEON

DEFENDANT

Judgment of Mr. Justice Clarke delivered 31st May, 2006.

1. Introduction
1.1 Both the plaintiff ("Mr. Shiel") and the defendant ("Mr. McKeon") had an interest in purchasing a property at Carrowhubbock, Enniscrone, Co. Sligo ("the property"). The property concerned had been in the ownership of the Sproule family for some time. The property consisted of a house with surrounding garden backing onto a further plot of land which in turn backed onto the sea. Mr. Shiel is a solicitor who owned a holiday home just across the road from the property. Mr. McKeon's family were from Enniscrone and owned lands directly adjacent to the property. Mr. McKeon had purchased those lands from his father and secured a planning permission for a significant retail and residential development for the development of his lands. His interest in the property dated back some years when the property was owned by a Mr. Ken Sproule with whom he had some contact in relation to a possible purchase. Sadly Mr. Sproule died in April 2005. There can be little doubt but that, subject to obtaining a suitable planning permission, the portion of the property nearest the sea could have been easily incorporated into the development for which Mr. McKeon had already obtained planning permission.

1.2 It will be necessary to set out in more detail the precise attempts which both parties made to purchase the property. Suffice it to say that there was a time when it is clear that both were actively pursuing the property. During that time a meeting between the parties took place on the 14th August, 2005, as a result of which Mr. Shiel contends that an arrangement was entered into whereby Mr. McKeon would purchase the property, would retain the rear portion for himself but would hold the front portion (which consisted of the Sproule house and the gardens immediately around it), on trust for Mr. Shiel. Any such arrangement is strenuously denied by Mr. McKeon.

1.3 However it is in the context of such an alleged arrangement that these proceedings are brought.

1.4 It will be necessary to turn in due course to the nature of the trust claimed and the legal principles applicable. However before doing that I should set out the uncontroversial facts which led to the meeting of the 14th August.

2. The Facts
2.1 While it would appear that both parties knew of each other, there does not seem to have been any direct contact between them until Thursday 11th August, 2005. The history of events concerning the possible purchase of the property up to that date needs to be outlined.

2.2 It would seem that Mr. McKeon had approached Mr. Ken Sproule some considerable time earlier with a view to a possible purchase of the property. However at that stage Mr. Sproule had, unfortunately, been diagnosed with a serious illness from which he, sadly, died. In the circumstances no further progress in relation to the matter occurred until July 2005 when the property was advertised for sale through Sherry Fitzgerald.

2.3 It should also be noted that there was a potential issue between Mr. McKeon and the Sproules as to the precise boundary between the neighbouring property which Mr. McKeon owned (and in respect of which he had obtained planning permission) and the property. While the amount of land concerned was not, in itself, very significant, the line of the boundary between the properties had the potential to be of some significance to Mr. McKeon because of access to public drainage facilities. If the boundary was where Mr. McKeon asserted it to be, then he would have had ready access to the public drainage. If the boundary was where it appeared on the ground then it might have been somewhat more difficult for Mr. McKeon to secure such access. There was some debate in the course of the hearing as to the extent to which there might have been other alternatives for Mr. McKeon. It was not possible, on the basis of the evidence before me, to reach any clear view as to the viability of alternative sources of access. I can do no more than conclude that securing that the boundary was where he (Mr. McKeon) suggested it ought to be was an issue of at least some importance to him. In that context Mr. McKeon arranged for his solicitor (Mr. Gordon) to write to Ms. Nuala Feeney of Sherry Fitzgerald in respect of the boundary.

2.4 It would also appear that prior to the 11th August Mr. McKeon had made a number of offers in respect of the property to Ms. Feeney and had, it would seem, agreed in principle to purchase the property for €435,000 on Monday or Tuesday the 8th or 9th August. No booking deposit had been paid by the time the events which are in controversy between the parties occurred. Still less had any formal contract been entered into.

2.5 I should note that neither side called Ms. Feeney to give evidence. Therefore much of the evidence given respectively on behalf of Mr. Shiel and Mr. McKeon concerning their dealings with the property (other than in relation to each other) was largely dependent on their own accounts and were not controverted. In the absence of any evidence to the contrary I can see no basis for not accepting those accounts. I merely note the fact that Ms. Feeney did not give evidence in fairness to her, for the purposes of pointing out that it is possible that she might have a different account in respect of some of the matters.

2.6 So far as Mr. Shiel is concerned it would appear that he had asked a Mr. Noel Jacob to bid on the property for him. Mr. Jacob had known Mr. Shiel for at least 10 years prior to these events and had phoned Mr. Shiel for the purposes of informing him that the property was for sale. It would appear that a number of bids were put on the property by Mr. Jacob on behalf of Mr. Shiel. It was Mr. Jacob's evidence, which I accept, that at the time when he made what was, for him, the highest bid of €415,000, it was his understanding that it was the top bid as of that time. He did not disclose to Ms. Feeney that he was bidding on behalf of Mr. Shiel. After making the bid of €415,000 and communicating that fact to Mr. Shiel, Mr. Jacob was no longer directly involved. It would appear that on 11th August Mr. Shiel came to understand that the property was to be sold to another party. In those circumstances he contacted a member of the Sproule family (Mr. Glen Sproule) directly rather than contacting Ms. Feeney the Estate Agent. As a result of that initial contact, it would appear that Mr. Shiel had a subsequent conversation with Ms. Feeney where he was informed that he would have to offer €500,000 for the property if he was to secure it. It would also appear that at that stage he offered €450,000.

2.7 The position which existed immediately prior to the initial contact between the parties was, therefore, that from Mr. McKeon's perspective he had an agreement to purchase the property (admittedly subject to contract and, indeed, subject to him paying a booking deposit in order to secure that the Estate Agents would treat the property as no longer on the market) and found that Mr. Shiel was attempting to interfere with that sale. However from Mr. Shiel's perspective, he had made what he considered to be the highest offer on the table at the time of the making of his offer of €415,000 and found that the property had, apparently, been sold without giving him a chance to up his bid. Due to the absence of any witnesses from either the Sproule family or the Estate Agents acting on their behalf, it is impossible to know with any precision how that undoubtedly difficult situation arose. However it is easy to see how, from the perspective of both parties, there was a feeling that things had not been properly dealt with. That fact should be noted before passing on to the controversial series of dealings between the parties which occurred between Thursday 11th August and Sunday 14th August to which I will turn in due course. It may also go some way towards explaining the level and force of the accusations directed at the hearing against both parties. However before going on to analyse the course of dealing between the parties it is necessary to turn, first, to the legal principles by reference to which those facts need to be assessed.

3. The Law

3.1 In *Pallant v. Morgan* (1953) 1 Ch. 43 Harman J. had to consider the legal implications of an agreement reached between the agents of two neighbouring land owners in an auction room immediately before an auction. One agent agreed that he would refrain from bidding on the basis that there would be a division of the land according to a formula which left certain details to be agreed later. The parties subsequently failed to agree on those details and the aggrieved party claimed specific performance or alternatively a declaration of trust. In respect of the claim for specific performance the court held that the arrangements between the agents were not sufficiently precise (having left matters of some substance over for further agreement) to permit specific performance. There was, the court held, "too much left undecided". However, at p. 48 Harman J. went on to say the following

> "Is the result then that the plaintiff must fail? In my judgment not so. To allow the defendant to retain lot 16 under these circumstances would be tantamount to sanctioning of fraud on his part and I find the following in Fry on Specific Performance 6th Ed. at p. 184, para. 386, at the end of the chapter in which the author is dealing with what he styles the "uncertainty of the contract": "the same certainty", he says, "will not be required in cases where there is an element of fraud, as in simple cases of specific performance of a contract. Thus where A. agreed with B. in effect that if B. would not try to buy a certain estate, A would try to buy, and in case of success would seed a portion of the estate to B. at a certain price: and B. acted on his bargain and allowed A. to purchase: and A. having purchased refused to perform his part and set up the uncertainty of the part to be seeded: the court held that the defence could not avail and directed an inquiry to ascertain the portion to be given up and the price. It seems that if this could not have been ascertained, B. might have claimed the whole estate".

3.2 The court then went on to note that the relevant paragraph from *Fry* is based on *Chattock v. Muller* 8 Ch. T 177 and proceeded to apply the principle to the facts of the case before it.

3.3 The Court of Appeal in the United Kingdom returned to the issue in *Banner Homes plc v. Luff Developments Limited and Another* (2000) Ch. 372. In applying *Pallant* Chadwick L.J. (speaking for the court) and having reviewed extensively all relevant authorities stated the following at p. 397:

> "Equity must never be deterred by the absence of precise analogy, provided that the principle invoked is sound. Mindful of this caution, it is, nevertheless, possible to advance the following propositions.
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> (1) A *Pallant v. Morgan* equity may arise where the arrangement or understanding on which it is based precedes the acquisition of the relevant property by one party to that arrangement. It is the pre-acquisition arrangement which colours the subsequent acquisition by the defendant and leads to his being treated as a trustee if he seeks to act inconsistently with it. Where the arrangement or understanding is reached in relation to property already owned by one of the parties, he may (if the arrangement is of sufficient certainty to be enforced specifically) thereby constitute himself trustee on the basis that "equity looks on that as done which ought to be done", or an equity may arise under the principles developed in the proprietary estoppel cases. As I have sought to point out, the concepts of constructive trust and proprietary estoppel have much in common in this area. *Holiday Inns Inc. v. Broadhead*, 232 E.G. 951, may perhaps, best be regarded as a proprietary estoppel case; although it might be said that the arrangement or understanding, made at the time when only the five acre site was owned by the defendant, did, in fact, precede the defendant's acquisition of the option over the 15-acre site.
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> (2) It is unnecessary that the arrangement or understanding should be contractually enforceable. Indeed, if there is an agreement which is enforceable as a contract, there is unlikely to be any need to invoke the *Pallant v. Morgan* equity; equity can act through the remedy of specific performance and will recognise the existence of a corresponding trust. On its fact *Chattock v. Muller*, 8 Ch.D. 177, is perhaps, best regarded as a specific performance case. In particular, it is no bar to a *Pallant v. Morgan* equity that the pre-acquisition arrangement is too uncertain to be enforced as a contract – see *Pallant v. Morgan* [1953] Ch. 43 itself, and Time Products Ltd. v. Combined English Stores Ltd., 2 December 1974 – nor that it is plainly not intended to have contractual effect – see *Island Holdings Ltd. v. Birchington Engineering Co Ltd.*, 7 July 1981.
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> (3) It is necessary that the pre-acquisition arrangement or understanding should contemplate that one party ("the acquiring party") will take steps to acquire the relevant property; and that, if he does so, the other party ("the non-acquiring party") will obtain some interest in that property. Further, it is necessary that (whatever private reservations the acquiring party may have) he has not informed the non-acquiring party before the acquisition (or, perhaps more accurately, before it is too late for the parties to be restored to a position of no advantage/no detriment) that he no longer intends to honour the arrangement or understanding.
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> (4) It is necessary that, in reliance on the arrangement or understanding, the non-acquiring party should do (or omit to do) something which confers an advantage on the acquiring party in relation to the acquisition of the property; or is detrimental to the ability of the non-acquiring party to acquire the property on equal terms. It is the existence of the advantage to the one, or detriment to the other, gained or suffered as a consequence of the arrangement or understanding, which leads to the conclusion that it would be inequitable or unconscionable to allow the acquiring party to retain the property for himself, in a manner inconsistent with the arrangement or understanding which enabled him to acquire it. *Pallant v. Morgan* [1953] Ch. 43 itself provides an illustration of this principle. There was nothing inequitable in allowing the defendant to retain for himself the lot (lot 15) in respect to which the plaintiff's agent had no instructions to bid. In many cases the advantage/detriment will be found in the agreement of the non-acquiring party to keep out of the market. That will usually be both to the advantage of the acquiring party – in that he can bid without competition from

the non-acquiring party – and to the detriment of the non-acquiring party –in that he loses the opportunity to acquire the property for himself. But there may be advantage to the one without corresponding detriment to the other. Again, *Pallant v. Morgan* provides an illustration. The plaintiff's agreement (through his agent) to keep out of the bidding gave an advantage to the defendant – in that he was able to obtain the property for a lower price than would otherwise have been possible; but the failure of the plaintiff's agent to bid did not, in fact, cause detriment to the plaintiff – because on the facts, the agent's instructions would not have permitted him to outbid the defendant. Nevertheless, the equity was invoked.

(5) That leads, I think, to the further conclusions: (i) that although, in many cases, the advantage/detriment will be found in the agreement of the non-acquiring party to keep out of the market, that is not a necessary feature; and (ii) that although there will usually be advantage to the one and correlative disadvantage to the other, the existence of both advantage and detriment is not essential – either will do. What is essential is that the circumstances make it inequitable for the acquiring party to retain the property for himself in a manner consistent with the arrangement or understanding on which the non-acquiring party has acted. Those circumstances may arise where the non-acquiring party was never "in the market" for the whole of the property to be acquired; but (on the faith of an arrangement or understanding that he shall have a part of that property) provides support in relation to the acquisition of the whole which is of advantage to the acquiring party. They may arise where the assistance provided to the acquiring party (in pursuance of the arrangement or understanding) involves no detriment (in pursuance of the arrangement or understanding) involves no detriment to the non-acquiring party; or where the non-acquiring party acts to his detriment (in pursuance of the arrangement or understanding) without the acquiring party obtaining any advantage therefrom".

3.4 It seems to me that the above passage represents the current state of development of the law in this area in the United Kingdom.

3.5 There does not seem to be any direct Irish authority on the matter. In The *MacGillicudy of the Reeks v. Joy and Another* [1959] I.R. 189 this court was concerned with an agreement entered into by the parties to the effect that they would join in the purchase of a farm. The case would appear to have turned on whether the agreement entered into was enforceable for a variety of reasons including an allegation of uncertainty, an alleged absence of consideration or intention to create legal relations an absence of a provision dealing with land commission consent for subdivision and an alleged absence of a sufficient note or memorandum to satisfy the statute of frauds. The plaintiff having satisfied the court that none of the above prevented an enforceable arrangement having been entered into, the court declared that the defendant held the appropriate portion of the lands on trust for the plaintiff. However it is clear that the case was argued on the basis of contract rather than a trust per se.

3.6 I see no reason not to follow the logic of the decisions in *Pallant v. Morgan and Banner Homes* and hold that, independent of an entitlement to enforce a contract, there exists an equitable entitlement in the circumstances detailed in those authorities to the enforcement of an arrangement which may fall short, in some respects, from the requirements for the enforcement of a contract. As was pointed out in Banner Homes there would be no need for a *Pallant v. Morgan* equity in circumstances where there was an enforceable contract because the aggrieved party could simply seek specific performance.

3.7 It is important to emphasise that the *Pallant v. Morgan* equity arises in circumstances where two persons may be engaged in a joint venture to purchase a property from a third party. It has no application to the more straightforward case where one party is engaged with the other in negotiations for a direct sale of the property. In the latter case a contract will only be enforceable if all of the elements necessary for the creation of contractual relations have been established and if there is a sufficient note or memorandum to satisfy the Statute of Frauds or a sufficient act of part performance or where, as noted in *Banner Homes*, a proprietary estoppel arises. However the principle behind the doctrine of part performance is that the Statute of Frauds cannot be used as an instrument of fraud. Similarly the *Pallant v. Morgan* equity derives from the principle that it would inequitable for a person who obtains a benefit (such as the withdrawal of a competitor from a bidding process) to retain the benefit without conceding the substance of the arrangement. I am therefore satisfied to follow *Pallant v. Morgan and Banner Homes.*

3.8 Having considered all of the relevant authorities I am therefore satisfied that the issue which I must consider on the facts of this case is as to whether there was an arrangement or understanding between the parties as to the purchase of the property such that the circumstances make it inequitable for Mr. McKeon to retain the property in its entirety for himself. It is not necessary that the arrangement or understanding has to be contractually enforceable. Against that background it is now necessary to turn to the contact between the parties which occurred on and after the 11th August, 2005.

4. The Facts in Controversy

4.1 The first actual contact between the parties would appear to have occurred when Mr. McKeon received a phone call, at his house, on Thursday 11th August, from Mr. Shiel. While there are some minor disputes as to what was said on that occasion it seems clear that Mr. Shiel indicated his active interest in the property, but Mr. McKeon was annoyed by this fact, and that the telephone call ended abruptly.

4.2 Mr. Shiel had earlier left a voice message for Mr. McKeon. Subsequently Mr. McKeon made a further phone call to Mr. Shiel which was taken by Mr. Shiel on his mobile phone as he was driving back to Dublin from Enniscrone in the company of his son. There are again some disputes as to precisely what was said during the course of that conversation. However it does not seem to me that anything specifically turns on that conversation in itself save to the extent that it may cast some light on the crucial discussions which took place the following Sunday.

4.3 In that context it is important to note that a great number of issues were explored in the course of the hearing not because they were questions of fact which in themselves had the potential to impact on the final decision in the case but rather were matters which either went to the credit of either of the parties or might be said to make it more likely that one or other contention as to what actually transpired on the Sunday was actually correct. It does not seem to me to be necessary to address each and everyone of those matters in the course of this judgment.

4.4 In any event it seems clear that the second telephone conversation started with Mr. Shiel indicating that he was not prepared to continue with the conversation unless Mr. McKeon apologised for the abrupt termination of their earlier phone call. Such an apology was ultimately tendered. Thereafter it would seem that Mr. McKeon indicated that his primary interest was in the rear portion of the property while Mr. Shiel indicated that his primary interest was in the house and surrounding garden. It appears to be common case that the parties agreed to meet when Mr. Shiel was back down in Enniscrone on the following weekend. As it happens it would appear that the meeting was originally intended to take place on the Saturday but did not, in fact, take place until the Sunday.

4.5 In the intervening period one matter of note occurred. It is clear that Mr. Shiel arranged for his partner, David Fowler, to ring Ms.

Feeney on the following day (Friday) for the purposes of telling her that Mr. Shiel would not be available until Monday. It would appear that Ms. Feeney told Mr. Fowler that if Mr. Shiel did not confirm, by close of business on that day (Friday), that Mr. Shiel was prepared to pay €500,000, the property would be sold to Mr. McKeon. It should be said that Mr. Shiel had first given the impression in evidence that nothing of any substance had occurred between the telephone calls on the Thursday and the meeting on the Sunday, but then conceded, under cross examination, that the conversation carried out on his behalf by Mr. Fowler with Ms. Feeney had occurred and, perhaps more importantly, that the substance of that conversation was to the effect that unless Mr. Shiel were to make a bid of €500,000 by close of business on Friday the property would be sold to Mr. McKeon.

In the same context the content of an affidavit sworn by Mr. Shiel on the 21st October, 2005 in an application made earlier in these proceedings needs to be noted. At para. 12 of that affidavit Mr. Shiel conveys the strong impression that he had no contact with Ms. Feeney between Thursday and the Sunday meeting. While this is technically true, in the light of his concession about the contact made on his behalf and the substance of the communication with him (to which I have referred) the paragraph is, regrettably, a long way short of the whole truth.

Of even greater concern are the contents of para. 15 of the affidavit which attempts to convey the impression that Mr. Shiel had outbid Mr. McKeon by offering €450,000 without mentioning that that bid had been rejected and that he had failed to bid €500,000 by close of business on the Friday as he was told by Ms. Feeney he was required to do to avoid a sale to Mr. McKeon.

It is, unfortunately, difficult to avoid the conclusion that Mr. Shiel attempted to conceal the adverse developments with Ms. Feeney on the Friday.

4.6 It is clear that Mr. Shiel was aware of that conversation (and that he had not, in fact, met the deadline of close of business on Friday), when he met with Mr. McKeon on the Sunday. It is equally clear that Mr. McKeon was not aware of the fact that Mr. Shiel had not met a deadline imposed by Ms. Feeney.

4.7 Much of what occurred at the meeting on the Sunday is common case. The parties had an initial meeting at Mr. Shiel's house, went to visit the site which was, of course, just across the road, and returned for further discussions in Mr. Shiel's house. On Mr. McKeon's account he was only there to listen and almost all of the running was made by Mr. Shiel. It is common case that Mr. Shiel suggested that Mr. McKeon would purchase the whole property but in trust for Mr. Shiel as to the house and garden portion. It is further common case that when the parties went to visit the site some discussion as to the appropriate boundary between the property as it might be divided took place. In relation to this aspect of the matter, Mr. McKeon accepts that he suggested that the boundary would need to be placed somewhat nearer the house than it actually appeared on the ground (in line with the neighbouring rear boundary). It is also accepted that Mr. Shiel agreed that Mr. McKeon would be entitled to connect (for the purposes of his planned development) into the sewer passing through the garden at the back of the property (the proposed boundary would have left the sewer on the portion to be allocated to Mr. Shiel). Finally, so far as the substance of the arrangements being contemplated is concerned, it would be appear to be accepted by Mr. McKeon that Mr. Shiel suggested that he (Mr. Shiel) would pay €275,000 of the total purchase price together with a proportionate share of the expenses (including stamp duty) connected with the purchase.

4.8 Of some particular relevance to the issues which I have to decide is that it seems to be common case that Mr. Shiel put forward details as to the mechanism by which the transaction contemplated might be effected. In particular he made suggestions as to the execution of a declaration of trust on the completion of the sale from the Sproules to Mr. McKeon which would have the effect of saving an exposure to double stamp duty. It was also suggested that there would be appropriate wayleaves to provide for connections from Mr. McKeon's development into the sewer.

4.9 There does not appear to be any dispute but that all of the above matters were referred to at the meeting between the parties. What is in contention is as to whether anything was agreed. Mr. Shiel's case is that he made it clear that in the event that agreement was not reached it was his intention to engage in a further attempt to purchase the property on the following Monday. On his case all of the above matters were agreed subject only to one question. Mr. Shiel accepts that Mr. McKeon wanted to take expert advice on the question of connections into the sewer.

4.10 On Mr. McKeon's case his only intervention in the discussions of any substance was to suggest that the line of the boundary between the portion which he was to retain (if agreement was reached) and the portion which was to go to Mr. Shiel was to be along the line of the back garden of the house on the left hand side of the property. In all other respects it is Mr. McKeon's case that he simply listened to Mr. Shiel's proposals. Indeed he goes further and says that in particular when Mr. Shiel began discussing the legal technicalities of how any arrangement might be implemented he indicated in strong terms that he did not understand such matters and that Mr. Shiel should discuss same with his (that is Mr. McKeon's) solicitor.

4.11 In the context of the dispute between the parties two further aspects of what transpired are relevant. It is common case that Mr. Shiel went to get a pen and paper for the purposes of recording the arrangements but that Mr. McKeon declined to have matters so recorded. The only matter which was in fact written down was the particulars of Mr. Shiel's solicitor. Mr. McKeon says that the reason why nothing was written down was because there was no agreement. Mr. Shiel is adamant that the absence of a written record does not in anyway imply that no agreement had been reached.

In the same vein Mr. Shiel contends that the parties shook hands on a number of occasions as Mr. McKeon was leaving. Mr. McKeon denies this.

4.12 While the case turns on whether any sufficient arrangement had been arrived at, at the meeting which I have just described, so as to make it inequitable for Mr. McKeon not to treat the relevant portion of the property as being held on trust for Mr. Shiel, some of the events which occurred subsequently are material to an assessment of which account of that meeting is, on the balance of probabilities, to be preferred.

4.13 Firstly it should be noted that on the following day, Mr. McKeon paid the booking deposit and thereafter a letter in a usual form issued from Sherry Fitzgerald (dated Monday 15th August, 2005) to the vendor's solicitors indicating that the property had been sold subject to contract and specifying the terms.

4.14 On the same day, the 15th August, Mr. Shiel contacted Mr. Andrew Turner of Hamilton Turner Solicitors who was the person indicated by Mr. McKeon on the previous day as acting for him. That phone conversation was followed up exactly a week later by a letter of 22nd August, 2005 from David Fowler (whom, as I indicated, is a partner of Mr. Shiel) referring to the conversation had between Mr. Shiel and Mr. Turner the previous week, and setting out the understanding which Mr. Shiel (and through him Mr. Turner) had of the arrangement in the following terms:-

"I understand the arrangement is as follows:

1. Peter is conclude his negotiations with the vendor for the acquisition of the entire property on the basis that John had agreed that he will withdraw from his negotiations with the vendors for the acquisition of the property by him.

2. Peter's acquisition of the entire property is in trust for John as to the house and the back garden. The back garden is to be along the line of the back gardens of the house on the left hand side of the house.

3. Peter is to transfer at no cost to John any portion of the garden area at the back of the house which may be on Peter's title.

4. I understand there is a mains sewer passing through the garden at the back of the house and that Peter will require 1/2 connections into this pipe for the purpose of undertaking the apartment development on his adjoining site and possibly also for the purpose of undertaking a development on the site at the back of the house in sale. It is agreed that Peter shall be entitled to make two separate connections to the public sewer as it traverses the garden.

5. Peter has agreed that the upon completion of the connections to the public sewer he shall make good the garden and re-seed to John's reasonable satisfaction. Upon the completion of the making of the connections to the sewer Peter will construct at his own expense a 2 metre wall to be capped and plastered on John's side.

6. John will pay €275,000.00 of the total purchase price for the house and the site and Peter will pay the balance. John will discharge his proportion of the deposit upon the signing of the Contract and the balance upon completion.

7. At the time of the signing of the Contract Peter will enter into a Declaration of Trust in John's favour in respect of the house and the garden.

8. Upon the completion of the acquisition of the property Peter will execute a Deed of Transfer of the house and the garden to John so that John may have the Deed of Transfer adjudicated exempt from stamp duty based upon the Declaration of Trust.

9. John has agreed that there will be executed and delivered to Peter the appropriate wayleaves and easements so that Peter has for the benefit of the adjoining site for the apartments and the site at the rear of the house rights to connect into the public sewer and thereafter to repair and maintain (sic). These easements will be registered as burdens on the title that John will hold to the property."

4.15 It will be seen from that letter that the arrangements correspond with the matters which, it is common case, were raised by Mr. Shiel at the meeting some eight days earlier. It is clear that in both his initial phone conversation with Mr. Turner and the letter written on his behalf which I have just quoted, Mr. Shiel clearly asserts that an agreement or arrangement along those lines had been entered into.

4.16 The letter of the 22nd August was replied to by a letter of 30th August from Mr. Turner to Mr. Fowler, the operative part of which reads as follows:-

> "From the discussion I had with your client and from the instruction received from my client it is apparent to me that no agreement is in existence in relation to the above mentioned property. Having regard to the content of your letter I am instructed that our client does not at this stage wish to proceed along the lines as indicated by you".

Thereafter the proceedings commenced.

4.17 It is important to note that prior to the receipt of the letter of 22nd August Mr. McKeon went to meet with Mr. Turner, on Wednesday the 17th August. An attendance of that consultation was produced on discovery and Mr. Turner was called by the plaintiffs to give evidence in respect of it. No privilege was claimed in relation to the matter. The attendance gives an account which, insofar as concerns the lead up to the Sunday meeting, is consistent with the evidence of Mr. McKeon. In relation to that meeting itself the memorandum reads as follows:-

> "He met him on Sunday. He instructed John that he did not wish any notes to be taken and didn't want any agreements to be produced in writing. He said that he needed to discuss the matter with his solicitor and architect that they would discuss the property and the proposals for the property. They informally agreed to divide the property into two lots. Peter will take the land at the bank (sic). And John would take the house at the front. Peter would pay €160,000 and John Shiel would pay €275,000 for the house. There was a small section that would be transferred from Peter to John Shiel and John Shiel would in return grant rights for the easement and access to the sewage. The foregoing represents the basic leads (sic) of an agreement but subject to Peter taking legal advice and advice from his architect".

4.18 One further matter noted in the memorandum of the consultation should be referred to. The memo ends with the following passage:-

> "In relation to John Shiel I have been instructed to delay matters until the contract comes in but if he pushes me on the issue I have been advised that I should notify him that we intend to purchase the property in our own name and to indicate to him that we have no real designs on the house and it is our client's view that he will on balance probably sell the property to him at a later stage".

4.19 It should be pointed out that in evidence Mr. Turner indicated that the phrase "informally agreed" was his interpretation of the matter and did not represent a specific comment made by Mr. McKeon.

4.20 The second matter that transpired was that prior to the letter of rejection of 30th August, a signed contract for sale of the property became available to Mr. McKeon by, at the latest, the 29th. Thus by the time the formal letter of rejection was sent Mr. McKeon had in fact a binding contract.

4.21 In assessing the evidence I should firstly say that while Mr. McKeon questioned some aspects of the memorandum of his

conversation with Mr. Turner, it seems to me that there is no basis for rejecting Mr. Turner's account of the consultation. On that basis it seems to me that I must hold that whatever language was used by Mr. McKeon in describing the meeting on Sunday the 14th, same was such as conveyed to Mr. Turner an impression that there was at least an informal agreement. It is clear that Mr. Turner, correctly, advised Mr. McKeon that there was no binding contractual arrangement between Mr. McKeon and Mr. Shiel. However that is not the issue in this case. The issue is as to whether there was an arrangement between the parties such as would render it inequitable for Mr. McKeon not to treat the property as being held, as to the appropriate part, in trust for Mr. Shiel. In the circumstances it seems to me that I must, on balance, hold that whatever language was used by Mr. McKeon at the meeting of the 14th it was such as was likely to have reasonably led Mr. Shiel to the belief that there was at least an informal agreement between them. If Mr. McKeon gave that impression to his own solicitor at a meeting some time three days later then it seems to me to be equally likely that he conveyed the same impression to Mr. Shiel. It is also of note that the recorded description of the "informal agreement" corresponds, to a very large extent, with the contents of the letter subsequently received on behalf of Mr. Shiel.

4.22 I am therefore satisfied, as a matter of fact, that Mr. McKeon indicated a sufficient level of agreement to the arrangements proposed by Mr. Shiel at the meeting on 14th August to lead Mr. Shiel to believe, reasonably, that they had entered into an arrangement sufficient to permit Mr. Shiel to withdraw from a consideration of whether he would attempt to reactivate his bid for the property on the following Monday. While Mr. Shiel had not, I am satisfied, made up his mind as to whether to bid again on the Monday, I am satisfied that the arrangement reached on Sunday influenced his decision not to contact Ms. Feeney and attempt to re-activate his interest in the property.

I am also satisfied that Mr. McKeon was concerned about the legal and engineering consequences of what was proposed and indicated that he needed professional advice on those matters. However those issues were concerned with the method of implementation of the arrangements rather than their substance. While I am, therefore, satisfied that the matters agreed to be discussed professionally were wider than those contended for by Mr. Shiel (and extended to questions concerning the legal methods of implementation) I am nonetheless satisfied that Mr. McKeon conducted himself at the meeting in such a way as conveyed the impression that, subject to those issues of implementation being capable of satisfactory resolution, an arrangement would be entered into.

4.23 I am also satisfied that Mr. McKeon was aware that his position was not secure until he had a formal legally enforceable contract signed by the vendor. It seems clear that he wished to keep, if at all possible, Mr. Shiel from becoming aware of the fact that he did not wish to go through with the arrangement until after he had secured a signed written agreement. While in fairness it should be noted that there was no suggestion that, if pressed, Mr. Shiel would not be told the true position, nonetheless it is clear that the desired position was that Mr. Shiel would not discover the true position until it would have been too late for Mr. Shiel to seek to do anything about it. That such a matter is a factor in determining whether a *Pallant v. Morgan* equity may be said to exist can be seen from item (3) in the passage from *Banner Homes* referred to at para. 3.3 above. Also that fact is only consistent with knowledge on the part of Mr. McKeon that it was likely that Mr. Shiel would refrain from any further attempt to bid on the property until such time as Mr. Shiel was told that all bets were off. It can only be to that end that it was decided to attempt to delay Mr. Shiel receiving that knowledge until after a signed contract was available to Mr. McKeon.

4.24 In all the circumstances it seems to me that I must conclude that at least an informal arrangement was entered into between the parties which led Mr. Shiel to the reasonable belief that Mr. McKeon would in fact purchase the property in part trust on his behalf and which led Mr. McKeon to the belief that Mr. Shiel would refrain from actively pursuing the property.

5. Some Other Issues

5.1 In his closing submissions on behalf of Mr. McKeon, counsel sought to draw a distinction between the authorities following *Pallant* and the facts of this case by reference to the events which occurred on the Friday (and thus prior to the meeting on the Sunday). On that basis it was contended that Mr. Shiel was already out of the picture by the Sunday (by virtue of having failed to offer €500,000 by close of business on the Friday). However it does not seem to me that that fact is, of itself, necessarily decisive. The test as set out in *Banner Homes* is as to whether there was detriment to Mr. Shiel or benefit to Mr. McKeon. Mr. Shiel's position was, undoubtedly, more difficult as of the Sunday than it had been at a time when he might reasonably be described as having been involved in negotiations. However he had already secured an entry into the negotiating process at a time after a sale had been agreed, subject to contract, with Mr. McKeon. The fact that Mr. Glen Sproule would, apparently, have been prepared to accept an offer of €500,000, notwithstanding there having being a previous agreement with Mr. McKeon at €435,000, shows that until such time as there were binding legal arrangements between Mr. McKeon and the Sproules, Mr. Shiel retained an opportunity to buy the property.

5.2 Whatever views may be held in relation to a party attempting to outbid a competitor whose offer has been accepted (and there has been much recent debate about so called "gazumping"), the fact remains that on the current state of the law in this jurisdiction a party is legally entitled to make a bid up and until the time when legally enforceable relations are entered into with another party. The very fact that Mr. McKeon was not anxious that Mr. Shiel be aware that he had no intention of going ahead with their arrangement until after he (Mr. McKeon) had in his possession a legally enforceable contract, shows that keeping Mr. Shiel off-side was considered by Mr. McKeon to be of some value to him. In the circumstances it seems to me that the test of benefit or detriment as set out in *Banner Homes* is met.

5.3 However it seems to me that I need to consider the undoubted fact that Mr. Shiel, in going into the meeting on the Sunday, was aware that his position had been significantly damaged by his failure to make the required bid by close of business on the previous Friday and, most importantly, that Mr. McKeon was not aware of that fact, under another heading.

5.4 Obviously so far as the formulation of contractual relations are concerned parties are not under any obligation to reveal facts which might place them at a negotiating disadvantage save in the limited exceptional cases in respect of which utmost good faith is required and subject to the requirement not to engage in misrepresentation. If this case were concerned with the specific performance of a contract then the fact that Mr. Shiel acted in that fashion would be of no relevance whatsoever. However in this case Mr. Shiel seeks to enforce an equitable remedy. It is an old adage that "he who seeks equity must do equity". In the circumstances I have to consider whether it would be inequitable for Mr. McKeon not to comply with the informal arrangement which, I am satisfied, was arrived at on the Sunday. However in assessing whether that would be inequitable, I must also have regard to whether it would be inequitable to allow Mr. Shiel to benefit from such an arrangement where it was entered into by him in circumstances where he was aware that Mr. McKeon was under a misunderstanding as to Mr. Shiel's negotiating position.

5.5 Under this heading I am satisfied that the distinction which counsel for Mr. McKeon sought to draw between this case and the other cases in which a *Pallant v. Morgan* equity have been found to exist, is correct. In all the other cases the parties were competing bidders at arms length where neither party had, apparently, any particular advantage in the negotiations or in respect of an upcoming auction. Indeed item (4) in the passage from *Banner Homes* referred to at para. 3.3 above speaks of a detriment to

seeking to acquire the property on "equal terms".

5.6 Where a party, such as Mr. Shiel, wishes to rely on equitable principles then it seems to me that he must also be shown to have done equity. While there may be reason to understand his attempt to gazump Mr. McKeon (on the basis that he was aggrieved at not being reverted to having been, at one stage, so far as he concerned, the highest bidder) it does not seem to me that he can invoke equitable principles when he procured the arrangement upon which he relies in circumstances where he was aware that Mr. McKeon was unaware of the fact that his position was far weaker than might otherwise be believed.

6. Conclusion

6.1 In all those circumstances I am satisfied that equity does not require that Mr. McKeon comply with the terms of the informal arrangement. That arrangement was procured in circumstances where one party was, to the knowledge of the other party, unaware of a significant weakness in that party's position. While under no legal obligation to reveal that weakness, Mr. Shiel does not seek to enforce a legal entitlement. It seems to me that Mr. Shiel has lost his entitlement to resort to equity to pursue the matter by reason of his failure to disclose his weakened position at the meeting on Sunday 14th. While the parties were not, on any view, on equal terms prior to the meeting of the 14th the extent of that inequality was concealed by Mr. Shiel.

6.2 In all the circumstances of the case I therefore dismiss the plaintiff's claim.