Neutral Citation Number: [2010] IEHC 167

THE HIGH COURT

2008 4997 P

BETWEEN

PATRICK O'CONNOR

PLAINTIFF

AND

P. ELLIOTT AND COMPANY LTD

DEFENDANT

JUDGMENT of Mr. Justice Roderick Murphy delivered on the 4th day of March, 2010.

1. Background

The plaintiff's claim is for specific performance of a contract which he alleges was made between him and the defendant on 27th February, 2007, by way of oral agreement which was evidenced in writing on 5th June, 2007 in respect of the sale of the plaintiff's premises at 1A and 2, Usher's Quay, at the corner with Usher Street, in the City of Dublin to the defendant company for the sum of €960,000, €100,000 of which was in respect of the subsoil. Mr. O'Connor alleges that correspondence from the defendant's solicitor of that date and of 18th July, 2007, notwithstanding that both were marked "without prejudice", constitutes a memorandum for the purpose of the Statute of Frauds.

By way of background the property had been owned by the plaintiff's family for many years and had been the location of the family's printing business which was taken over by the plaintiff on the death of his father. The plaintiff at all material times owned the property, having inherited the business from his father and having bought out the interest of his siblings in the property following the death of his parents.

The possibility of entering into an agreement with the defendant for the development of the property arose on foot of a previous approach by the defendant to the plaintiff in late 2004. Negotiations ensued and a development agreement was entered into between the parties in January 2005 which is referred to in the Statement of Claim. At that time the defendant was in the process of developing lands and premises formerly known as the Abbey Garage, No. 3 – 10 Usher's Quay, Dublin 8, and had approached the plaintiff with a proposal for the sale and development of his adjoining property.

That agreement provided, *inter alia*, that the plaintiff would not object to the defendant's actual and/or proposed application for permission to develop the adjoining property and that both the plaintiff's property and the adjoining property would be developed together.

Early in 2006 it was agreed between the plaintiff and the defendant that the development agreement would be varied so that the property and adjoining property would be developed separately. In the course of 2006 and 2007 the defendant commenced works and substantially completed the development of the adjoining property.

The plaintiff alleged that, in consequence of the said works, the plaintiff's right to light on the east side of the property was obliterated and it was further claimed that the works had severely disrupted the business of the plaintiff.

On 26th January, 2007 the defendant indicated that it no longer intended to honour the agreement between the parties but, following further discussion and negotiations, a meeting was held at the Merchant Café on 27th February, 2007, recorded in an e-mail from Mr. Mark Elliott, a director of the defendant company, whereby the plaintiff agreed to sell and the defendant agreed to purchase the property for the sum of €860,000 subject to conditions that were discussed at a meeting of 3rd April with the parties' solicitors and which were set out in a letter from the solicitors for the plaintiff dated 25th May, 2007, subject to modifications on 28th May, 2007. No reference was made to an easement to develop the subsoil at that stage.

The plaintiff claims that, by letter of reply from the solicitors for the defendant dated 5th June, 2007, and in certain subsequent correspondence, the oral agreement of 27th February, 2007 became enforceable for the purpose of the Statute of Frauds.

2. Correspondence

The plaintiff's solicitors' letter of 25th May, 2007 set out details of the agreed transaction as understood by their client in relation to 1A and 2 Usher's Quay and the development at Mellowes Quay. Under the heading of "disturbance" it was stated that compensation in the sum of €22,500 would be paid to the plaintiff at the same time as the consideration of €860,000 and that further consideration in respect of the basement/subsoil was to be paid to him.

The defendant was to block up the property at 1A Usher Street and ensure that 2 Usher Street continued to be fit for the plaintiff's company, Dot Binding & Labels Ltd., to operate its business until such time as redevelopment commenced.

The plaintiff was to seek tax advice and, if changes were proposed which improved the tax position of the plaintiff, then the defendant would act reasonably towards accepting such changes.

Valuers were to meet to commence negotiations regarding consideration for the basement/subsoil.

No building work, which would interfere with the plaintiff's light, was to be carried out until such time as the defendant had acknowledged and accepted terms of the agreement and once compensation for the basement had been agreed and finalised.

The reply of 5th June, 2007, was in response to that letter. In relation to 1A and 2 Usher's Quay, six out of eight of the terms contained in the letter of 28th May were agreed. It was not agreed that the defendant be responsible for the maintenance of the plaintiff's property and ensuring that it would be fit for the purpose of carrying out the business of Dot Binding & Labels Ltd.

It was agreed that the deed of easement proposed to be granted to the defendant in respect of the redevelopment of 1A and 2 Usher's Quay, above ground level, should not be assigned to a third party without the consent of the plaintiff, which consent would not be unreasonably withheld.

In relation to the Mellowes Quay development all three of the terms contained in the plaintiff's letter were agreed.

The terms relating to disturbance were agreed as discussed in a telephone conversation. The maintenance was, as indicated above, not agreed and the tax advice was noted and agreed.

The letter of 18th July 2007, headed as indicated, "without prejudice", referred to previous correspondence and stated:

> "we confirm that all matters have now appear (*sic*) to be agreed between our clients. However on going through our letter of 5th June, 2007, we would comment as follows:
>
> **1 and 2 Usher Street:**
>
> (1) You might please let us have a draft deed of easement and building licence.
>
> (4) You might please confirm exactly what work your client now expects to be carried out to the premises…
>
> (8) The agreed figure is now €100,000.
>
> **Tax advice:**
>
> You might please confirm if your client has obtained advice in relation to the structure of the transactions and you might please let us know the consequences of any such advice.

We look forward to hearing from you."

Number 4 above in relation to 1A and 2 Usher Street refers to the ongoing maintenance and the work that was to be carried out to the plaintiff's premises.

Number 8 referred to the consideration for the easement to develop the subsoil which was then agreed.

The letter of 18th July, 2007, was preceded by a fax from the solicitors for the plaintiff, to the solicitors for the defendant, which stated as follows:

> "Billy,
>
> I note from your message that all matters are now agreed between the parties. However, I would like to tie down a time scale for finalisation of the deed of easement and payment of consideration to Paddy [O'Connor]. Perhaps you would come back to me on this as soon as you can take instructions from your client.
>
> Regards,
>
> Fiona Thomas
>
> Taylor and Buchalter"

The plaintiff's solicitor enclosed an initial draft of a licence agreement for the defendant's solicitors' consideration, requested maps to identify the licensed premises and the retained premises, and wished to establish a tie frame for finalisation of all matters. On 20th September a reminder of the request for time line for finalisation of documents and payments was sent and on 27th September the plaintiff's solicitor wrote that their client was most disappointed that little or no progress had been made in relation to the matter since 18th July.

On 20th September the plaintiff's solicitor sent the defendant's solicitor a fax stating that the plaintiff had to borrow money to buy out his family members' interests and that he needed to proceed with the transaction as soon as possible in order to discharge that debt.

The defendant's solicitors' fax of 27th September explained that he had been away until the previous Monday and was catching up and would respond to the draft licence agreement the following week.

On 12th October, 2007, a letter from the defendant's solicitors headed "without prejudice" referred to the draft licence agreement and suggested that it might be "a situation that an outright purchase by way of long lease would be more appropriate". A request was made for confirmation that the plaintiff's tax advice would not affect the structure of the transaction. A request was also made for a push and call option agreement. Documents, including a booklet of title, form of building contract, building specification service charge, home bond documentation and a Land Registry approved scheme map, were sent to be held in trust pending completion.

> By fax of 23rd November, 2007 the defendant's solicitor wrote:
>
> "Subject to contract/contract denied.

> 'Hi Fiona,
>
> I spoke to Mark [Elliott] about the basement and his clear understanding is that the basement figure of 100,000K is paid over only if it is developed and is used for commercial purposes, other than car parking. Can you please take instructions on this.
>
> In the meantime I attach an initial and very rough draft lease which my client has not seen so I must fully reserve the right to make amendments.
>
> I look forward to hearing from you with draft option agreement as discussed.
>
> Regards,
>
> Billy Parker,
>
> Whitney Moore"

This was the first correspondence made "subject to contract/contract denied".

By letter of 12th December, 2007, the plaintiff's solicitor referred to the basement and to the defendant's solicitor's letter of 18th July, 2007. The letter continued:

> "At all times it was acknowledged that the 'further' or 'additional' sum of €100,000 was being paid in respect of our client allowing your client to develop the basement and subsoil below the premises. At no time was it ever suggested that the payment of this sum be deferred until development occurred. In fact, we note that in your definition of the 'demised premises' in the draft lease, you are including the subsoil below the premises. Clearly, the reason for engaging valuers to value the basement area at current market value was so that the consideration being paid at this juncture would include the additional €100,000. Our client is not willing to re-negotiate this issue. If your client does not wish to pay the additional sum of €100,000 then all references to the basement and subsoil should be removed from the draft lease."

By fax dated 11th January, 2008, the defendant's solicitors told the plaintiff's solicitors that they expected completion at the beginning of February to be realistic. However it was further stated that:

> "One point which I know will not be agreed and that is any compensation if there is no development within ten years. Your client's option is to call upon our client to purchase the premises at that stage."

By letter dated 25th February, 2008, from the defendant's solicitors, headed "without prejudice", it was stated that two significant commercial issues between the parties needed to be resolved before proceeding with the legal documentation. The defendant never envisaged paying a sum of €100,000 in respect of the basement at that time. That would only arise in the event of redevelopment of the property and the actual use of the basement. The letter continued:

> "We note your client is not willing to re-negotiate this issue. However our client's position is similar and they are not prepared to re-negotiate."

The second issue regarded redevelopment. The letter stated:

> "We do not understand your reference to a further agreement whereby our client compensates your client in the event that the property is not developed within ten years. Your client's compensation comprises the ability, the end of ten years, if the property is (*sic*) not been redeveloped to call upon our client to acquire the property from your client at market value. There is no question of any further compensation being paid to your client.

In respect of the first matter the plaintiff's solicitors on 29th February, 2008 stated that it was willing to give options with regard to the basement either to pay the €100,000 at that stage or at a later date subject to a valuation being carried out at that stage and was willing to agree on the issue of redevelopment.

On 5th March, 2008, the defendant's solicitors, by fax, said that the basement was a real issue and suggested a "very reluctant compromise" in that the defendant agreed to a payment on a restricted basis where there was planning for commercial use other than car parking and that development had taken place.

By 6th March, 2008, the plaintiff's solicitors gave notice of issue of proceedings seeking a specific performance of the agreement unless the defendant confirmed that it would take all necessary steps to specifically perform all aspects of the agreement.

On 20th June, 2008, a plenary summons was served.

The above outlines the sequence of events in which correspondence was sent by the defendant "without prejudice" followed by subsequent lengthy correspondence, up to the fax of 5th March, 2008, referred to above, which was headed "subject to contract/contract denied", - as was the fax of 23rd November, 2007.

3. Preliminary issue: admissibility of "without prejudice" correspondence

Both the letter of 5th June, 2007 and that of 18th July, 2007, relied on by the plaintiff as constituting a written memorandum to satisfy the Statute of Frauds, were headed "without prejudice".

The defendant contended that the parties were in dispute at the time of that correspondence because the plaintiff had indicated, in the course of May 2007, that his original forbearance in declining to object to the defendant's construction works might be reversed, and action taken accordingly, if the development agreement was not concluded as originally agreed and foreseen. Accordingly, it was submitted that this correspondence should not be admitted.

The plaintiff submitted that the existence of a possible related dispute did not transform a letter written in the absence of a dispute into a letter attracting the "without prejudice" privilege. In particular, the underlying policy and rationale of the privilege was not engaged by the consideration that a right to light issue had arisen in the context of negotiations and was revived in the context of

calls for the agreement to be formally concluded. The right to light issue was the subject of detailed open correspondence on the part of the defendant in its open letter of 17th May, 2007. The plaintiff submitted that it was difficult to see how the same "dispute", the subject of open correspondence, could invest the correspondence relating to the agreement (and evidencing that agreement) with the necessary quality of privilege.

In this submission of the plaintiff, the defendants reliance on the "without prejudice" nature of correspondence as investing that correspondence with the quality of protection afforded in a pre-contractual negotiation by the phrase "subject to contract/contract denied", was conflating a rule of evidence with a special rule of contract law. The "without prejudice" rule and the "subject to contract" rule applied in different contexts for wholly different reasons and were supported by wholly different policy considerations.

The plaintiff contended that the two letters, of 5th June and 18th July, 2007, were not protected by the "without prejudice" privilege on the grounds, first, that these were not communications in the context of a dispute or negotiation of settlement of a dispute, and, further, that these letters fell within the well-established exception to the "without prejudice" rule in respect of correspondence evidencing the existence of a concluded agreement.

Reference was made to Parker L.J. in *South Shropshire District Council v. Amos* [1987] 1 All E.R. 340, at 344, where it was held that the heading "without prejudice" did not conclusively or automatically render a document so marked privileged.

In O'Flanagan v. Ray-Ger Ltd. [1983] WJSC-HC 3316, Costello J. stated that "[T]hese words alone possess no magic properties and some more substantial grounds had to be found to justify the defendants' objection to the admissibility of this letter".

Keane C.J. in *Ryan v. Connolly* [2001] 1 I.R. 627, at 631, stated that it was clear from *Cutts v. Head* [1984] 1 Ch. 290 and other authorities that the presence of the heading "without prejudice" does not automatically render the document privileged. The Court was entitled to look at the document in order to determine whether it was of such nature as to attract privilege.

The plaintiffs submit that the rule is actually a privilege that forms part of the general law of evidence and was based on public policy. Reference was made to McGrath on *Evidence*, (Thomson Round Hall, 2005) paras. 10-111 at pp. 574-5:

> "In order for a claim of privilege to succeed, the party claiming it must establish that the communication in question was made (i) in a *bona fide* attempt to settle a dispute between the parties; and (ii) with the intention that, if negotiations failed, it could not be disclosed without the consent of the parties …"

McGrath continues (para. 10-113 at pp. 74):

> "The party seeking to assert privilege must show that at the time the communication was made, a dispute existed between the parties in respect of which legal proceedings had commenced or were contemplated and the communication was made in a genuine attempt to further negotiations to settle that dispute. The fact that a communication concerns a dispute between the parties is not sufficient to confer privilege – it must be made in furtherance of the settlement of the dispute. This is clear from the decision of Costello J. in *O'Flanagan v. Ray-Ger Ltd*."

Reference was also made to Lord Mance in *Bradford & Bingley v. Rashid* [2006] 1 WLR 2066 at para. 87 of his judgment:

> "…it is wrong to assimilate the express use or effect of the phrase 'without prejudice" in a context where there is no dispute or attempt to compromise a dispute with the significance of the 'without prejudice' rule which applies, or of the 'privilege' which exists, where there is an attempt to compromise a dispute. I am unable therefore to agree with my noble and learned friend Lord Brown's statement at para. 63 that 'generally speaking' communications marked 'without prejudice', will 'attract the privilege even without the public policy justification of encouraging the parties to negotiate and settle their disputes out of court'. It is not open to a party or parties to extend at will the reach of the 'without prejudice' rule or of the 'privilege' as regards admissibility or disclosure."

As stated in Abrahamson, Dwyer & Fitzpatrick, *Discovery and Disclosure* (Thomson Round Hall) (2007) at para. 36-22, statements made during negotiations may be admitted where they do not relate to the substance of the dispute.

In McGrath, on *Evidence* at para. 10 – 130, the matter is put in the following way:

> "If negotiations succeed the reasons for non-disclosure ceases and the fact of the compromise is admissible. Further, "without prejudice" communications are admissible if a question arises as to whether they have resulted in agreement, whether a settlement document reflects what was actually agreed between the parties, or whether they give rise to an estoppel."

In *Cutts v. Head* [1984] Ch. 290, at 310, Oliver L.J. said that the policy protects negotiations "whilst liability is still an issue", and in consequence it will apply, as a general rule, where the negotiations have been unsuccessful, but where these negotiations lead to a concluded agreement the "without prejudice" documents will be admitted in evidence to prove the existence and terms of that concluded agreement.

Danckwerts L.J. in *Tomlin v. Standard Telephones and Cables* [1969] 3 All E.R. 201, at 203-4, referred to Lindley L.J. in *Walker v. Wilsher* [1889] 23 Q.B.D. at 335:

> "What is the meaning of the words 'without prejudice'? I think they mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms proposed in the letter are accepted a complete contract is established and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one."

Danckwerts L.J. categorised that statement as a great authority and it seemed to him to apply where there was a binding agreement or an agreement intended to be binding, reached between the parties. He held that not only was the court entitled to look at the letters although they were nearly all described as 'without prejudice', where the intention of the parties was that there was a binding agreement contained in the correspondence.

4. Ruling of the Court

The Court is satisfied there was no genuine dispute or negotiation to settle a dispute. The use of the phrase "without privilege"

should not inadvertently immunise acts from their normal legal consequences. McGrath on *Evidence*, at paras. 10-116 to 10-119, has analysed the cases which underlie that conclusion.

The letters written by the defendant's solicitors on 5th June, 2007 and 18th June, 2007 and other such letters headed "without prejudice" were not written in the context of a settlement of a dispute between the parties. The parties would appear to have been in agreement on the essential elements on the deal and indeed in relation to compensation for disturbance.

Having reviewed the authorities it seems to the Court that the "without prejudice" correspondence on behalf of the defendant, in particular the letters dated 5th June, 2007 and 18th July, 2007, are not protected by the "without prejudice" privilege and are relevant and ought to be admitted in evidence as proof of the agreement of the parties at issue in the proceedings.

Such a ruling is relevant to the determination of whether there was a concluded agreement.

5. What was agreed?

The plaintiff maintains that most of the essential elements of the agreement were agreed at the meeting between Mr. O'Connor and Mr. Elliott on 27th February, 2007, at the Merchant Café. That meeting had taken place at the request of Mr. Elliott following a demand on the part of Mr. O'Connor that works on the adjoining site, which Mr. O'Connor had permitted as part of a previous arrangement between the parties which was not honoured by the defendant company, should cease forthwith. The meeting lasted for 3½ hours. Mr. Elliott reduced the parties' then agreement to writing and forwarded it that afternoon by email to the plaintiff with an indication that, once Mr. O'Connor confirmed he was happy with it, it would be forwarded to the defendant's solicitor.

Six headings were included in that summary of the discussion as follows:

> (1) 1A and 2 Usher Street to be purchased for the amount of €860,000 calculated by reference to 8 apartments at €107,500 each. The transaction to take place as soon as possible with a caretaker's agreement and an option to Mr. O'Connor to purchase the ground floor commercial unit in a new development for €250,000.
>
> (2) Mellowes Quay development: Mr. O'Connor could buy a specified apartment together with a commercial unit on Usher Street with specified finishings and two car parking spaces.
>
> It was agreed that the transaction in respect of 1A and 2 Usher Street would take place as soon as possible and that contracts for the Mellowes Quay development would be completed as that development was completed.
>
> (3) A Meeting was proposed for 5th March to progress the matter.
>
> (4) The solicitors were identified for each party.
>
> (5) Tax advice: if changes were proposed following on Mr. O'Connor's receipt of tax advice then Elliott's would act reasonably towards accepting these changes.
>
> (6) Moving out: the defendant would give labour assistance to Mr. O'Connor to move out of his premises.

The note was not signed by or on behalf of the defendant.

The plaintiff's solicitor wrote on 10th April, 2007 subject to contract and on 11th May, asking for confirmation as to whether or not the defendant was willing to formalise the agreement and requesting that the defendant would do no work which would deprive the plaintiff's property of light until such agreements had been formalised in writing. The plaintiff's solicitors' letter of 15th May, 2007 stated that Mr. O'Connor was of the view that the consideration for the basement should only be payable if and when the defendant obtained planning permission for a basement and that consideration should amount to €250,000, index linked, payable within a definite period after the granting of such permission.

The defendant's solicitors wrote an open letter on 17th May, 2007 in relation to the right to light, saying that any diminution of the plaintiff's light was of a minor nature only and that they were prepared to compensate for such diminution or, in the event of their client's being unable to agree, to refer the matter to arbitration.

The plaintiff's solicitors wrote on 18th May, 2007 saying that the defendant's offer of €20,000 in respect of the basement was not acceptable but that their client was satisfied that the matter proceed in all other aspects. Their client was not in agreement that the deprivation of light was of a minor nature.

On 22nd May, 2007, solicitors for the defendant agreed to the issue of the valuation of the basement being dealt with as the plaintiff suggested and referred to the plaintiff selecting one of three valuers.

On 25th May, 2007, the plaintiff's solicitors, as requested, set out details of the agreed transaction as understood by their client. This was a modified version of the note of the 27th February meeting. The valuation of the basement was to be agreed between the parties with valuers assisting the negotiations.

Compensation for disturbance was also, as from the letter of 28th May, 2007, to be agreed between the parties.

The letter of 5th June, already referred to above, followed.

That letter, which was headed "without prejudice", agreed all but three matters.

The first of these was that the defendant would be responsible for the maintenance of 1A and 2 Usher Street and to ensure that it would be fit for the purpose of carrying out the business of the plaintiff's company. The parties were to meet on the premises to discuss exactly what work would be carried out to the premises. This would appear to have been a matter of detail and not of substance.

The second matter, relating to the deed of easement granted to P. Elliott & Co. Ltd. in respect of the redevelopment of 1A and 2 Usher Street not being assigned to a third party without the consent of Mr. O'Connor, was not agreed but the defendants understood that the request related to a situation where their client might seek to assign its obligations under the proposed agreement with the

plaintiff. It was agreed that the plaintiff could approve of such assignment. No further proposal was made by the plaintiff and, in such circumstances, it would appear that there was agreement on this point.

The third matter was disturbance and it would appear that, following a subsequent telephone conversation, that this matter was agreed as discussed.

By letter dated 5th July, 2007, the plaintiff's solicitors wrote to the defendant's solicitors noting that "most issues have now been agreed". It is not clear what issues remained outstanding given that the additional €100,000 in respect of the granting of an easement for the development of the basement was agreed.

By 16th July, 2007, the plaintiff's solicitors asked for confirmation of the agreement which had been reached almost two weeks beforehand. They confirmed by lunchtime the following day. The defendant's solicitors message acknowledged that all matters had now been agreed between the parties and asked for a time scale for finalisation of the deed of easement and payment of consideration to the plaintiff.

By letter of 18th July, 2007, the defendant's solicitor wrote to the plaintiff's solicitor a second "without prejudice" letter. Referring to previous correspondence they confirmed that all matters "now appear to be agreed between our clients". They continued: "However on going through the letter of 5th June, we would comment as follows:

> **1A and 2 Usher Street:**
>
> 1. You might please let us have a draft deed of easement and building licence.
>
> 4. You might please confirm exactly what work your client now expects to be carried out to the premises.
>
> 8. The agreed figure is now €100,000
>
> **Tax Advice:**
>
> You might please confirm if your client has obtained tax advice in relation to the structure of the transactions and you might let us know the consequences of any such advice.

Two points remained: that of the work that the plaintiff expected to be carried out on the premises and the consequences of tax advice. The latter point was agreed in that the defendant would "act reasonably towards accepting these changes." It was more an issue of the mode of implementing the transfer rather than a matter of substance.

The issue of confirming exactly what work the plaintiff expected to be carried out does not appear to have been addressed by the parties and appeared to have been a matter of detail.

6. Was there a concluded agreement?

In view of the above correspondence it would appear that the parties, through their respective solicitors, were *ad idem* as to the substantial terms of the contract.

However, the interest which was to be transferred to the defendant in respect of 1A and 2 Usher's Quay and the interest the plaintiff would receive from the defendant in respect of the apartments at Mellowes Quay were never specified.

Notwithstanding this, the Court is satisfied that there was an agreement in writing by 18th July 2007.

The sequence of letters already detailed above may be summarised as follows:

On 17th May, 2007, Whitney Moore offered €20,000 and refused the plaintiff's request for €250,000 which was confirmed on 18th May, 2007, but was agreed on 22nd May, 2007, to be referred to a valuer. On 25th May the plaintiff's solicitor referred to €860,000 for an easement to development above ground level. By 5th June that was agreed. On 5th July the plaintiff's solicitors noted that the defendant had agreed an additional sum of €100,000 for the development of the basement and on 18th July, 2007, that figure was agreed by the defendant.

7. Subsequent correspondence

Reminders were sent on 13th September, 20th September, and on 27th December, 2007.

By email dated 27th September, the defendant's solicitors apologised for missing the plaintiff's solicitors' calls as he had been away until the previous Monday and was catching up and would respond to her draft licence agreement the following week. On 5th October it was noted that the plaintiff desisted from seeking injunctive relief on the basis of the terms of agreement which were agreed between the respective clients on 18th July. The defendant's solicitor said that he would definitely have instructions the following week and understood that the transaction could take place immediately once the documentation was agreed and the plaintiff had his tax structure in place. Further reminders were sent to the defendant's solicitors.

The Court has already noted that tax advice relating to the mode of transfer would be agreed. It was not an issue affecting the existence of the contract.

On 23rd November, 2007, and 27th November, 2007, an email headed "subject to contract/contract denied" was received from Whitney Moore stating that Mark Elliott's clear understanding was that the basement figure of €100,000 would be paid over only if the basement was developed and used for commercial purposes other than car parking.

The development of the subsoil referred to in the plaintiff's solicitor's letter of 25th May, 2007, was agreed in the "without prejudice" letter of 5th June from Whitney Moore. However, the figure agreed in the defendant's solicitors' subsequent letter of 18th July was €100,000. There was no indication of the timing of such payment. The plaintiff's solicitors replied the same day saying that they were taking the plaintiff's instructions and would revert the following day.

On 12th December, 2007, the plaintiff's solicitors wrote that at all times it was acknowledged that the "further" or "additional" sum of

€100,000 was being paid in respect of the plaintiff allowing the defendant to develop the basement and subsoil below the premises. At no time was it ever suggested that the payment of this sum be deferred until development occurred. The definition of "demised premises" in the draft lease included the subsoil below the premises. Their client was not willing to renegotiate that issue. If the defendant did not wish to pay the additional sum of €100,000 then all reference to the basement and subsoil should be removed from the draft lease. The letter referred to the plaintiff's solicitors' letter of 5th July 2007 noting the agreement in respect of the plaintiff's granting of an easement to the defendant for the development of the basement and subsoil under 1A and 2 Usher Street. Whitney Moore's letter of 18th July 2007 confirmed the figure to be €100,000.

It was clear that the issue of the basement became a "real issue" on the 5th March, 2008 when the defendant's solicitors wrote "subject to contract/contract denied" and stated:

> "As you may recall my client was on the verge of ending all discussions when the issue of payment for the basement was raised by your client."

The message continued:

> "As a very reluctant compromise my client agreed to a payment but on a very restricted basis. That is that there must be planning for commercial use. If there was only planning for car parking they would not pay as it would not have any value for parking.
>
> On this basis they feel there will be no payment to your client unless and until there is planning for commercial use in the basement and the basement is developed accordingly. If this happens, your client will get €100,000.
>
> My clients are very clear and insistent on this point and I can only suggest that your client contact my client to discuss the matter further."

Proceedings followed this exchange.

The e-mail of 11th January, 2008, from the defendant's solicitors was headed "subject to contract/contract denied" and envisaged completion in February as being realistic. The e-mail continued referring to a point which the writer knew would not be agreed. "…that is any compensation if there is no redevelopment within the ten years. Your client's option is to call upon our client to purchase the premises at that stage."

The Court notes that this email and that of 23rd November, 2007, were headed "Subject to contract/Contract denied".

In addition the letters of 12th October and 7th November from Whitney Moore were headed "without prejudice".

The Court has already ruled on the issue of "without prejudice" in relation to the communications between the parties.

The issue of "subject to contract/contract denied" is, of course, different.

It is clear that negotiations in 2005 headed "strictly subject to contract/contract denied" have no relevance to the present case as they related to negotiations leading to the previous development agreement. The discussions in February 2007 and eventually the alleged agreement in issue in this case, could not, in the view of the Court, be covered by the "subject to contract" provisions in that development agreement.

The Court also notes that the plaintiff's solicitors' letter of 10th April, 2007 in relation to the agreement in issue was "subject to contract". That letter indicated that there was agreement in principle to all aspects of the matter other than in relation to the basement. Her further open letter of 11th May, 2007 referred to the formalisation of the agreement which was, on the defendant's solicitor's invitation, expressed in her letter of 25th May which was responded to by the defendant's solicitor's letter of 5th June 2007.

That open correspondence (albeit in part made "without prejudice") removed the "subject to contract" element.

The Court recognises the general rule that there is no concluded agreement until such time as written contracts have been exchanged (see McDermott; *Contract Law*, Butterworths (2001) at 81 and *Winn v. Bull* (1877) 7 Ch. D 29). The exception to that general rule is where there is already a concluded oral agreement of which there is an adequate note or memorandum to satisfy the Statute of Frauds (Ireland) 1695 or where there are sufficient acts of performance. (McDermott, Op cit., *Kelly v. Park Hall School Ltd.* [1979] I.R. 340; *Mulhall v. Haren* [1981] I.R. 364; and *Boyle v. Lee* [1992] 1 I.R. 555.)

More recently Hardiman J. stated in *Supermac Ireland Ltd v. Katesan (Naas) Ltd*. [2001] 1 I.L.R.M. 401, [2000] I.R 273 (at 281):

> "In my view, it is plainly arguable that the use of this rubric by the solicitors does not preclude the existence of a 'done deal' between the parties themselves, which the plaintiffs contend for. Insofar as it is contended that the plaintiffs are estopped by the use of the rubric from asserting a completed and enforceable agreement, this seems to be plainly a matter for evidence at the trial."

Keane J. (as he then was) in *Jodifern Ltd. v. Patrick Fitzgerald and Margaret Fitzgerald* [2000] 3 I.R. 321 held (at 328):

> "…[P]rovided a document exists which is capable of constituting a note for memorandum sufficient to satisfy the Statute of Frauds and which does not contain the words 'subject to contract' the principles laid down by this court in *Boyle v. Lee* [1992] 1 I.R. 555 do not apply, as was made clear by the judgment of O'Flaherty J. in the latter case."

Keane J. concluded by remarking that the claim and submissions rested unequivocally on the two agreements for sale and not on subsequent correspondence protected as it was by the use of the formula 'subject to contract/contract denied'.

8. The authority of the solicitor for the defendant

In *Guardian Builders Ltd. v. Patrick Kelly*, (Unreported, High Court, 31st March, 1981), Costello J. held:

> "It is well established that an express authority need not be given to authorise an agent to sign a memorandum which is sufficient to satisfy the Statute … So the question arises whether [the agent] had authority, either express or implied, to

sign the memorandum."

The defendant's solicitor accepted in evidence that he at all times acted on behalf of his client with the authority of and on the instructions of Mr. Elliott.

Moreover the evidence of Mr. O'Connor and of Mr. Elliott supported the existence of a concluded agreement as between them and in respect of all essential requirements of an agreement for the sale of the property at the time Mr. Parker wrote his letter of 5th June, 2007 and again at the time that he wrote the letter of 18th July, 2007.

9. The property

From 25th May, 2007, when the plaintiff's solicitors wrote to the defendant's solicitors setting out the details for the agreed transaction, it was clear that the property was referred to as 1A and 2 Usher's Quay above ground level even though Mr. O'Connor was to retain ownership of the ground floor together with the use of the rest of the building pending redevelopment. In this regard a caretaker's agreement was envisaged. The term was agreed in the letter from the defendant's solicitors of 5th June. While there was discussion as to the mode of transfer of the plaintiff's interest by way of (a) the sale of the property; (b) a building licence and easement; and (c) the lease of the property, this did not appear to be a matter of substance from the parties' perspective.

Indeed, while the provision with regard to changes resulting from tax advice might be regarded as affecting the mode of transfer or by way of analogy as to the intent of the parties, the issue of a mode of transfer was not made an issue in the evidence of either the principals nor the solicitors on behalf of the principals.

It would follow from the evidence that the mode of transfer did not affect the agreement. No reference was made to the title of the plaintiff's premises.

The Court has also considered that this would be a matter that one would expect to find in a Law Society contract for the sale of land it does not seem, in the circumstances of the case, to have been a matter that affected the enforceability of the contract, evidenced in writing, as between the principals and their respective solicitors.

The acknowledgment of the agreement in the letters of 5th June and 18th July were not "subject to contract".

The provision with regard to the basement/subsoil is somewhat different. Originally an option was envisaged. Consideration of €100,000 was later agreed on 18th July, 2007. While there was no indication of the transaction in relation to this part of the property being transferred "as soon as possible" or "immediately the legal documentation is ready for execution" as envisaged in the oral agreement at the Merchant Café in February, 2007 and recorded, though not signed, immediately thereafter, the provision regarding the subsoil provided that consideration would be agreed and be negotiated with valuers. That much was agreed in the defendant's solicitors' letter of 5th June, 2008 and in their subsequent letter of 18th July, 2007 without, however, indicating any timing.

As already indicated, the timing and the provision that it was subject to development for commercial use, was not agreed. The plaintiff's solicitors believed that the €100,000 would be paid on closing. By letter of 12th December, 2007 they stated that "our client is not willing to renegotiate this issue". They conceded that, if the defendant did not wish to pay the additional sum of €100,000, then all reference to the basement and subsoil should be removed from the draft lease. In the view of the Court, this did not amount to an opening of negotiations notwithstanding the plaintiff's unwillingness to renegotiate the issue.

10. Decision of the Court

The Court is satisfied that in respect of the premises including the basement and subsoil that there is evidence in writing of an agreement between the parties which accords with the requirements of the Statute of Frauds (Ireland) 1695. Subsequent correspondence did not affect that agreement.

The agreement forms an open contract subject to the Vendor and Purchaser Acts 1874.

The Court will amend the general endorsement of claim to include reference to the letter of 18th July, 2007.

Accordingly, the Court will order specific performance of the agreements evidenced in writing of 5th June, 2007, and 18th July, 2007, whereby the plaintiff agreed to grant an easement for the development, and subsequent sale, and the defendant agreed to develop and subsequently buy or arrange for the purchase, of the property known as 1A and 2 Usher's Quay, Dublin 8.