Neutral Citation Number: [2005] IEHC 196

THE HIGH COURT

2002 No. 10980 P

BETWEEN

MICHAEL McMAHON

PLAINTIFF

AND

PATRICK O'LOUGHLIN

DEFENDANT

Judgment of Mr. Justice Roderick Murphy delivered the 9th day of June, 2005.

1. Claim

On 19th April, 2002 by agreement in writing the plaintiff agreed to purchase and the defendant agreed to sell certain lands and premises being a petrol filling station and dwelling house comprised in folios 55139F and 16018F in the County of Galway, at an agreed purchase price of £450,000 or €571,382. The closing date was 28 days from the signing of the agreement by the vendor. In the following months of May and June the defendant requested the plaintiff to sign a supply agreement with a third party, Irish Shell Limited (Shell). It was claimed that on or about 5th July, 2002 the defendant's agents indicated that the defendant would not complete the contract unless the plaintiff entered into an agreement with Shell. On 10th July, 2002 the defendant purported to rescind the contract and return the deposit paid by the plaintiff.

The plaintiff claimed to be ready, willing and able to purchase the lands and called upon the defendant to comply with the terms of the contract of 19th April, 2002. The defendant failed to do so. The plaintiff claimed, inter alia, specific performance of the contract of 19th April, 2002 and damages for breach of contract in lieu of or in addition to specific performance.

2. Defence

The defendant denied that there was any concluded enforceable agreement. The premises were a family home within the meaning of s. 2 of the Family Home Protection Act, 1976. The prior consent of the defendant's spouse, Eileen O'Loughlin, was not obtained nor furnished. The defendant contended that the contract of 19th April, 2002 was void.

If there had been an agreement, which was denied, it was subject to a pre-condition that no contracts existed or should have been deemed to exist until the contracts for sale had been signed and exchanged between the parties and the deposit paid. The defendant denied any such exchange.

The defendant claimed that in the course of the negotiations between the parties the plaintiff was furnished with a sales agreement dated 1st September, 1999 made between Shell as the supplier and the defendant as the buyer and that the plaintiff confirmed to the defendant that he was prepared to purchase the premises and to be bound by the said agreements. It was a collateral agreement between the parties that the premises would be purchased subject to the plaintiff taking over the agreements then enforced between the defendant and Irish Shell Limited and that the plaintiff had agreed to execute such documentation as might be required but refused to do so.

In fact, the evidence showed, and it was common case that a sales agreement of 1st September, 1999 and an undated loan agreement was not furnished to the plaintiff before the execution of the contract of 19th April, 2002. What was furnished to the plaintiff by the defendant's agent was a letter of 17th April, 1998 from Shell to the defendant. That letter comprised an offer which was accepted subject to the terms and conditions as outlined therein by the defendant.

In his defence, the defendant denied that he had wrongfully rescinded the contract of 19th April, 2002 if it was ever valid or effective. The defendant further denied that he was in breach of his contractual obligations or that his conduct had caused the plaintiff to suffer loss and damage. If the plaintiff had suffered any loss or damage the same was not by reason of any wrongful act of the defendant as alleged.

3. The contract

The memorandum of agreement of 19th April, 2002, on its face, appears to be preceded by the consent in writing signed by the vendor's spouse.

An additional special condition was inserted at the behest of the plaintiff purchaser's solicitor as follows:

> 4. The goodwill of the business carried on, and the property in sale is included in the price. The vendor shall be responsible for and undertakes to pay all debts and liabilities and to observe and perform all obligations regarding the conduct of the business prior to completion. The vendor further warrants and certifies that there are no employees whose employment requires to be continued by the purchaser and the purchaser shall be indemnified in relation to any claims from staff, current or past. The purchaser shall not assume responsibility for any contracts, agreements or obligations of a continuing or ongoing nature.

The memorandum was executed by the plaintiff purchaser subject to that special condition among others. There was no mention of the agreements between the defendant and Shell.

4. Agreement with Irish Shell Limited

4.1 The defendant had a series of ten-year sales agreements and a loan agreement with Shell.

4.2 The brochure, prepared by Casey Auctioneers on behalf of the defendant, as vendor, showed a photograph of the premises with the canopy marked "Shell", the pumps and other fixtures and fittings with the same distinctive colours. Under the heading of "description" the brochure highlighted in red the following: "There is an agreement with Irish Shell to April, 2008".

4.3 Mr. Peter Casey of Casey Auctioneers furnished to the plaintiff a copy of the letter from Shell to the defendant dated 17th April, 1998, together with copies of the accounts before the execution of the memorandum of agreement of 19th April, 2002.

That letter contained the following material paragraphs:

> "Irish Shell Limited, in return for a ten-year sales agreement between Patrick O'Loughlin and Irish Shell, are pleased to

detail the following offer as a means of enhancing the future sales volume of this site.

(1) Equipment.

We will supply the following equipment on a free-loan basis:

Retail visual image – level 3

Canopy

2 MS pumps

Tank gauges

Interceptor

Tank – 20,000 litre

The total value of this equipment is IR£63,000.

This equipment will be provided on a free loan basis subject to the terms and conditions of the CAPITAL FREE LOAN AGREEMENT, a copy of which is attached. The equipment will remain the property of Irish Shell Limited and you will be responsible for its maintenance over the period of the agreement.

(2) Direct dealer support budget (DDSB).

Irish Shell Limited believes the proposed development will result in increased sales of Shell products to O'Loughlins under the terms of the sales agreement and will enhance and promote the image of the Shell retain network.

Irish Shell Limited is pleased to make a contribution of IR£62,000 in recognition of the foregoing.

In return Irish Shell will require the following:

A. An exclusive 10-year sales agreement to commence on the date of the first delivery subsequent to the completion of the development.

B. All bulk fuels and lubricants to be purchased directly from Irish Shell Limited.

C. (Further requirements relating to payment, safety, opening hours and credit cards).

This offer is subject to the approval being granted by the Board of Directors of Irish Shell Limited.

Thank you for allowing us the opportunity to put this offer to you. Please confirm your acceptance by completing the following:

I accept the above offer subject to the terms and conditions as outlined above.

Signed by the defendant

Irish Shell Limited are pleased to have your station as a member of the Shell retail network.

Yours,

John Hartnett

Dealer Area Manager"

It was common case that the acceptance was signed by the defendant.

There was no evidence that a copy of the subsequent sales agreement nor the loan agreement was given to the plaintiff until 21st June, 2002, almost two months after the execution of the memorandum of agreement of 19th April, 2002.

4.4 The agreement of 1st September, 1999 (the sales agreement) recited the contemplation, consideration and agreement that only Shell motor fuels shall be delivered to or sold from the premises and to that end had agreed to enter into the sales agreement. The operative part of the agreement was commencing from 1st September, 1999 for a period of ten years the supplier would supply and the buyer would purchase only Shell brands of motor fuel, as defined subject to the terms and conditions thereof.

Paragraph 8 related to transfer to a third party in the following terms:

"8(a) The buyer shall not transfer this agreement to a third party save on a disposition whether by way of management agreement, licence, lease or assignment or otherwise of the buyer's business in or of the premises or such part thereof as is used for the sale of motor fuel and automotive lubricants and then not without the prior consent in writing of the buyer whose consent shall not be unreasonably withheld.

(b) The buyer shall not make any such disposition of the whole or any part of the business in or the premises of the buyer used for the sale of motor fuel or other products of the supplier to a third party without first having:

(i) produced to the supplier the written agreement of such third party to be as fully bound by the terms of these presents as though he had been party hereto of the other part.

(ii) and obtained the consent of the supplier to accept such written agreement and to be bound to such third party together with or in the place of the buyer for the purposes of this agreement.

(c) In the case of a proposed assignment the supplier is unwilling for any reason to accept such a third party together with or in the place of the buyer for the purposes of this agreement the supplier shall have the option to purchase or to introduce a purchaser to purchase at a price not less than the price offered by the third party the property which the third party has offered to buy; or where no price has been offered at a price the equivalent of the open market value of the property proposed to be assigned as determined by an arbitrator appointed by agreement of the supplier and the buyer or in default by the president or other chief officer for the time being of the Irish Institute of Auctioneers and Valuers and pursuant to the provisions of the Arbitration Act, 1954 a amended or extended or other corresponding statute for the time being in force.

(d) In the event of such disposition as aforesaid the buyer's obligations hereunder shall cease (if they cease at all) when and only when the provisions of this clause have been fulfilled in their entirety.

(e) The buyer shall not cease to carry on or share his said business or cease to occupy or share the occupation of the buyer's premises save pursuant to a disposition such as hereinbefore mentioned.

(f) As part of the consideration of the obligations undertaken by the supplier hereunder the buyer hereby undertakes that the buyer will on or within three months prior to the expiry of this agreement give to the supplier no less favourable an opportunity than that given to trade competitors of the supplier to enter into a further or new sales agreement with the buyer and in the meantime to refrain from undertaking any obligation or do any act as a result of which the bargaining position of any of the trade competitors of the suppliers could become more favourable than that of the supplier for the purpose of negotiating with the buyer a new supply agreement or a renewal of these presents."

4.5 An undated loan agreement provided that Irish Shell Limited would loan to the defendant, as user, for use at the premises the various items of equipment specified in the Schedule with effect the date of delivery thereof to the premises until the agreement should be terminated. It was agreed that the value of the equipment was IR£63,000. It was provided that the Shell might determine the agreement by summary notice if the defendant, as user, properly determines any supply agreement entered into with the company or commits any breach of the provisions of the agreement, among other events. On the termination of the ten years or if the agreement were terminated and the defendant were unable to return the equipment then he should, in lieu of returning same, pay to Shell a sum equal to so many tenth parts of the value of the equipment as there were years and parts of a year unexpired of the said period of ten years.

The Schedule to that agreement referred to the following equipment:

RVI level 3

1 x New canopy

3 x Gilbarco pumps

1 x Galaxy ECO tank gauge and printer

1 x 20,000 l. tank

This list would appear to correspond to the type of equipment mentioned in the letter of 17th April, 1998 other than the latter includes an interceptor.

5. Pre-contract correspondence

5.1 On 14th February, 2002, Mr. Peter Casey of Casey Auctioneers had written to Mr. McDonald of V.P. Shields and Son, the plaintiff/purchaser's solicitors, subject to contract/contract denied, saying that subject to contract, agreement had been reached on the sale of the above property and gave details thereof. He stressed that all negotiations had been of an exploratory nature only and that no contracts existed until the contracts of sale had been signed and exchanged between parties and the full amount of the deposit was paid and accepted.

5.2 On 19th February, 2002 the vendor's then solicitor enclosed contract for sale in duplicate together with the original file plan of the three folios. On 25th February, 2002 the purchaser's solicitor wrote to the vendor's solicitor saying, *inter alia*, the following:

"The contracts are framed on the basis of straightforward property sale, whilst we will take our client's instructions in the matter, we wonder whether it is wholly appropriate given the subject matter involved."

5.3 The following day, 26th February, 2002, the purchaser's solicitor wrote again in relation to further pre-contract queries, inter alia, insofar as is relevant as follows:

"4. We understand that the property includes both commercial and residential property, you might confirm whether your client has received an indication of an apportionment in respect of the same in order that it may be agreed with prior to the contracts being signed.

5. Given the way the contracts are framed, we presume that the goodwill of the business carried on at the property is not proposed to be sold. You might confirm as this may impact on the VAT position.

6. Given the situation as detailed at 5 above, please confirm that there are no staff who will require to be taken over by our clients and that there are no continuing contracts or agreements of any nature, in respect of which your client anticipates our client to assume a continuing obligation or liability.

9. Please confirm whether the residential property is (*sic*) forming part of the property in sale is the Family Home of the

vendor or any party."

5.4 On 8th March, 2002, Mr. Casey of Casey Auctioneers wrote to the purchaser's solicitor with a list of furniture and fittings plus details of tanks and pumps associated with the filling station. That included the following items:

Forecourt equipment (owned by Patrick O'Loughlin – unless stated)

Tanks

Pumps:

1 x AGRO diesel

1 x white diesel

1 x road diesel – double pump – (property of Shell)

2 x quads for Unleaded – (property of Shell)

1 x quad for Super and Unleaded – (property of Shell)

Provision for vapour recovery

Canopy:

outer portion 2

inner portion – (property of Shell)

Interceptor

Airline unit

5.5 The letter of 26th February, 2002, from the purchaser's solicitor was repeated on 26th March, 2002.

5.6 The repeated letter was replied to on 28th March, 2002. The vendor's solicitor said that the information in relation to query 4 had already been given to the purchaser. In relation to query 5 it was said that the property was being sold as a going concern and was a matter between a prospective purchaser and an auctioneer and not a question on title. In relation to paragraph 6 confirming that there were no staff and no continuing contracts the vendor's solicitor replied as follows:

> "(6) The purchaser knows full well that Paddy O'Loughlin is self-employed and is a sole operator in this business and again my client cannot understand how these questions are being asked when your client knows full well the situation."

In relation to the query on the family home the reply was as follows:

> "(9) The residential property is the family home of the vendor and the vendor's spouse will sign the contract."

5.7 The purchaser's solicitors, on 16th April, 2002, returned the contract, duly signed, together with the balance deposit subject strictly to the vendor accepting the amendments to the special conditions by the addition of special conditions 4 (already referred to above) and another not relevant to the present proceedings.

5.8 On 30th April, 2002 the purchaser's solicitors returned the contracts in duplicate, referred to point 9 of the vendor's solicitor's letter of 28th March, 2002 in relation to the vendor's spouse signing the contract, requested that the vendor re-sign the contract after his wife had executed the consent.

6. Requisitions on title

The purchaser's solicitor made the standard form requisition on title in relation to premises as follows:

> 1. If any fixtures, fitting or chattels included in the sale are the subject of any lease, rental, hire purchase agreement or chattel mortgage furnish now the agreement and on closing prove payment to date or (as the case may be) discharge thereof.

That requisition dated 30th April, 2002 was replied to by the then solicitor for the vendor on 2nd May, 2002 as: "No". On 9th May, 2002 the purchaser's solicitor made a rejoinder as follows:

> 1.1. Your answer is no. Can we presume that you intend to say that None of the fixtures, fitting or chattels included in the sale or subject to any agreement specified in the sub-clause?

There was no reply to that rejoinder.

7. Post contract correspondence

7.1 On 14th May, 2002 the purchaser's solicitor advised that the purchaser should be in funds to close the transaction before the end of the week and ask for a response to the rejoinders of 9th May. That letter continued:

> "With regard to the question of the supply agreement between your client and Shell, our client is not prepared to sign any agreement in respect of supply to the property. Given the correspondence between ourselves prior to the signing of the contracts, and special condition 4 thereof, we do not see that our client has any obligation to sign such agreement."

7.2 By letter of 27th May, 2002 the purchaser's solicitor referred to his previous letter of 14th and to a subsequent telephone conversation which purported to introduce discussions between the purchaser and the vendor's auctioneer amending or altering the terms of the contract which existed between the respective clients.

7.3 The defendant vendor's solicitor replied the following day on 28th May, 2002, *inter alia*, as follows:

> "The reality of this matter is that your Mr. McMahon was aware at all times about this solus agreement. It was on the brochure in large print stating 'There is an agreement with Irish Shell to April, 2008'. He subsequently demanded and was furnished with a copy of the document and returned to the auctioneer and indicated that he was happy with it and on foot of that negotiations were entered into. To attempt to state that a special condition in the contract refers to this document is simply not correct. That part of the special condition refers to and is in the context of employees. In fact in my last conversation with your Mr. McDonald he stated that he was unaware of the solus agreement and never saw it.
>
> The fact of the matter, as your client well knows being an oil dealer himself, is that Irish Shell will not, as matters stand, allow my client complete this sale. Your client knows this and in fact I understand he had discussions with the Irish Shell representative.
>
> It is not a question of my client refusing to complete the sale, he is, in the circumstances, being left with no choice but to return the deposit to you."

7.4 Further correspondence followed. On 21st June, 2002 the solicitor for the vendor wrote to the purchaser's solicitor enclosing copy documentation given to the purchaser, the original of which was signed by the defendant. This would appear to have been the letter from Irish Shell dated 17th April, 1998. A copy of the sales agreement and a copy of the loan agreement referred to in the documentation was also included in that letter of 21st June.

7.5 On 10th July, 2002 the solicitor for the vendor returned the deposit of €50,394.76 to the plaintiff's solicitor which was returned by the latter on 12th July, 2002.

8. Evidence on behalf of the Plaintiffs

8.1 The plaintiff gave evidence of negotiating with Casey Auctioneers and of seeing the two page letter of agreement with Irish Shell dated 17th April, 1998, referred to in the brochure. He said he was not interested and asked the auctioneer for a copy of the solus agreement before he paid the booking deposit in early February. He had got the two pages from the auctioneer five days after paying the deposit.

Mr. McMahon believed that that letter was not a big issue or a problem for him as there was no mention of it in the contract and he did not feel himself bound. When he was about to close the sale, a week before the defendant asked him to meet the representative of Irish Shell Limited. He said he wanted to supply his own fuel. He said he did not see the Shell sales agreement until July or August. If he had been bound by that agreement he would have approached the sale in a different way and paid less.

He had shown the two page letter of 17th April, 1998, to his solicitor. He did not hear that there was any agreement in place. His own solus agreement provided for termination. He presumed that the defendant was going to terminate his solus agreement.

In cross-examination he said that his father owned a petrol station since the early 1970s and had an agreement with Esso of which he was aware but did not know "how deep it went". He could not remember what it would cost to get out of such an agreement and did not know if the Shell agreement would bind him. Mr. Casey did not discuss a solus agreement but did discuss the agreement with Shell. He did not remember if he had asked Mr. Casey whether he could get out of it or that Mr. Casey had replied that there was no way of getting out of it. He did look for the agreement and was shown the letter which he said did not bind him. He did not remember fixtures and fittings being the property of Shell in the letter of Mr. Casey dated 8th March, 2002. That agreement was with Mr. O'Loughlin. However, it did cross his mind that it might bind. He did not think that he had said to Mr. Casey that while he did not like it, he would take it, referring to the Shell agreement. In relation to the meeting with Mr. Hartnett of Irish Shell he said that he was not interested in the agreement with Shell and that it had never been raised. He assumed that Mr. O'Loughlin, the defendant, would buy out the agreement. He did not remember the appointment with Mr. Hartnett for 8th May, 2002.

8.2 At all material times the plaintiff was advised by his brother-in-law, Mr. Duncan McDonald, a Scottish solicitor who worked with V.P. Shiels and Son, solicitors for the plaintiff.

In his evidence Mr. McDonald said that he was aware of the agreement of 17th April, 1998 when it was given to him on 20th February, 2002. There was no mention of a solus agreement. It was his opinion that the letter, as it stood, did not run with the property.

He drafted a special condition regarding the continuing obligations. The purpose of his letter of 16th April, 2002 was to flush out any matters of which the purchaser should be aware. There was no reference by the vendor's solicitor to the Irish Shell agreement.

It was only when he was told by his client a few days before closing which had been fixed for the week of 14th to 20th May, 2002, that it was indicated that he would have to sign the Shell agreement.

It was not until 21st June, 2002, when he got a copy of the solus agreement and the loan agreement.

In cross-examination he said that he was aware of the restriction on conveyancing documentation including the contract of sale for a solicitor who had no practising certificate. He was admitted as a solicitor in this jurisdiction in 2004.

In relation to the letter of 17th April, 1998, as it stood, he believed it did not attach as it was not registered. The purchaser had no notice of the agreement. He did not request whether there was a formal agreement or not. He asked, by way of pre-contract enquiries, whether there was any binding agreement.

He did not accept that paragraph 6 of his letter of 26th February, 2002, relating to employment contracts with a general enquiry regarding contracts agreement or obligations for continuing or ongoing nature should be interpreted as a "*eiusdem generis*".

He did not make any enquiries in relation to the letter from the auctioneer of 8th March, 2002 in relation to the equipment. He gave the client the list but did not make him aware nor refer to anything.

He agreed that requisitions were raised to get information and if the reply were wrong or incorrect he would raise a concern and seek clarification by way of rejoinder. He agreed that it would be a matter of concern if the vendor and purchaser were not on the same wavelength. If it was material he would make enquiries regarding the items in the sale. He did not get a copy of the free loan agreement nor think of getting a copy.

He was satisfied with the reply to the requisition relating to fixtures and fittings on the premises. He would consider the items which were the property of Shell not to have been included.

He believed that the reference to subsisting obligations regarding the staff and agreements of any nature to have been distinct and not conjunctive. The latter would have covered any sales agreements.

He believed that where there was no ambiguity in the contract that there was no question of the parties not being *ad idem*.

He agreed that all negotiations were on an exploratory basis subject to the exchange of contracts.

The witness said he would have expected the vendor's solicitor to have responded differently. He did not assume the Shell items would remain. He had taken the view that the vendor could buy out the Shell agreement and was satisfied with the rejoinder on requisition by following it up with a letter of 9th May, 2002:

> "Can we presume that you intend to say none of the fittings … are subject to any agreement".

8.3 Peter White, manager of Emo Oil had spent five of the forty years with Emo dealing with such agreements. A loan agreement was repayable whereas a development grant was not. An oil company would give a letter of freedom on paying for the product and writing off the loan.

He referred to clause 8 of the solus agreement and said that in such circumstances of termination of the agreement that the oil company would re-brand and the owner would get the fittings on repayment. He had never rejected any new owner. An application would be made at least one month before the proposed transfer. In his experience he never removed pumps nor canopies but did remove logos. He agreed in cross-examination that a purchaser would be tied in relation to the site unless by mutual agreement they could declare the contract null and void. A vendor could also get out of the agreement before he sells. He agreed that a solus agreement could devalue the premises.

8.4 Mr. Ken Carney, auctioneer with nine years' experience in Kinvara, believed that over the four years since the contract there was an increase of 10% per annum. In relation to a severance, he believed that the petrol filling station was then worth £300,000 while the house was worth £150,000 (€380,000 and €190,000). The present value would be an approximate 20% increase.

On re-examination he agreed that he would assume an easement by a right of way over the petrol station in relation to the house; that, though he had not examined the planning file, the absence of separate planning permission would devalue the house.

8.5 Mr. Tom O'Brien, Consultant Engineer, gave evidence in relation to the severance of the residential from the business premises. He considered access, septic tanks, services and agreement between the parties regarding delineation. He said that he would be astonished if the planning authorities refused and disagreed with the report of Mr. McNeala, the vendor's engineer.

Under cross-examination he said that planning permission should be applied for a separate entrance and a septic tank or otherwise leeway should be granted. He agreed that the requirement was a minimum of 0.5 acres and that the house was on approximately 0.3 acres of a total site of 0.71 acres.

He had not sunk any boreholes in relation to the percolation area of the septic tank nor did he know if the percolation area required by the 1998 planning permission had been installed.

9. Application for direction.
9.1 Mr. Brady S.C., counsel for the defendant, at the end of the plaintiff's case, applied on behalf of the defendant for a direction and indicated that, if refused, he would go into evidence.

The first ground for such a direction was that the contracts had, in fact, not been exchanged.

Secondly, it was accepted that the evidence would be that there was no prior consent by the defendant's spouse.

Mr. Brady relied on *Kelly v. Irish Nursery and Landscape Co. Ltd.* [1983] I.R. 221 where the High Court (McWilliam J.) had dismissed an action by the plaintiff purchaser in which he claimed specific performance of an alleged contract for the sale by the defendants of their land. The plaintiff's solicitors had accepted the defendants' conditions but endeavoured to obtain the defendants' consent to some alterations in the terms of the proposed contract. The defendants' solicitor insisted on certain changes in the proposed terms. The duplicate contract documents were executed by the defendants. The plaintiff's solicitor stated the plaintiff's refusal to accept one of the proposed terms. The defendant's solicitor then wrote returning the deposit money and saying that the defendants had decided not to proceed with the transaction.

The Supreme Court disallowed the appeal as there was no enforceable contract for the sale of the defendants' land as no exchange of contracts had taken place. Kenny J., in reviewing the facts, held that there existed a contract signed by both parties but never exchanged. The court did not agree that the document was too uncertain to be enforced as an agreement to sell.

> "Subject to any special stipulation agreed between the parties, the general law in Ireland as to the necessity of exchanging contracts is that it is not necessary for the vendor and purchaser to exchange contracts to make an agreement enforceable at law: see pages 20, 49 and 337-338 of Wiley's Irish Conveyancing Law. In England, however, it is settled by the decision of the Court of Appeal in E*ccles v. Bryant & Pollock* that where there is an arrangement for the sale of land 'subject to contracts', a binding contract comes into existence only where there is a mutual exchange of contracts: see also *Wynn v Bull* and *Chillingworth v. Esche* (at 228)."

In that case, as in the present, there was an express condition on the correspondents that no contract would come into existence until contracts were exchanged between the solicitors. Accordingly, the plaintiff's appeal was dismissed and the order of Mr. Justice McWilliam in the High Court affirmed.

Mr. Dwyer S.C. argued that it was the vendor's solicitors who had failed, notwithstanding their statement in the letter of 28th March, 2002, that the vendor's spouse would sign the contract and the purchaser's solicitor's reminder on 30th April, 2002, that, given the requirements for prior "consent" that they would require the vendor to re-sign the contract after his spouse's execution [of the consent]. Mr. Dwyer referred to *AIB v. O'Neill* where the charge over the farm and dwelling, though not signed by the wife, was valid against the farm. He also referred to s. 3 of the Family Home Protection Act, 1976.

While in England it is standard conveyancing practice that a binding contract does not come into force until exchange of contracts has taken place, there is no such general practice in Ireland (see Wylie, 2nd ed. 1.32).

The court distinguished the facts from those in *Kelly v. Irish Nursery*, accepted Mr. Dwyer's submission regarding the failure of the defendant's solicitor to have the spouse give her prior consent and, in the circumstances, the court declined to make a direction. Mr. Brady S.C. proceeded to lead evidence.

10. Evidence on behalf of the Defendant
10.1 Mr. Peter Casey had instructions in summer 2001 to sell and had a brochure printed with a photograph of the Shell filling station on the front page. In November, 2001 the vendor took ill and was unwell until spring of 2002.

Mr. Casey first met the plaintiff on 30th January, 2002 and gave him a copy of the brochure. The plaintiff asked for a copy of the Shell agreement. On the second meeting on 4th February, 2002 he gave the purchaser financial data and the letter of agreement with Shell of 17th April, 1998. His evidence was that the plaintiff had asked if he could get out of the agreement and he told the plaintiff to take advice. He was selling the property with the Shell agreement until 2008. A few days later he was with the plaintiff and his wife at the premises when the plaintiff asked if it was possible to buy the garage separate from the house, he replied it was not. He believed that the purchaser and his solicitor were buying the residential filling station with the Shell agreement until 2008. He said that the purchaser said he would be able to work with it.

For stamp duty purposes an apportionment of the price was agreed: the house at £150,000 and the garage (the petrol filling station) at £300,000 less costs.

He believed that if there was no separate entrance to the house that there would be a diminution of £20,000 in the value. If there was an easement the diminution would be £10,000. Parking would affect the price by 10%. If a property was severed it would have a negative effect on both parts.

He agreed, in cross-examination that the agreement was not a ten year agreement to 2008 but a ten year agreement from 1st September, 1999. He believed it to be the duty of the purchaser to get the Shell agreement. He agreed that he did not tell the purchaser that he had to take over the Shell agreement when he spoke to him on the 3rd or 4th February, 2002. He himself did not see the agreement of September, 1999 until 11th February, 2005 during the hearing before the court. He said that he had told the purchaser that the agreement of 17th April, 1998, was not the solus agreement and believed that, as he was in the oil business himself, that he would understand. He had told him to get advice and that Shell would be in contact with him after the contract was entered into. He did not say that the contract was subject to him being approved by Shell. He agreed that there was nothing in the contract for sale regarding Shell but that he had always mentioned a ten-year solus agreement.

He said that the defendant's wife, Mrs. O'Loughlin, had been at the meetings and he believed she was the co-owner.

10.2 Mr. Jack B. Fitzgerald had been a solicitor for over 30 years with a conveyancing practice and is a partner in Kennedy Fitzgerald, the defendant's solicitors.

In his evidence he said that the letter of 17th April, 1998. would put him on enquiry and he would have raised the issue of the loan agreement by way of pre-contract enquiry. He would have insisted on examining the documents with Shell. He would have asked a direct question. If he had not followed conveyancing practice in that manner he believed that there would have been problems at closing.

In cross-examination he said that had he been acting as vendor he would have difficulties with special condition 4 and would not have agreed to it. In relation to the correspondence asking confirmation that there were no continuing agreements he would have referred to the documents in his possession regarding the solus agreement and would have written to the purchaser's solicitor to clarify that the ten years extended to 1999.

He would have raised a specific question regarding the agreement of 17th April, 1998. Mr. McDonald made a general enquiry which should have elicited a specific response. He would have been much more direct. He agreed that the solus agreement should have been given to the purchaser.

He believed he asked Mrs. O'Loughlin, the defendant's wife, if she had given prior consent. She did not give prior consent.

In relation to the requisitions his evidence was that if acting for the vendor he would reply yes, and give details in relation to fixtures and fittings. The purchaser should have been aware, given the letter of the auctioneer of 8th March, 2002, listing the furniture and fittings and, in particular, the forecourt equipment owned by Patrick O'Loughlin, the defendant. Four items corresponding with those mentioned in the letter of 17th April, 1998, were indicated as being property of Shell. He believed that he must know that that answer was wrong despite it being answered three times to the contrary. He believed that if he were on notice he was on full enquiry. It would not be prudent conveyancing practice to omit to ask specific questions. It was put to him that Mr. McDonald said that he had not sufficient information to ask specific questions. Mr. Fitzgerald replied that if the letter of 17th April, 1998 were not available then he would accept the answer to the requisition but agreed that the solicitor for the vendor should have included the Shell document in the reply.

As conveyancing solicitor he said that he must make direct enquiries. The vendor's then solicitor was not justified in giving the answers he gave.

10.3 Mr. David McNeala gave detailed evidence regarding the five planning permissions from 1975 to 1998 in relation to the development of the dwelling house and filling station together with septic tank on the last folio acquired. The entire site was shown as lodged with the planning application by way of one planning unit.

If there were separate sales it would be necessary to make a planning application in relation to a separate entrance and separate septic tank with percolation area. He referred specifically to site distances on the road and the area necessary for percolation and

concluded that planning would not be successful.

Under cross-examination he referred to his report concluding that planning permission "may" not be forthcoming. Notwithstanding he was of the opinion that he did not think a subdivision was possible given that it had been considered as a single planning unit.

10.4 Mr. John Hartnett had been with Irish Shell from 1975 and he was a Dealer Area Manager for the west of Ireland for the previous seven years. He outlined to the court the difference between the sales agreement and the loan agreement. The former was known as a solus agreement. He referred to paragraph 8 thereof which required the buyer not to transfer to third parties without the consent of Shell. He knew of no case of refusal. If there had been transfer without consent he would have initiated a suit against the dealer and any third party supplier, if any, for passing off.

In relation to the transfer of equipment, he said that where there was a breach of condition all equipment would be removed and the premises would be de-branded.

Shell did not allow a buyout of the solus agreement. The defendant had previous agreements with Shell and, indeed, had leased the property by way of reassignment of the sale agreement and then had it reassigned back.

The letter of 17th April, 1998 was a letter of offer. Once accepted development would take place and the sales agreement would become operative from the date of the first delivery of fuel.

He was aware of the defendant's illness. He had arranged with the defendant to meet the new purchaser a week before the closing of the sale when he was told that the meeting was off. He contacted the plaintiff who told him that he was not planning on signing the agreement with Shell.

Under cross-examination he agreed that the solus agreement predated the Competition Act but said that they had successfully sued under such agreements and, in the previous twelve months had released unprofitable dealers. He was not familiar with the sales agreement. He agreed that Shell had no interest in the land and that the 1999 agreement did not bind a purchaser.

If they had proof that the defendant had taken Emo oil they would have sued.

10.5 The defendant, Mr. Patrick O'Loughlin, gave evidence of his marriage and of the development of his business. He was a mechanic by trade and in 1969 had purchased the site to which the first two folios referred. In 1998 he purchased the third folio and built a workshop, the house, new pumps and canopy and a shop in 1992. There was redevelopment in 1998 which took over a year to complete.

He had two sales agreements with Shell before 1999.

He was planning to retire and to move back to his parents' house which he had renovated. He had leased the business when his mother was sick and he had stayed with her.

He gave evidence of the sales agreement and the loan agreement for equipment. He wanted to sell the entire together with the Shell agreement which was referred to in the auctioneer's brochure.

He had known the plaintiff and his family who came from the same village where they had a supermarket and hardware store and also an Esso filling station. He assumed they had an Esso agreement.

When he realised that the plaintiff was serious he gave him the accounts and the letter of 17th April, 1998.

While the plaintiff was a customer of his coming in and out he identified four occasions when they had met with regard to the sale. On the third they had gone to the garage workshop, Mr. Casey, the auctioneer, had left and they discussed the carriage equipment and the Shell agreement. His evidence was that the plaintiff had said he would be happier without it but would go along with it. He said that if the plaintiff had not gone with Shell that would have finished the matter.

Mr. Dwyer S.C. objected that this was not put to Mr. McMahon, the plaintiff. What was put to Mr. McMahon in relation to the agreement appeared to have been a conversation with Mr. Casey, the defendant's auctioneer and not with the defendant

10.6 The defendant's wife, Mrs. Eileen O'Loughlin told the court that her signature was made after 19th April, 2002, and not before. In cross-examination she referred to being at the former solicitor's office only once at the end of April when she signed the memorandum of agreement. She remembered her husband, the defendant, asking if he had to sign and being told, "no".

11. Submissions of Counsel on behalf of the plaintiff

11.1 Mr. Dwyer, S.C. referred to the contract of the 19th April, 2002, and of the obligation of the vendor to disclose. The agreements of September, 1999, were not brought to the attention of the plaintiff. The previous letter of the 19th April, 2002, did not run with the land. The defendant did not take proper steps to reply to correspondence and to requisitions in relation thereto. It was not until the 21st June 2002 that copies of the September, 1999, agreement were furnished. The defence at paragraph 5.1 was wrong.

Section 3 of the Conveyancing Act, 1882 put the purchaser on enquiry and was followed by the plaintiff's letter of 26th February, 2002, and the 26th March, 2002, which replied that there were no ongoing contractual provisions. Moreover, special condition 4 was unambiguous. The reply to requisitions were also unambiguous.

The plaintiff knew that there were agreements but did not know "how deep they were". His own supply contract with Emo could have been determined by agreement. His brother and father had operated petrol stations. He insisted on seeing agreements which he was on notice of and gave these to his solicitor who advised that the agreements did not run with the land.

He had received a contract which was not suitable for business and had so advised by way of letter of 25th February, 2002. On the following day, 26th February, 2002 he had raised pre-contract enquiries. Mr. Fitzgerald had given evidence of the need for specific enquiry. It was submitted that his was a reasonable query. The reply was that there were no ongoing contractual arrangements. No evidence was given by the then solicitor for the defendant. In any event, the plaintiff/purchaser was not given the 1999 agreements until June 2002 two months after the contract was signed.

11.2 Consel referred to *Massey v. Midland Bank* [1995] 1 All E.R. 929; *Banco Exterior International v. Mann* [1995] 1 All E.R. 936;

Bank of Baroda v. Rayarel [1995] 2 F.L.R. 376.

The obligation of the vendor/defendant is to convey under the contract. The contract broke down on the agreement with Shell. The agreement furnished did not impose any obligation on the purchaser. The 1999 agreement was not furnished until after the contract.

11.3 In relation to the consent for the Family Home Protection Act, Mr. Dwyer, said that he was not in a position to contradict the evidence of Mrs. O'Loughlin, the defendant's wife.

He referred to s. 3 of the Family Home Protection Act. There was no notice that s. 1 of the Family Home Protection Act was not complied with.

If the court were to hold that s. 3 did not apply then he was entitled to sever the legal contract and he referred to *AIB .v. O'Neill* [1995] 2 I.R. 473 which followed on Bank of *Ireland .v. Smyth* [1995] 2 I.R. 459 and *Roberts v. O'Neill* [1983] I.R. 47.

In *Roberts .v. O'Neill*, where specific performance granted could not be performed as the wife did not consent, the court awarded damages.

In relation to a possible mistake, he submitted that the defendant had not sought rectification or rescission and referred to *Irish Life .v. Dublin Land Securities* [1989] I.R. 332 case where the High Court had refused rectification and relied strictly on the terms of the contract. While the Supreme Court had invited the defendants to amend their pleadings to allow for rectification, no application was, in fact, made.

Mr. Dwyer, S.C. submitted that the defendant's evidence was that the plaintiff had never been told that he would have to sign the Shell agreement. Therefore, Condition 1 of *Rooney McFarland .v. Carlin* [1981] N.I. 138do not apply. There was no ambiguity in the contract signed.

It is clearly a case of unilateral mistake. The plaintiff sought specific performance of the whole contract or of the petrol filling station or damages if the court decided that s. 3 of Lord Cairn's Act (the Chancery Amendment Act, 1858) applied.

12. Submissions on behalf of the defendant
12.1 Mr. Brady S.C. submitted that specific performance is a discretionary remedy. The plaintiff had constructive notice of the solus agreement. There was clearly lack of *consensus ad idem*. Even though the plaintiff/purchaser was not furnished with the actual contract between Shell and the defendant/vendor before the contract was signed on the 19th April, 2002, he had been furnished with the brochure and a copy of the letter of the 17th April, 1998, between Shell and the defendant. In those circumstances, the purchaser and the purchaser's solicitors, were bound to have raised an express enquiry – a clear enquiry and they did not do so.

He referred to Delaney: "Equity and the Law of Trusts in Ireland", 3rd ed. at 45:

> "A person will be deemed to have constructive notice when he fails to make the inquiries and inspections which he ought reasonably to have made, judged by reference to standard conveyancing procedures."

That standard was clearly stated by Mr. Fitzgerald.

It is stated in Snell's Equity (30th Ed., 2000) at pages 53 to 54 that a purchaser would be treated as having constructive notice "of all that a reasonable prudent purchaser, acting on skilled advice, would have discovered". The question of constructive notice was considered by Henchy J. in the Supreme Court in the context of the application of the Family Home Protection Act, 1976 in *Somers .v. W*. [1979] I.R. 94 at 108.

The letter of the plaintiff's solicitor of the 17th April, 1998 advised that the purchaser was not bound "as things stood". All the *inditia* of Shell in the filling station were clear. The enquiry in any event, was almost obtuse.

He referred to the Conveyancing Act, 1882 and to *Northern Bank v. Henry* [1981] 1 I.R.

12.2 In any event Condition no. 4 should be construed on an *eiusdem generis* basis relating only to employment obligations.

12.3 Counsel also referred to clear evidence of no prior written consent of Mrs. O'Loughlin, the defendant's wife and referred to the relevant case law distinguishing between vendor and purchaser suits and mortgage suits.

13. Decision of the court:
13.1 On this basis of the uncontested facts of the case and the law in relation to constructive notice under s. 3 of the Conveyancing Act, 1882 and prior consent under s. 3 of the Family Home Protection Act, 1976 the court acknowledges the difficulties posed by this case.

What is primarily relevant is the contract itself rather than the negotiations leading up to its execution. Oral evidence may be allowed where written evidence does not exist (see Wylie: Irish Conveyancing Law, 2nd ed., 6.03; 6.33).

The evidence in relation to the conversation between the vendor and the purchaser regarding the Shell agreements is contested. The court must balance the defendant/vendor's version of this event together with the auctioneer's evidence with

the provisions of the memorandum of agreement containing the special condition and the requisition and reply thereto.

Mr. Brady S.C., on behalf of the defendant/vendor relied on *Delaney* and *Snell* with regard to constructive knowledge. Both references relate to enquiries and inspections which ought reasonably to have been made and of notice that a reasonable purchaser, acting on skilled advice would have discovered. This, of course, begs the question of what enquiries ought reasonably to have been made. The plaintiff/purchaser's former solicitor did make enquiries from the vendor's solicitor. The answer to the enquiries made no reference whatsoever to the existence of the agreements with Shell.

The former solicitor, having considered both the special condition proposed by the purchaser and the first requisition, should have been alerted to the need to make specific reference to the Shell agreements, if such agreements were to affect the purchaser. No thought seems to have been given to the matter. It should have been clear that certain fixtures and fittings were not the property of the defendant/vendor

The former solicitor had previously acted for the vendor in the letting of the Shell filling station to a tenant during the period when the defendant was ill and should have been aware of the need to protect his client from proceedings resulting from a breach of the agreements with Shell.

The purchaser's solicitor, on the other hand, did raise this matter in the first requisition and, of course, as already referred to, had negotiated special Condition no. 4 (see 13.3 below), raised an unambiguous requisition in relation thereto and had referred to the matter in correspondence.

The court finds that the plaintiff had constructive notice as defined by s. 3 of the Conveyancing Act and did take steps (special condition 4) and make inquiries (requisition 1) in relation thereto.

13.2 *Wiley: Irish Conveyancing Law*, (2nd ed. [1996]) has a number of relevant passages in relation to conveyancing practice.

As in the case of the vendor's solicitor, the purchaser's solicitor must take care he receives full detailed instructions from his client at the earliest opportunity. He refers to a detailed instruction form and a progress sheet and states that:

> 3.40 "It is also essential for the purchaser's solicitor to check with the purchaser the details of the property being bought. These then may be checked with the particulars provided by the vendor's solicitor in the draft contract. A further check may be made by writing to the vendor's estate agent asking him to furnish a copy of the sale particulars prepared by the latter. Particular care should be taken to discover if extra items are included in the sale of the property, e.g. fixtures and fittings."

In relation to fixtures and fittings *Wiley* states:

> 9.15 "We have mentioned in earlier chapters the importance of determining precisely what fixtures, fittings or chattels are to be included in the sale. One way of doing this is to include in the particulars a list of the items in question, or to incorporate by reference to an infantory attached to the contract. If this is done, it has the advantage that it will attract the warranty by the vendor contained in the Law Society's general conditions of sale (1995 edition) that, at the date of actual completion, they 'shall not be subject to any lease, rental hire, hire purchase or credit sale agreement or chattel mortgage'."

In relation to commercial and industrial property Wiley at para. 5.14 refers to pre-contract enquiries or requisitions being usually made and to a due diligence exercise being carried out by the solicitor acting for the purchaser carrying out a full 'health check' including a thorough investigation of the title, a full survey of the property, a check on compliance with planning, environmental and related legislation and, of course, detailed examination of the business financial state.

13.3 What is of crucial significance is special Condition 4 which refers to four elements.

The first of these is the goodwill of the business carried on and the property in sale, was to be included in the price. This would imply that the purchasers should pursue some form of due diligence search in relation to the business. Significantly, both the accounts and the letter of agreement with Shell of the 17th April, 1998, but not the agreements themselves, were furnished at the same time.

The second element contained in the condition related to an undertaking to pay all debts and liabilities and to perform all obligations regarding the conduct of the business prior to completion. While it was not argued by the plaintiff, the terms of that general undertaking may have had some relevance to the personal agreement between the vendor and Shell.

The third element related to the warranty, certification and indemnity in relation to employees. No issue arose in relation to this matter.

The fourth, and controversial, element of the condition that the purchaser 'shall not assume responsibility for any contracts, agreements or obligations of a continuing or ongoing nature' referred to the future. While, here again, it might have been helpful to refer specifically to the Shell agreements, it seems that a prudent solicitor for a vendor should have been alerted that this condition excluded agreements such as the Shell agreements.

Indeed, the very introduction of a special condition by the purchaser should always alert the vendor's solicitor to a likely restriction on the vendor's interests.

The vendor himself understood that the benefit and the burden of the Shell agreement would pass. However, the agreement was not by way of a right or easement passing with the land but rather a personal agreement in relation to the financing of the development of the premises and a tied agreement in relation to supplies. In addition certain items were designated as "property of Shell".

The court is not persuaded by the *eiusdem generis* argument in relation to this special condition. The general is not that of obligations in relation to employees. It may relate to obligations in relation to debts and liabilities regarding the conduct of the business prior to completion, or in relation to the goodwill of the business and the property in sale being included in the price.

The court finds that the fourth element in Condition 4 is a separate condition and cannot be restricted by the *eiusdem generis* rule.

Having introduced the fourth element of Condition 4 and having raised the matter in requisitions it seems to me that the purchaser was entitled to proceed on the basis that he would not be bound by any obligation and, in particular by the agreement with Shell. This is so notwithstanding the somewhat unsatisfactory lack of clarification of fixtures and fittings owned by Shell, and the absence of inquiries with regard to the passing of the property owned by Shell specified in the agreement of 1998 of which the plaintiff had notice.

Were it not for the absence of the vendor's wife's prior consent in writing the court is of the view that the purchaser would have been entitled to rely on the contract with the special condition, reinforced by the reply to the first requisition.

13.4 There is no doubt that the conveyancing implications of the Family Home Protection Act, 1976 and the Family Law Act of 1995 are of critical importance. This legislation has caused conveyancers many difficulties. The Law Society has published guidelines for practitioners.

The essential reason why conveyancers must be aware of that legislation is that it declares any disposition of an interest in the family

home by the owning spouse as being void unless the disposition had the prior consent in writing of the non-owning spouse. The authorities regard void as being of no effect and not just voidable.

The burden of proof of proving validity is on the person alleging it (s. 3(4) of the Act and *Bank of Ireland v. Smith* [1996] 1 I.R. 241).

The court should also consider that the Act should not be construed as if it were a conveyancing statute (see *Bank of Ireland v. Purcell* [1989] I.R. 327 at 333). Some ten years earlier Henchy J. in *Nestor v. Murphy* [1979] I.R. 326 at 329, in the context *of both spouses entering into a contract* held that it would be outside the spirit and purpose of the Act if either the husband or the wife could have the contract declared void because the other did not give a prior consent in writing.

Farrell: Irish Law of Specific Performance, 1994 edition, comments on *Nestor v. Murphy* that:

> "The defendants arguments would have the effect that contracts could be unfairly or dishonestly repudiated by parties who entered into them freely, willingly and with full knowledge."

In the present case, of course, both spouses had not entered into the contract. Mrs. O'Loughlin was not the registered owner.

The defendant in his evidence said that he had signed the contract for sale on 19th April, 2002. His wife's signature was not on it. He had never seen her signature on it. His then solicitor said that his wife would have to sign it which she did some ten days later. He and his wife's evidence was that she signed and that he had asked if he had to sign and was told he didn't have to. I accept the evidence on behalf of both Mr. & Mrs. O'Loughlin in this regard.

It is difficult to understand why the contract was not re-executed after the wife's written consent given that the correspondence clearly referred to such prior consent being available.

13.5 The plaintiff had submitted that, while accepting that the Family Home Protection Act was not complied with, that the court should sever the contract of the family home from that of the business.

Mr. Dwyer, S.C. on behalf of the plaintiff, relied on *Allied Irish Banks v. O'Neill* [1995] 2 I.R. 473 at 481 where Laffoy J. was of the view that in defining the expressions 'family home' and 'dwelling' in the Family Home Protection Act of 1976, the legislature itself theoretically severed such a larger holding and theoretically created new holdings calling the family home, being the dwelling together with any garden or portion of ground attached to and usually occupied with it or acquired for its amenity or convenience, on the one hand, and the balance of the holding on the other hand. Counsel argued that the purpose of the legislation could only have been intended to render void the purported conveyance or disposition insofar as it affected the family home.

Mr. Brady S.C., on behalf of the plaintiff, argued that in *Allied Irish Banks v. O'Neill* and similar cases related to transactions by way of security rather than of contract for sale Laffoy J. had stated:

> "The application of the principles may vary depending on the nature of the transaction, whether it is an outright transaction by way of security, or whether it is for value or voluntary, and whether it remains in contract stage or the contract has been completed."

The court has heard extensive evidence in relation to the practical difficulties in severing the family home from the petrol station. There was conflict in relation to the outcome of planning permission for separate entrances, foul waste and supply of services.

The court finds, on the basis of the expert evidence, that planning permission would not be readily forthcoming. Neither party should be forced into possible further litigation in relation thereto.

The court accepts the practical difficulties of severing the subject property compared to that of severing a family home, together with its amenities, from farmland.

The court accepts that there are practical difficulties with regard to the severing of the dwelling from the petrol station and further difficulties with planning permission. The dwelling house is more ancillary to the petrol station than independent from it. Moreover, the court is persuaded that the authorities favouring severance relate to enforcement of security of residential farms rather than of contracts for sale of residential business. In the circumstances it does not seem that it would be appropriate for the court to sever the dwelling from the petrol station.

Moreover, the court accepts the distinction referred to by Laffoy J. in *Allied Irish Bank v. O'Neill* [1995] 2 I.R. 473 that the application of principles may depend on the nature of the transaction. The case law favouring severance of the dwelling from other lands seem to be mortgage suits rather than vendor and purchaser suits.

It follows that the court must consider the entire contract void by reason of the non-compliance with the prior written consent of the vendor's spouse.

13.6 The plaintiff, while accepting that in the event of mutual mistake a contact will not be enforceable and, subject to the issue of restitution, the contract will be rescinded, argued that the situation in respect of unilateral mistake was more complex and allowed him a remedy.

Unilateral mistake occurs where:

- the other party to the contract is aware of the mistake and is aware that it is due to error;

- that such other party did not draw attention to the mistake;

- mistake is calculated to benefit the other party (see *Delaney* 467 – 469).

The plaintiff argued that there was a mistake in that the defendant understood that the plaintiff knew and had accepted the Shell agreement. Though the plaintiff was aware, and was put on notice of the defendant's view, his solicitor made inquiries and was satisfied that the Shell agreement did not affect the sale. Thus he could not be said to have relied on same, or indeed sought to benefit from it. Such a mistake was not one which would entitle the defendant to rescind or disentitle the plaintiff to seek specific performance: *Irish Life Assurance Company Limited v. Dublin Land Securities* [1986] I.R. 332 applies.

The plaintiff's solicitor in addition sought to restrict any continuous and ongoing agreements and was entitled to rely on the reply to the first requisition.

13.7 In summary this is a case where the vendor had intended that the purchaser would take over the Shell agreement and where the purchaser did not want nor had any obligation to do so. Though put on inquiry the plaintiff/purchaser's solicitor negotiated a special condition protecting his client and raised an appropriate general requisition the reply to which indicated that no agreement affected the contract.

The parties are entitled to rely on their solicitors with regard to the technical and complex drafting of contracts and raising and replying to requisitions. Their respective clients are bound by their solicitors.

The vendor's then solicitor, seemingly contrary to instructions, failed to make any stipulation with regard to the Shell agreement, ignored the effect of the latter portion of special Condition 4, inaccurately replied to the relevant requisition and failed to obtain the prior consent in writing of the vendor's spouse.

The court has already indicated (13.3 above) that, were it not for the absence of the vendor's wife's prior consent in writing, the purchaser would have been entitled to rely on the contract.

It is, of course, somewhat unsatisfactory to arrive at such an outcome.

13.8 The plaintiff's further claim is for damages in lieu of specific performance. The Court has a discretionary power to award damages either in addition to or in substitution for specific performance. Section 2 of the Chancery Amendment Act, 1858 gives the Chancery Court power where it would have jurisdiction to award specific performance. Under the Judicature Act this is extended to all courts. It does not apply where the contract in question is of such a type that it is not specifically enforceable. The jurisdiction may be involved in cases where damages could not be awarded at common law, e.g. where the contract lacks some legal formality but is nevertheless enforceable in equity. (See Wylie: Irish Conveyancing Law, 2nd ed., 13.54 and footnotes 355, 356).

Mr. Dwyer has urged the court to consider awarding damages in lieu of specific performance. He referred to *Roberts v. O'Neill* [1983] I.R. 47 where the Supreme Court in granting specific performance held that the relevant point in time for ascertaining the existence of alleged hardship was the date of the contract for sale (17th January, 1978 in that case) together with interest.

However, in *Wroth v. Taylor* [1974] Ch. 30, Megarry J. decided to refuse specific performance but did grant damages in lieu, measured at the date of judgment.

The court proposes to hear counsel on whether damages should be awarded in the circumstances of the present case and, secondly, whether, and to what extent, the court, if it decides to award damages, should follow the authorities cited above.