Neutral Citation no. [2008] NICh 2

Ref: **DEEC5963**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **07/01/08**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

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BUBBLE INNS LIMITED

(Plaintiff)

v

BEANNCHOR LIMITED

(First Defendant)

and

FAIRMOUNT TRUSTEE SERVICES LIMITED, WILLIAM ADAMS WOLSEY, LINDA GEORGINA WOLSEY, LUKE WOLSEY and CONALL WOLSEY

(Second Defendants)

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DEENY J

[1] The plaintiff in this action seeks specific performance of an alleged contract with the second defendants for the sale of retail premises at 703-707 Lisburn Road. There is no note or memorandum in writing signed on behalf of the second-named defendants and the plaintiff therefore relies on the doctrine of part performance. I am assisted by the helpful submissions of counsel for the plaintiff, Mr Mark Orr QC and Mr Copeland, and counsel for the defendants Mr Stephen Shaw QC and Mr Humphreys. I have taken into account their oral and written submissions, without proposing to recite them seriatim.

[2] The Managing Director of the plaintiff company is a Mr Harry Diamond. He has been in the licensed drink trade in Northern Ireland all his life. The plaintiff owns some 18 companies owning 20 to 30 properties mostly public houses.

[3] On or about 29 September 2005 he was informed by a senior manager at Bass Ireland, at a meeting arranged for other purposes, that Mr Bill Wolsey

might be interested in selling the Tatu Bar at 701 Lisburn Road, Belfast, a successful public house and restaurant. Mr Wolsey controls some 18 licensed premises in Northern Ireland through the first defendant or other related companies.

[4] Following this there was a mobile phone conversation between Mr Wolsey and Mr Diamond. Evidence diverges at this point and for now I will summarise the evidence of Mr Diamond. He says they agreed to meet and did meet on 7 October 2005 at lunchtime in the Spaniard Bar Restaurant, Waring Street, Belfast. (Mr Wolsey agrees there was such a meeting but asserts that there had been an earlier meeting between him and Mr Diamond.) Mr Wolsey was on his own but Mr Diamond was accompanied by Mr Nigel Beggs, a fellow Director of the plaintiff who was particularly concerned with financial matters. Mr Wolsey said at the Spaniard that he was prepared to sell the Tatu Bar and the adjoining shop premises for £5.5m. These shop premises had been discussed in the phone call. They consisted of 703-707 Lisburn Road leased as an off-licence, a furniture shop, an Indian restaurant and a snooker hall. Mr Diamond says he did not comment at that time but asked for the turnover figures and the leases on the shops including their rents. He was told he would get those as soon as possible. That afternoon Mr Beggs got the leases, as Mr Diamond put it, although what he really got was a schedule summarising the leasehold interests and current rents. Turnover figures for the Tatu Bar were provided next day. At this meeting the breakdown of the £5.5m was £3.25m for Tatu and £2.25m for the shops. Having digested these figures Mr Diamond met Mr Wolsey again at the Spaniard on 10 or 11 October. Both sides agree that this meeting took place, although neither is sure whether it was 10 or 11. Mr Diamond gave evidence about his thinking leading up to this meeting and his approach to the valuation of the pub and premises. He knew that Mr Wolsey was opening the Merchant Hotel with adjoining bar restaurant premises and he believed that the turnover of Tatu would fall when that happened. In light of all the factors he offered £5m for the two properties. Mr Wolsey said no but after discussions they agreed on £5.125m for the two. There was discussion of a split and the reasons for that and it was agreed that Tatu would be bought for £3.125m and the shops for £2m. Mr Diamond said that Mr Wolsey was to show him the shops and restaurant etc next door. Access to the roof of 701 Lisburn Road was achieved through 703. There was room to put a second floor in the Tatu premises; Mr Diamond said he was keen to do this and needed the access from 703. This was one of the reasons why he was keen on purchasing the shops. He said that at an earlier stage he had declined to buy Tatu on its own. He said, although this was not pressed, that the price for Tatu was inflated because Mr Wolsey could get rollover relief on ploughing that money into his construction of the Merchant Hotel which would not be the case with the shops.

[5] He was not party to but heard of Mr Beggs' conversations with Mr Wolsey after this meeting on 10 or 11 October. Mr Diamond said that Mr Wolsey volunteered that he was over budget in his creation of the Merchant Hotel. Mr Wolsey said he would be a very poor negotiator if he had admitted that to Mr Diamond, which he denied doing. However if they had already agreed the deal but were discussing the split it might have been necessary to explain this to Mr Diamond as he says was done. It may be that this information was not, in truth, very secret.

[6] Mr Diamond said that there was a meeting on 9 November, which is undoubtedly the case. He said the reasons were that Mr Wolsey could not sell the shops at that time but offered a signed letter as Mr Diamond's solicitor, Mr Peter Conlon of Joseph Donnelly & Co, was "slightly concerned if Mr Wolsey changed his mind." Mr Diamond conveyed this to Mr Wolsey several times who said he was a gentleman and he would be selling the shops to him for £2m. The signed letter was subsequently scrapped as anything which was in writing before April 2006 might have or be deemed to have serious adverse consequences in tax for Mr Wolsey or his interests. It was then that the meeting in the solicitor's office was suggested as an alternative. It took place in the offices of Messrs MKB Russells. Mr Diamond and Mr Peter Conlon were present on his side. Mr Wolsey was present with his two sons Conall and Luke and his solicitor Mr Gordon McElroy. At that meeting, as a subsequent attendance note from Mr Peter Conlon confirmed, Bill Wolsey agreed to sell and Harry Diamond agreed to buy the premises at 703/705/707 Lisburn Road, "attached to Tatu" for the sum of £2m. Mr Diamond and Mr Conlon thought the contract was to be signed at the end of April 2006 i.e. in the new tax year. Both of them believed, although Mr McElroy did not remember this, that it was "confirmed there were no strings attached to this arrangement." The meaning of that is unclear but I am inclined to think that it tells against the plaintiff as much as for it. To finish the chronology briefly, I note that the contract for the sale of Tatu which was already with Mr Conlon by 9 November was signed for the plaintiff on 11 November and for the defendant on 15 November. Completion took place on 28 November. Once the tax year was complete Mr Diamond in his own words badgered his solicitor Mr Peter Conlon to get the contract for the shops. Mr Conlon wrote on 19 April requesting the contract. Considerable attention was paid to this correspondence. I can state my view succinctly. It supports the view that Mr Wolsey had indeed agreed to sell the shops for £2m as set out above but is not inconsistent with the view that this agreement was a "gentleman's agreement" not binding in law.

[7] Mr Diamond said in evidence that on or about 18 August 2006 he was surprised to receive a phone call from a Mr Robert Ditty of Hamilton Osborne King saying that Mr Wolsey would sell him the shops at 703-707 Lisburn Road. He, Wolsey had been offered £2.75m. Would Mr Diamond improve on that? I accept fully Mr Diamond's evidence that he was shocked at this

evidence and that he said to Mr Ditty (who was not subsequently called) that he had an agreement with Wolsey to buy the shops for £2m. Wolsey said he knew nothing about this. Mr Diamond then instructed his solicitors.

[8] Before turning to the cross-examination of Mr Diamond by Mr Shaw I think it helpful to briefly refer to the evidence of Mr Nigel William Beggs. He gave evidence on the morning of Wednesday 17 October for the plaintiff. His sworn testimony was that Mr Wolsey at the first meeting on 7 October which he attended mentioned £5.5m as the price for Tatu with the adjoining investment property. He, Beggs, did not remember any breakdown being mentioned then. He sought financial information on Tatu and information on the leases of the investment property. He was referred to Mr M Wilson, estate agent. He contacted Mr Wilson who got approval from Mr Wolsey to forward the Schedule of Rents and Tenants with their leasehold interest to Mr Beggs. All of this is convincing evidence that Mr Wolsey was proposing to sell the investment property at this time as well as the public house.

[9] Mr Beggs was not at the meeting on 10 or 11 October but following it he had a number of conversations, in my view very important conversations, with Mr Wolsey. Mr Wolsey's accountants were Messrs Price Waterhouse Cooper. They were also the plaintiff's auditors. They set up Chinese walls to advise both parties. During one conversation Mr Wolsey told Mr Beggs that on the advice of PWC the completion of the investment property would have to be delayed until after the start of the next tax year. He also told Mr Beggs that the investment property was owned by Beannchor Limited's investment or pension fund. Mr Wolsey offered to provide a signed letter confirming that there would be a sale in the future.

[10] However he later returned after further consultation with PWC, on the evidence of Mr Beggs, and phoned him to say that he Wolsey could not be seen to be doing anything before A day and probably for some time after it. There could be no signed letter. He, Mr Beggs, accepted that.

[11] The reference to A day was expanded later in the case. The statutory arrangements with regard to pensions were altering from 5 April 2006. The second defendants in this action were the Trustees of the Beannchor Pension Fund. Its beneficiaries were Mr Bill Wolsey and Mrs Linda Wolsey, his former wife. It seems that an agreement to sell this property, either at all or at the proposed price of £2m, would be in conflict with the valuation of the pension fund which had already been furnished to the Revenue. To proceed with the transaction therefore was, the defendant said, potentially likely to lead to a very heavy tax penalty on the pension fund which they were very anxious to avoid. The court inquired at one point whether accountancy evidence would be given. None was forthcoming and nor was the court referred to any statutory provisions or Revenue circular dealing with the effect of A day on self administered pension funds such as this. In those

circumstances I must take the evidence of Mr Wolsey and in particular of Mr McElroy in saying that there were strong taxation reasons why the pension fund could not commit itself to the sale of this property, which made up an important part of the fund, before or until sometime, the length of which is in dispute, after 5 April 2006.

[12] Pausing at this point therefore I record that on listening to them, while I wondered about the legal consequences of their evidence, I found Mr Diamond and Mr Beggs to be witnesses of truth whose account appeared to be acceptable. In the course of a lengthy cross-examination by Mr Shaw I find the account ultimately put and Mr Wolsey's case to be unconvincing. However it seems to me on the evidence of the plaintiff's case itself that what happened here was quite simple. Mr Wolsey did agree to sell both the public house and the adjoining shops for £5.125m. But very quickly afterwards, possibly the same afternoon and certainly within a day or two Mr Wolsey made clear that he would not only not be selling the investment property in that tax year but that he would give no written promise to do so, while saying that he was a man of his word who would do so. A verbal agreement regarding the sale of land can, it seems to me, be varied verbally until and unless there is a note or memorandum in writing signed by the party to be charged or there is an act of part performance. In this respect, contrary to the defendant's submissions in law, it seems clear to me that I must consider what was the parol agreement between these parties. As Moore LCJ said in Lowry v Reid [1927] NI 142 at page 151:

> "In my opinion, we must at some stage consider the contract and its affect, before we are in a position to judge, whether or not the acts relied on to take the case out of the statute are acts of part performance of the contract."

See also Andrews LJ at p. 157.

Mr Beggs said that Mr Wolsey made clear that he was a man of his word and the deal would be done and they should not worry but he was acting on the advice of his advisors.

[13] I return to the evidence of Mr Diamond. I have read my notes of his lengthy cross-examination by Mr Shaw but it is not necessary to go through every detail. He accepted that at some point he knew that the shops were owned by the pension fund rather than by Beannchor Limited, although he could not say exactly when he learned that. He accepted that in recent years a valuation of public houses would often be on the basis of twice turnover which would be about £3.2m on a turnover of £33,000 per week. But he pointed out, as he had before, that he expected the turnover to fall as many of the customers would follow Mr Wolsey down to his new premises at the

Merchant Hotel. A not inconsiderable part of the cross-examination of Mr Diamond and of the subsequent evidence of Mr Wolsey seemed to me quite extraneous and unhelpful to the court. It seemed only designed to distract either the witness or the court and was not of assistance. He acknowledged that the schedule of leasehold interests sent by Mr Wilson (page 134 of the bundle) was marked "without prejudice subject to contract". However it came in before the meeting of 10/11 October. He admitted that he never had got the actual leases for the property. Mr Shaw pressed him that if he really thought he was entering into a legally binding agreement for the purchase of these premises, entirely subject to leasehold interests, he and his solicitor would have insisted on seeing the leases. What if, when he came to buy the properties in the following tax year, he discovered that the leases had break clauses disadvantageous to the landlord? It did not seem to me that Mr Diamond had any very adequate answer to that point, save to say that he did not care if the tenants went as he believed the properties could be easily let at attractive rents given the booming retail climate on the Lisburn Road. On a different point, he had not had an architect prepare a drawing of how the two premises would be connected.

[14] He accepted that Bubble Inns Limited was not then incorporated although this was done before a contract was signed on 11 November. Mr Shaw contrasted the financial information sought and obtained by Mr Beggs on the pub for the plaintiff e.g. page 137, with the paucity of information relating to the shops. At one stage there was considerable attention paid to the terms of page 127 a fax to the Bank of Scotland on behalf of the plaintiff but I conclude that in the light of all the evidence it does not tell significantly one way or the other. Mr Shaw established that Mr Diamond had obtained no valuation of the shop's property which he had agreed to buy at £2m. His answer was that he did not as he had been told he could not buy the property then and any valuation would be out of date by the next tax year i.e. 6 months later.

[15] His evidence continued on Tuesday 16 October. Mr Shaw pointed out that the document referred to at page 127 which refers to both the bar and the investment property seemed to be the only document the plaintiffs had recording the alleged contract. Mr Diamond was not aware of any other note or record of the "deal". Mr Diamond agreed that the first version of the deal on his case was for the sale of all at £5.125m to be completed in 4-6 weeks. The second version of the deal was for completion of the shops in or after April 2006 which he agreed was a different deal. The public house Tatu was valued because the lender, the Bank of Scotland, needed that. John Martin did that and valued it as £3.3m as he had done earlier for the defendant. They had furnished that valuation of Tatu to the plaintiff.

[16] Mr Diamond was cross-examined about his proposed use of the stairs in the adjoining shop premises to gain access to create a second floor and

operate a second floor restaurant in Tatu. How was he to do that when there were leaseholds in existence? Mr Diamond pointed out that it was only the upstairs lessees who could have any ground for complaint. He was friendly with the owner of the snooker hall. He did not see any reason why the restaurateur would object to the people passing outside his restaurant, presumably as they would bring in trade. Mr Shaw's point was a valid one but not to the extent of leading me to doubt that Mr Diamond had it in mind to open out into the adjoining shop premises. But it is worth bearing in mind that he does not seem to have researched it in any great depth in October and November 2007. Nor had he obtained any building surveyor's report on the shop premises. He did not know if there were any problems or defects in the fabric. If the plaintiff's case is right he too was bound to buy these premises in 2006 but he did not know at this time whether they were in sound condition. Mr Diamond recollected overnight on his own that he had seen a further document about the turnover for 3 months. It turned out that he was correct in that but that the document had been overlooked in the discovery process. It was subsequently handed into court. He rather unwisely disputed that a document from Mrs Wolsey to Mr Beggs must have been sent on 14 October 2005. But this documentation with the final draft accounts was only coming after the alleged binding agreement on 10 or 11 October. There was debate about which turnovers were inclusive of VAT and which were exclusive of VAT. I think it is enough to say that the plaintiff ultimately made it clear that it was not running the case on the basis that buying at £3.125m was in itself a detriment suffered by the plaintiff. Mr Orr helpfully clarified that when the matter later arose. That, of course, does not detract from their point that there was one agreement because the plaintiff was anxious to secure the adjoining properties to help in the development and operation of the public house at 701.

[17] Reference was made to the document of 2 November 2005 (pages 151-153) which was a letter of offer from the Bank of Scotland to the plaintiff for the purchase of the investment property at 703-707 Lisburn Road. Mr Diamond accepted that it was a condition precedent of the drawdown that there should be a valuation of the property which had not taken place nor had the bank's solicitors been provided with the leases as required by paragraph 4(iv) of the letter. The letter had never been signed. It was a draft. The bank had clearly been approached about this as a different transaction from the purchase of Tatu but Mr Diamond said that was because of the deferment. They had originally been approached (page 127) about the entire property.

[18] With regard to control of the pension fund which owned the shops Mr Diamond did not remember who decided on behalf of the pension fund. Mr Wolsey gave the impression he controlled the shops. It was his pension fund. Mr Shaw asked him whether he had asked anyone or directed anyone to establish who the owner of the four shops was. Mr Diamond admitted that he did not. He said that was the role of Mr Beggs. This evidence goes against

the case made in part by the plaintiff that Mr Wolsey had held himself out as having the actual authority to commit the pension fund. Mr Diamond may have formed that impression but it does not seem that there an actual representation by Mr Wolsey in that regard. Mr Diamond seemed to leave the matter to Mr Beggs.

[19] Mr Diamond agreed that not only had Mr Wolsey asked for the shops deferral, without giving a detailed explanation of his tax affairs but that Mr Diamond agreed to that being put off to April. It may be that Mr Beggs had agreed that first. He did not probe it. "He gave me his word and I took it." The meeting in Russells in front of Mr Wolsey's sons and the shaking of hands was to give him some comfort. A letter of comfort could not be given so as nothing better could be got they had the meeting. The defendant relies on this as showing that it was clear by then that the defendant and in particular the second defendants were not legally binding themselves to sell the investment property. Reference was made to the plaintiff's solicitor's letters of 17 October and following (page 156) which are all concerned with Tatu and not with the original deal. There was no reference to the shops. Mr Diamond said he could not speak for Mr Conlon although he accepted that he was acting for him. It was put to him that Mr Conlon must have been told by Mr Diamond that the shops deal was not going ahead and the witness did not demur from that nor from the point that the pre contract inquiries only related to Tatu. (Mr Orr pointed out that there was a reference to the purchase of the retail units in Mr Conlon's letter of 31 October 2005 (page 191)). When pressed about this Mr Diamond said that Mr Wolsey had several times told him that he was a gentleman and he would not go back on his word. That in effect accords with the evidence of Mr Gordon McElroy and, it seems to me, the evidence that I can rely on generally in this case i.e. that shortly after 10 or 11 October Mr Diamond was, in truth relying on a gentleman's agreement with regard to the retail premises at 703-707. I am inclined to think that the absence of any reference in Mr Conlon's first letters of 11 and 17 October (same letter sent to two different addresses) to the retail premises is supportive of the view that they had ceased to be part of the "deal" which the solicitors were now to put into effect.

[20] For completeness I note that at one stage it looked as though the draft contract sent by Messrs MKB Russells gave credence to the plaintiff's case but Mr Conlon expressly said in evidence, that, following clarification, that was not the case. Mr Shaw put his client's account of the initial negotiations to Mr Diamond but my view is that it was not very convincing. I will deal with it so far as necessary, in Mr Wolsey's evidence. The claimed meetings before 7 October were unlikely because the conversation with the gentleman from Bass was only on 29 September. It was also notable that Mr Wolsey did not know the dates of the alleged meeting or phone calls or put any date forward. He also claimed that his two sons were present at the initial meeting but neither of these young men, both employees of the first defendant, were

called to give evidence. In cross-examination Mr Diamond said that if he had not received comfort from the 9 November meeting he would not have completed on Tatu on its own nor paid that price. However as was later pointed out it does not appear that either he or his solicitor expressly said at the meeting on 9 November, nor in any letter before or leading up to it, that the purchase of Tatu was conditional on the subsequent sale to them at £2m of the retail shops. It seems clear on the evidence that if that had been put in a letter to the defendant's solicitors or said in front of him that he would have corrected that as he would realise that it would have the potential for embarrassment (or, conceivably, illegality) with regard to the tax dispositions being made in connection with the pension fund.

[21] In re-examination Mr Diamond said to Mr Orr that no one had ever said the approval of the trustees was required for the shops transactions. It was following the evidence of Mr Diamond that the debate took place as to whether or not the plaintiff was relying on detriment in this case. The conclusion of this was the plaintiff's senior counsel confirming that they were not alleging they had made an overpayment for Tatu but only that he cannot now develop Tatu as he would have wished because he does not own the premises next door.

[22] I turn to the testimony of Mr Beggs. His evidence is important here as confirming that Mr Wolsey in a second or later telephone conversation said that there could be no side letter in that he could not be seen to be doing anything before A day and probably for some time after that. This was on the advice of PWC. This was at a time when Mr Beggs had been told the property was owned by the pension fund. He dealt with the issue of "due diligence" in the memorandum to the Bank of Scotland and I do not consider that that would have presented a difficulty to the plaintiff in this case, all other things being equal. I note that in examination in chief he talked about the main focus after these phone calls being the completion of Tatu bar. "We did not want conditions for the investment property to delay a quick completion of the bar." It must be implicit in that that the conditions for the sale of the investment property were not therefore discussed let alone agreed in the autumn of 2005. I accept Mr Beggs' account of his two post Tatu conversations with Mr Wolsey, one in the Merchant Hotel. I found that they are consistent with Mr Wolsey having entered into a gentleman's agreement and not a binding legal contract with regard to the investment property. In answer to Mr Shaw, in cross-examination Mr Beggs said that it was correct that it was clear the pension fund could not dispose of the shops before A day nor be seen to do so. It was he who confirmed that the meeting with Bass Ireland was on 29 September only a week before the meeting he attended on 7 October which he clearly believed to be the first meeting between Mr Wolsey and Mr Diamond on this topic, thereby contradicting Mr Wolsey's subsequent evidence. Mr Wolsey's case was put to Mr Beggs but in so far as he was aware of the facts he robustly rejected it. I accept his evidence in that regard.

[23] Mr Peter Francis Conlon gave evidence on behalf of the plaintiff. He is a partner in the firm of Joseph Donnelly and Company Solicitors, who are acting for the plaintiff and have done so for many years. His involvement in this was as early as 11 October when he wrote a letter to Mr McElroy of MKB Russells. In fact he sent that letter to the former professional address of Mr Russell but then sent the same letter on 17 October to the current professional address of the defendant's solicitors. That letter only refers to Tatu. That is consistent with Mr Conlon receiving instructions, whether from Mr Diamond or Mr Beggs is irrelevant, that only the Tatu part of the purchases was proceeding, at least at that time. He was clear however in his own mind that there was to be a subsequent transfer of the retail shops but that this could not proceed for tax reasons in the current tax year.

[24] Mr Conlon attended the meeting at the offices of MKB Russells on 9 November 2005 at the request of Mr Diamond. Mr Wolsey was there with his two sons and his solicitor. The shops were discussed. It was agreed that Mr Wolsey had agreed to sell the shops to Mr Diamond for £2m and Mr Diamond had agreed to buy them without any strings attached. At the conclusion of this exchange they leaned across the table and shook hands.

[25] After April 2006 Mr Diamond pressed Mr Conlon to write to the defendant's solicitors which he did in a series of letters. It is clear that he and Mr Diamond believed that Mr Wolsey would honour his promise. Something further emerges from the one letter in reply of Mr McElroy and Mr Conlon's two attendance notes of telephone conversations with Mr McElroy on 2 May and 13 June 2006. What emerges from those is that Mr McElroy also believed that Mr Wolsey had promised to enter into a contract for the sale of the shops in the new tax year which commenced on 6 April 2006. The attendance note of 13 June especially records that Mr McElroy advised he had received instructions to "forward contract". It is hard to see how he could have received those instructions from anyone but Mr Wolsey or that they mean anything other than Mr Wolsey still thought he was to forward a contract to Mr Diamond at that stage. Yet only a few weeks later he felt able to instruct Mr Ditty to market the property to third parties. Finally after Mr Ditty's approach to Mr Diamond Mr Conlon wrote, conveying Mr Diamond's indignation to MKB Russells. That firm wrote back on 21 August 2006 saying they had taken their client's instructions on Mr Conlon's letter of 21 August. "Our client does not consider there is any binding agreement between it and your client." There is no denial of some agreement. Nor is there any assertion on instructions of the sort subsequently made in the witness box by Mr Wolsey that all he was obliged to do was to give Mr Diamond a chance to buy the premises before he sold them. I will deal with Mr Wolsey's evidence in a moment but it seems to me that his failure of memory in this regard seems to have taken place contemporaneously with the increased offer for the investment properties.

[26] Mr Conlon was cross-examined by Mr Shaw QC. He knew that the pension fund was the legal owner of the shops. He and his client were seeking something as strong as possible to back up the agreement which had made. Mr Wolsey at all times, he said, held himself out to be capable of coming to deals on behalf of the pension fund. It was made clear by Mr McElroy that the trustees could not enter into the transaction for A day. There could be no contract before that date. This was consistent with Mr Conlon's note of what Mr McElroy said on 2 May 2006 i.e. "it was still too close to the start of the tax year to enter into contract in this matter". Mr Shaw put to the witness that therefore there was no contract by 2 May 2006. Mr Conlon said there would have been no doubt about the matter of a contract had one have been signed. Mr Conlon felt the handshake was part of an overall deal. Significantly he agreed with Mr Shaw that this was a gentleman's agreement. That is consistent with him subsequently seeking a contract in April 2006. I find his letter of 31 October 2005 (page 191) does not assist one way or the other in this regard. He agreed there was not even a draft contract with regard to the shops nor any prospect of receiving the same but only the handshake. While he agreed that his client had only hope or expectation of the shops he reiterated that Mr Wolsey held himself out at all times as if in a position to sell the shops. I think I must take from the collective evidence that again this was an impression he gave rather than an express representation. Mrs Wolsey was not at the meeting on 9 November. Mr Conlon did not remember Mr McElroy using the expression "gentleman's agreement" on 9 November but it may well have been used. In re-examination he said that no one ever sought to limit Mr Wilson's authority to act for the trust. Mr Shaw then asked for leave and was given leave to put to the witness that McElroy did say on 9 November that Mr Wolsey did not have power to buy into the pension fund. Mr Conlon's answer to that, both from my notes and the digital recording was to the effect that he was not going to contradict Mr McElroy but if that had been said he did not think that Mr Diamond and he would have explored the matter nor would they have had Mr Wolsey shaking hands because he would have had no authority. "It does not add up to my way of thinking." I accept Mr Conlon as an honest reliable witness but in my view this evidence is not ultimately determinative of the issue in question. Mr Orr in any event pointed out that that had not been put to Mr Diamond in the course of his lengthy cross-examination. That completed the case for the plaintiff.

[27] The case for the defence began with the evidence of William Adams Wolsey on Thursday 18 October. He is a Director of the first defendant which owns some 18 licensed premises and the Merchant Hotel. He and the other second defendants are the Trustees of the Beannchor Limited Pension Fund, a small self-administered pension fund. His former wife Linda Wolsey and he are the main beneficiaries of that fund. Although they have been separated for some 10 years she continues to be active in the business with a particular

interest in its finances and is the Company Secretary of the first defendant. His two sons are aged 23 and 21 and both work in the business. The four shops the subject of this dispute are owned by the pension fund.

[28] Mr Wolsey gave evidence at length about his version of the events which led to the agreements the subject of this dispute. I obviously had the opportunity to hear and observe him at close quarters when he gave his evidence about these matters and he was not a convincing witness. He seemed uneasy and was blushing and indeed shaking on occasions when giving evidence about some of these matters. Nor does his evidence on some of the points seem any more convincing when analysed. He agreed that he had approached the sales manager of Bass to alert Mr Diamond (and two other publicans) to the possibility of selling Tatu. He says that following a phone call from Mr Diamond they met in Tatu. He did not know the date. He said that his sons Conall and Luke were present at this business discussion. That had never been put to Mr Diamond. Furthermore these two young men, although apparently present throughout the hearing were not called to give evidence. He claimed that Mr Diamond asked him to name his price for the pub and after a short piece of haggling they agreed on £3.125m and shook. According to Mr Wolsey Mr Diamond then immediately said could they go for a celebratory dinner and began to make quite extraneous inquiries. I found this most unlikely. Mr Diamond did agree there was a celebratory dinner and a discussion of matters connected with that at a significantly later stage. It took place indeed after completion. That sounded much more likely. That Mr Diamond would plunge into these matters after a conversation of a few minutes and without ever asking what the turnover of the public house or asking for documents to verify that or asking about the possibility of extending the public house is simply incredible. Mr Wolsey denied that the four shops were ever mentioned at the time of the agreement on Tatu. Again this seems unlikely given that they are next door and that anyone wishing to add to the floor area of Tatu would inquire about the possibilities for doing that.

[29] Mr Wolsey then claims that his next discussion with Mr Diamond was at the Merchant Hotel and they never discussed either Tatu or the shops at all. He denied that he had told Mr Diamond that he had overrun his budget at the Merchant Hotel saying that he would be a very poor negotiator to tell him that he was strapped for cash. It might be so before an agreement was made but it may well be different afterwards, if indeed, as I have said, there was any great secret about the matter. However according to Mr Wolsey they were not over budget for the Merchant Hotel in September and October 2005, that only happened later, in January 2006.

[30] According to Mr Wolsey there was then a further phone call from Mr Diamond because he had found rival publicans in Tatu and wanted to know what was going on. It was then that he asked about the shops and the rent

roll for the shops. According to Mr Wolsey he immediately told him that he could not sell the shops before April 2006 or for a considerable time thereafter because of A day. Again that seems less likely than the version of Messrs Diamond and Beggs that he was happy to talk about the shops but in fact it was his advisers who told him or reminded him of the A day issue. If he knew that immediately why, as he said he did, did he agree to a meeting in the Spaniard to talk about the shops as well as the pubs.

[31] He agreed that there was a meeting with Messrs Diamond and Beggs in the Spaniard on 7 October. He agrees that at that meeting he gave Mr Beggs Mr Michael Wilson's number so he could get the rent roll details of the premises. Why would he do that if he already knew that he could not sell the premises until a considerable time after 6 April 2006? He reiterated that it was at the luncheon meeting in the Spaniard that he told Mr Diamond, who was prepared to offer him £2m for the shops, that he could not act now and nor would he provide a side letter as comfort. Again if so why were the rent roll details being furnished to Mr Beggs? How did he know whether a side letter was possible if he had not consulted his advisers? This evidence did not have the ring of truth.

[32] He accepted Mr Conlon's evidence about the meeting on 9 November, having said that he didn't recall any discussion between the meeting in the Spaniard and that meeting. I prefer the evidence of Mr Beggs on that. He said that at that meeting it was made clear that he did not bind the trustees and that furthermore there could be no sale without a "period of clear blue water after A day". That was to avoid difficulty with the Revenue Commissioners. They could be liable for a very heavy tax burden on the pension fund if they were to act otherwise.

[33] He said that in July 2006 there was an approach from a party to purchase the shops and he asked Mr Ditty of Osborne King to act on behalf of the pension fund. Following this offer he instructed Mr Ditty to go back to Mr Diamond and offer him the last call on the purchase property. In cross examination he accepted that he had heard Mr Shaw put that there was a gentleman's agreement to sell the shops to the plaintiff for £2m. He was evasive when asked whether that was correct. He did say that he had made it crystal clear that there was "no contract for no price". He did not deny that £2m was mentioned. His claim that it was made clear that he was not speaking for the pension fund was unconvincing. He, , had no document before him and nor had Mr McIlroy. Mr McElroy denied that he had said "there are no strings attached" as set out in Mr Conlon's memo at page 154 but counsel pointed out that that denial had not been put to either Mr Diamond or Mr Conlon. His claim was that all he was doing was giving Mr Diamond an opportunity or chance to purchase the shops in the new tax year. That is clearly inconsistent with the other oral and documentary evidence in the case. He claimed that the contract referred to by Mr McElroy in his two

conversations with Mr Conlon was a contract to offer Mr Diamond the opportunity to purchase the shops. As Mr Orr exposed that was not a credible assertion. He accepted that he was the "client" referred to by Mr McElroy in correspondence and conversations with Mr Conlon. When taxed with the letter from his solicitors of 21 August 2006 to Joseph Donnelly & Company he said the letter was incorrect.

[34] He was cross examined about the operation of the pension fund. He said that his former wife was his financial expert. She had been in the licensed trade for 32 years. It was true to say that he was the prime mover and made the decisions regarding the public houses but the commercial property was jointly owned. She was her own lady. He was only dominant where he owned the property outright. It was pointed out that a document involving the Green farm ownership of these premises at an earlier stage was signed by him but it was also signed by Linda. Again another document was produced which was signed by both of them as trustees. It was put to him that he did the deals. He agreed with that but said that he discussed them first with Linda and if she agreed they would purchase properties. He accepted that there was no document limiting his authority to act for the trust. He acknowledged that he had not put in a replying affidavit to the affidavits of Mr Diamond and Mr Beggs in the action but junior counsel said that that was in accordance with his directions. It was put to him that he had a lot of things happening between the Bass Ireland meeting with the plaintiff on 29 September and the meeting which both parties agreed took place on 7 October. In an effort to fit everything into that short space of time he said he may have met Mr Diamond in Tatu on the same day as his phone call or the next day. In evidence in chief he had stated that he had met him the very next day after the phone call. He was unsure of the dates. He said many other witnesses including his two sons had seen Mr Diamond discussing the matter with him in Tatu.

[35] In re-examination he said that Mrs Wolsey was a formidable person with a full grasp of business. He agreed that the role of Fairmount was really to ensure that transactions were not fraudulent but were lawful.

[36] When asked by myself about his version of the initial meeting with Mr Diamond he repeated his account. I then asked him was that all and he then volunteered for the first time that Diamond had asked him about turnover before offering £3.125m for the pub. He said it had slipped his mind earlier. But he did not show Mr Diamond or hand him the valuation which he had. There was no hesitation on Mr Diamond's part. He never asked for any surveyor's report on Tatu or details of the staff or the gross profit or whether or not another floor could be squeezed into the property, before agreeing to pay £3.125m. I find this very unlikely.

[37] Mr Gordon McElroy then gave evidence on behalf of the defendant. He is a partner in M K B Russell, solicitors and the defendants are his clients and have been in one way or another for about 13 years. He dealt with the pension fund and the role of Fairmount in regard to that. It arose from statutory intervention to make sure the beneficiaries were not exploited by trustees. It was there to ensure that fair value was attained.

[38] Of Mrs Linda Wolsley he said that she was very forceful and that she must be kept fully informed and that decisions were not taken without her input. He said leases must be executed by all the trustees and that the trustees cannot delegate under this deed. This proved to be incorrect. At the invitation of the court he looked overnight for relevant documents relating to the trust.

[39] Following initial discussions with Mr Wolsey in mid-October of 2005 in connection with each transaction the witness met Mr Todd of PWC on Friday 21 October. He, Todd, explained that the level of valuations obtained for the pension fund currently were very suitable for the A Day requirements coming up. It was important that the value of the assets should not exceed certain limits, he was told, or else the surplus would be taxed at 55%.

[40] He dealt with the conveyancing issues to deal with Tatu and they were all in relation to Tatu not to the retail premises at that time. He spoke at the meeting of 9 November, although he had spoken to Mr Peter Conlon beforehand. Mr McElroy conveyed to him the PWC advice and said that the shops were not going to be included in the sale. Mr Conlon had come back to him after that phone call and said they should be included and that they sought some comfort and suggested a side letter. He was told that was not possible. The meeting was to give them some comfort with regard to the sale of the shops. That concluded the evidence on Thursday 18 October.

[41] On Friday 19 October there was some discussion about documents which Mr McElroy had obtained. It transpired that Conall Wolsey had been added as a trustee in 2003 but also Luke in 2006. I gave leave to both sons being joined as defendants and to both parties to amend their pleadings. Mr McElroy resumed his examination-in-chief. The documents gave him some difficulty as he had not been aware that the young man had been added as a trustee and it meant that at least one conveyance of his was defective.

[42] Among the documents located was the trust deed and it transpired from Clause 5.3 of that that there was indeed a power on the part of the trustees to delegate their powers. He dealt with the meeting of 9 November. He said that he explained to those present that because of A Day the trustees were not in a position to sell and, according to him would not be until clear blue water had passed after A Day. Mr Diamond wanted some comfort such as a letter that he would keep in his safe and which would never see the light

of day to confirm that Mr Wolsley was going to sell. The witness said that he said then that that was exactly what they could not have. The only reason they would want that would be to enforce it in the future and then it would see the light of day and we could not allow that to happen.

[43] Listening to this evidence it occurred to me to question whether the conduct of the trustees was entirely proper vis a vis the Revenue Commissioners. If in fact this offer of £2m existed ought they to have revised their valuation previously received with regard to the value of their properties? But there was no plea of ex turpi causa on the part of the plaintiff here and the matter was not raised before me. I will say no more in the circumstances at this stage.

[44] Mr McElroy had rejected Mr Conlon's suggestion of simultaneous contracts because of the advice from PWC. Mr Diamond had not said that the purchase of Tatu was conditional upon him purchasing the shops. His view when he first heard from Mr Conlon on and later after 19 April 2006 was that there was no contract at that stage. On 13 June 2006 he did have instructions (contrary to his client's evidence) to forward a contract to Mr Conlon with regard to the retail purposes. The refusal of any letter, whether to be kept in a safe or otherwise, giving comfort to Mr Diamond was a clear denial of any intention of entering into legal relations. The initial negotiations between the parties had been superseded by subsequent events. It is never suggested in correspondence between the solicitors that the sale of Tatu was part of a larger agreement.

[45] On the issues to whether the second defendant, the trustees of the pension fund, were bound by Mr Wolsey I find the evidence of this witness more convincing with regard to the role of Mrs Linda Wolsey than as to whether anything was expressly said in front Mr Conlon and Mr Diamond. I prefer the view of Mr Conlon in that regard. In regard to the other matter he would not dispute there was a gentleman's agreement but it was not legally binding. That completed the evidence for the defendant. I now pass to consider the issues in the action in the light of the relevant law.

[46] The defendants in their defence and amended defence relied on Section 2 of the Statutes of Frauds (Ireland) 1695 as rendering any alleged oral contract for the sale of the premises at 703-707 Lisburn Road as unenforceable. It is interesting to look at the statute. Its full title and opening words are as follows:

> "An Act for prevention of Frauds and Perjuries.
>
> For prevention of many fraudulent practices which are commonly endeavoured to be upheld by perjury, and subornation of perjury."

Section 2 of the Act provides that:

> "no action shall be brought … whereby to charge the defendant … upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them … unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

[47] In Lowry v Reid 1927 NI 142, C.A., the Court of Appeal in Northern Ireland reversed the trial judge and held that the appellant having given up his own property to his detriment on the faith of his mother's representations, was entitled to a decree for specific performance to carry these representations into execution, and that acts of part performance by the appellant were sufficient to take the case out of the operation of the statute of frauds. As indicated previously in this judgment the court was firmly of the view that one had to look at the terms of the alleged contract between the parties to ascertain whether the alleged acts of part performance referred unequivocally to such an agreement. I respectfully agree with that view as expressed by Andrews LJ at page 157. Insofar as certain of their Lordships in Steadman v Steadman 1976 AC 536 may have expressed dicta to the contrary I take the view that I should follow our own Court of Appeal. However, for the avoidance of doubt, the outcome of the case would not be altered by following the approach of beginning with the acts of part performance. On the essential point I am satisfied there is no conflict between those decisions. Andrews LJ, page 154 stresses that the doctrine of part performance is a purely equitable one.

> "Its underlying principle is, that the court will not allow a statute which was passed to prevent fraud to be made itself an instrument of fraud. In other words, the court disregards the absence of that formality which the statute requires when insistence upon it would render it a means of effecting, instead of a means of averting, fraud. The question in each case is, whether the plaintiff has an equity arising from part performance which is so affixed upon the conscious of the defendant that it would amount to a fraud on his part to take advantage of the fact that the contract is not in writing. The right to relief rests not so much on the contract as on what has been done in pursuance or in execution of it. Under the statute the

> note of memorandum of the contract must be signed by the party to be charged. Under the doctrine of part performance the equity must be possessed, not by the party to be charged, but by the plaintiff – the person who seeks relief; and this equity arises from his part performance of the contract."

[48] I find a similar statement in the judgment of Lord Reid at page 540F in Steadman. "If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid he will not then be allowed to turn round and assert that the agreement is unenforceable. Using fraud in its older and less precise sense, that would be fraudulent on his part and it has become proverbial the courts of equity will not permit the statute to be made an instrument of fraud." For completeness the conclusions I reach are not inconsistent with the helpful summary of the law by Barron J in Mackie v Wilde (1998) 2 IR 578.

[49] It seems to me that the plaintiff here must fail in several different respects in this action. Firstly, if one looks at the terms of the contract I find that it was made clear that this was a gentleman's agreement not intended to be legally binding. I need not repeat the evidence and findings above which lead to that conclusion. What is a gentleman's agreement? In Chambers English Dictionary it is defined as "an agreement resting on honour, not on formal contract." It is based on the concept, and these words were used in this case, that a gentleman is a man of his word and will honour his word even if he is not legally obliged to do so. This was the assurance, I find, that Mr Wolsey gave to Mr Diamond. But the implication is also clear that the duty on Mr Wolsey is in honour not in law. The disappointed party to a gentleman's agreement has no remedy in law, unless he is able to bring himself within a relevant equitable doctrine. In the context here where the defendants had good reason to make clear that they could not be legally bound until A Day on 6 April 2006, the actual agreement between the parties was that they would not be legally bound. In such circumstances it would be inequitable to now find that the defendants are legally bound.

[50] Secondly from that, one has the plain words of the statute and the dicta, which could be replicated from other cases, with regard to the doctrine being designed to avert fraud. In this case I do not consider that Mr Wolsey set out to defraud Mr Diamond. I say that for two reasons. Firstly, as indicated above it is my finding, on the balance of probabilities and in the light of oral and documentary evidence, that Mr Wolsey did intend until shortly after 13 June 2006 to sell the retail properties to Mr Diamond, through their respective corporate interests, for £2m. The initial agreement in the Spaniard to sell all the property for a single price was varied promptly by Mr Wolsey and I find he was entitled to so vary it. His position from shortly after 11 October 2005 until shortly after his solicitor's letter of 13 June 2006

was that he was bound in honour only to sell (or, at least facilitate the sale of) the retail properties for £2m. This is a very different matter from his setting out to induce Mr Diamond to buy the Tatu Bar on the promise of selling him the retail properties for £2m. I do not think he set out to do that.

[51] Secondly, in this regard, the plaintiff expressly accepted that they were not making the case that Mr Diamond had been induced to purchase the Tatu at an overvalue. To use Lord Reid's expression, the plaintiff had not prejudiced its position on faith of the agreement. Tatu was an independent and commercially sensible purchase. The only expense which the plaintiff incurred was some very trivial expense with regard to asking it's solicitors to write letters with regard to the sale of the retail premises. Enough was said at the trial to indicate that the defendants would very vigorously defend any suggestion that the sale of Tatu was at an overvalue e.g. by calling valuation evidence to say the sale price was the market valuation at the time.

[52] A separate defence relied on by the second defendants to this action is that the retail properties were in fact owned by them as trustees for the Beannchor Pension Fund, the beneficiaries of which were Mr and Mrs Wolsey. The amended amended statement of claim alleges that Mr Wolsey held himself out "as having all requisite capacity and authority" to enter into a contract to sell the shops. Having considered the matter I find that no express representation was made by Mr Wolsey or Mr McElroy that he had authority solely and without the assent of any of the fellow trustees to commit to the fund to such a sale. I note that other transactions by this pension fund do seem to have been signed by at least one other trustee. It is important to bear in mind that Mrs Wolsey and Mr Wolsey have been separated for at least ten years and are divorced. I do not think there can be any presumption that he was authorised to commit the fund without her prior agreement. There is no evidence before the court that she did agree, although there is some indication that she would have been aware that negotiations, at least, were taking place. There was no document indicating that Mr Wolsey did have any express authority from the trustees to commit them, particularly to a large transaction of this sort. Indeed I heard from the solicitor to the effect that searches could find no such document and he did not believe it to exist. Mrs Wolsey is, on the evidence, a woman of independent judgment with independent interests which may not always coincide with those of her ex-husband, although they work constructively together in the business, she being Company Secretary of the first defendant. Although, therefore, it is not strictly necessary for me to do so, I consider that I should record that the plaintiff would fail on this ground also. As the defendant pointed out the burden of proof here is on the plaintiff and they have not discharged that burden in this respect.

[53] I now deal with the remaining matters. I have found that Mr Wolsey was in breach of the gentleman's agreement to sell the retail properties for

£2m. However it does not seem to me, for the reasons set out above that his conscience is "so affixed", to use the words of Andrews LJ that the plaintiff is entitled to relief by way of damages against him. I say that partly because he was a trustee as well as a beneficiary of this pension fund. I say further that on the authorities that any right to damages usually only arises where the court has jurisdiction to grant specific performance. I found I do not have such jurisdiction on the facts in this case. I have taken into account the submission of counsel for the plaintiff as regard to the personal liability of Mr Wolsey based on Section 92 of the Judicature (NI) Act 1978 and Snell on Equity (31st Edition) 18-11. I am not persuaded that this is an appropriate case in which to make an order for damages against Mr Wolsey personally but I will hear them on the subject of costs.

[54] As indicated I have found that the plaintiff has not shown that Mr Wolsey had actual authority to commit the pension fund nor that the pension fund through its trustees had made a representation to the plaintiff that he had such authority. Nor (per Chitty on Contracts, Volume 2, 31-075 and 31-056) do I find that the trustees have been negligent or are otherwise estopped from repudiating the purported agreement made herein, if such existed. It is one thing for the most qualified trustee to discuss possible sales of pension fund assets with third parties. It is another thing for the pension fund to be legally committed to such a sale, without any assent from the trustees or any signed written document evidencing a purported sale. I therefore find for the Defendants. I bear in mind the dictum of Sir Robert Megarry VC in Cowan v Scargill [1984] 2 All ER 750 at 761D.