**Neutral Citation No.: [2009] NICh 4** | *Ref:* **DEE7435**

*Judgment: approved by the Court for handing down* | *Delivered:* **12-03-09**

*(subject to editorial corrections)**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**CHANCERY DIVISION**

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**BETWEEN:**

**MAYNARD HAMILTON**

**Plaintiff;**

**-and-**

**KEVIN FRANCIS JUDGE, GARY JUDGE, DAMIEN JUDGE AND SEAMUS JUDGE**

**Defendants.**

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**DEENY J**

[1] This action relates to a disputed sale of lands at Obins Street, Portadown. The third defendant was the owner of a dwelling house No. 168 Obins Street. It adjoined the entrance to a much more extensive property immediately behind it. That property was principally a large yard but also included in the original or altered form the gardens of a number of other dwelling houses on Obins Street. The titles to the property were various and by then in the hands of the defendants but, the court was told, were all owned at the time of trial by Kevin Francis Judge.

[2] By writ of summons of 18 February 2008 the plaintiff contended that on or about 12 June 2007 he had negotiated a contract with the defendants for the sale of both parcels of land in the sum £2,250,000. While initially in their defence the defendants agreed to that date of 12 June 2007 it was common case on the evidence that the discussion which gave rise to the agreement relied on by both parties in different ways took place on 14 May 2007. However, the defendants from the beginning maintained that the consideration for the two parcels of land was to be £2,500,000 rather than £2,250,000. The matters to be decided by the court are essentially what was in

fact agreed and what, in the light of subsequent events, is the legally binding effect of any agreement. I will refer in due course to the issues for decision helpfully prepared by counsel. I note the counterclaim which the defendants put forward asserting a binding agreement and seeking specific performance of the contract for the sale of the lands in the sum of £2.5m. I note the plaintiff's amended defence to that counterclaim, which refers in turn to their amended statement of claim denying any binding agreement.

[3] Mr Tim Ferriss QC led Mr Park for the Judges and Mr C M Lavery QC led Mr Ronan Lavery for Mr Hamilton. It was agreed between counsel that Mr Ferriss would open the matter and call witnesses to establish what he contended to be a binding contract. It was further agreed between the parties that the discoverable documents in the action could be received in evidence in the court without formal proof. At the request of the court the parties were asked to clarify further agreement between them in a statement of "Issues for Decision by the Court". That was an agreement that the issue of the vendor's ability to convey good title at the requisite time and the evidence of any consequential loss if there was an entitlement to the same would be deferred until the judgment of the court on the issues as to the terms of any agreement and the binding or other nature of the same and the applicable remedies.

[4] The first task of the court therefore is to consider the evidence before it and decide what, if anything, was agreed between these parties. What had happened was that Mr Kevin Judge had for many years conducted a business in this large yard. He would buy plant and material from the liquidators of factory premises and then sell it on over the subsequent months. With the demand for more housing in the Portadown area and his own relatively advancing years (he told Mr Lavery in cross-examination that he was "over 60"), he was amenable to a sale of his yard which had become much more valuable than at the time of his acquisition of it in the 1970s. Indeed he had received a verbal offer for the yard from a Derek Harrison who was then a property developer in County Armagh. This, said Mr Kevin Judge, and Mr J P Hagan his solicitor bore this out, was in the sum of £2.25m. Other persons may have expressed interest as well. Mr Hamilton came to learn of this, apparently through a man who built houses for him, Eugene McCann. Mr Hamilton was a property developer. He came to Mr Judge's yard on a date which I find to be 14 May 2007, although he himself did not remember the precise date. There was a considerable degree of agreement between the witnesses as to what occurred on that day but, crucially, disagreement as to the amount of money agreed. Mr Judge explained the circumstances in which an offer was forthcoming from Mr Hamilton of £2.5m on which he shook hands. Mr Hamilton's contention was that, knowing of Mr Harrison's offer of £2,250,000 he persuaded Mr Judge to agree to sell him the land for the same amount although he had earlier refused Mr Harrison. He said that was because he, Mr Hamilton, was in a position to complete quickly. He said that he told Mr Judge that many offers would fly in the air but he was there to do

business. This is not a persuasive argument before the court as it was also common case between them that there would be no vacation of the premises until at least 25 October, which is the first date for completion inserted in the documents later. Both parties seem to think that they had in fact agreed a six month delay, i.e. to November, and subsequently this was postponed until January 2008 and finally 11 February 2008. It is hard to see therefore why Mr Judge would agree to sell to Mr Hamilton for exactly the same price as he had refused from Mr Harrison on several occasions.

[5] More generally I found the evidence of Mr Kevin Judge credible. I do not say that his memory was exactly right in every respect but I found it generally credible. He was skilfully cross-examined by Mr C M Lavery but it seems to me that he stood up to that well and that his reluctance to agree to some propositions from Mr Lavery was in fact justified. I will return to the issue of "subject to contract" in due course.

[6] The same could not be said of Mr Maynard Hamilton. I did not find his demeanour in giving evidence, nor the evidence itself, convincing. For example, he told me that he had been asking the bank for £800,000 and that he himself was putting in £850,000 towards the purchase. However when one looked at the banking documents one found quite different figures. He was cross-examined by Mr Ferriss QC, with equal skill to that of Mr Lavery but he did not stand up to it well. There are inconsistencies between his evidence-in-chief and his earlier affidavit in the action. There were significant inconsistencies in his contentions about the nature of the deposit. While admitting he had agreed a 15% deposit he did not seem to think that there was anything wrong in then forwarding only a 10% deposit. His memory was inconsistent about a number of quite important matters. He did confirm and I find that he subsequently signed Memoranda of Sale on 27th June 2007 without the agreed price being inserted. He expressly authorised his then solicitor Mr Paul Ferris to release those documents to the solicitors for Mr Judge. He gave him authority to send those. Most unfortunately, he did not hear anything more about the conflict of price until February 2008.

[7] Mr Judge has the further assistance in establishing his case that he made a contemporary note of the price he had agreed with Mr Hamilton in a diary notebook which he kept. It was not suggested that that document in any way of a forgery and I find it to be authentic. It stated the price at the figure he now contends for.

[8] A further considerable support to him was the evidence of his solicitor Mr John P Hagan of Portadown. He had an attendance note made on 14 May 2007. Mr Kevin Judge had telephoned him on that day to say that he had agreed £2.5, not with Mr Harrison, as Mr Hagan expected but with Mr Maynard Hamilton. That also recorded that the deposit was to be in the sum of 15%. These together make a strong case in favour of Mr Judge's version of

events. Against it Mr Hamilton faces the difficulty that he had no contemporary note and he did not speak to his solicitor until 12 June, almost a month later. I note that that was the date put in the statement of claim and endorsed on the writ of summons here. At that time Mr Ferris noted the settlement figure in the sum of £2,250,000. That gave sufficient time for Mr Hamilton to have forgotten what he had agreed with Mr Judge. This is the likely explanation here although I do not definitively rule on whether or not he forgot or for some reason thought that it would be advantageous to him to try and alter the price. It is right to say that the deposit he then paid in July 2007 represented 10% of his version of the contract price ie. £2,250,000. However this was not spelt out in the correspondence. Indeed it is most unfortunate that Mr Ferris, Mr Hamilton's then solicitor, sent two signed Memoranda of Sale to Mr Hagan's office leaving them to fill in the prices, without stating what the overall price was to be. As explained above the two properties were owned by Mr Judge and his son Damien and, at the time, his other sons. It was not unreasonable that the sub-division of price between the Judges might be left to them but obviously the solicitor should have inserted in the letter the overall price which should not be exceeded between the two contracts.

[9] For the reasons set out above, and taking into account Mr Hamilton's further argument of communications sent at a much later date to the Judges relating to bank borrowing and the evidence of Damian Judge, Eugene McCann and Paul Ferris, I am satisfied that the agreement between the parties on 14 May was for sale of the two parcels of land together in the sum of £2.5m. In argument counsel for Mr Hamilton referred to and relied on the Statute of Frauds(Ireland) 1695 but I have concluded that this does not ultimately assist him for the reasons which I will now identify. Mr Hagan's office sent the necessary documents of title to Mr Ferris. As I said he returned signed contracts with no price inserted. Mr Hagan's office then returned the contracts on 17 July 2007 with a total consideration in the sum of £2.5m. Most unhappily, Mr Ferris, possibly because he was initially away on holiday, never checked these contracts against his instructions. The difference in price between the parties does not seem to have been noticed, rather remarkably, until the amended date of completion on 11 February 2008.

[10] In the interval there were significant acts of part performance. I turn for a moment to refer to the authorities relevant to this issue. I am bound by, and respectfully agree with, the decision of the Court of Appeal in Northern Ireland in Lowry v Reid (1927) NI 142. The court there emphatically rejected the contention of counsel for the respondents that the court should establish the acts of part performance first and then turn to the terms of the contract. As Andrews LJ put it at page 157:

> "Indeed, it would be, in my opinion, impossible to apply the proposition as so stated in practice; for, I

> ask, could it be said that the acts of part performance referred unequivocally to an agreement the terms of which were ex hypothesi not known, unless, indeed, they were acts of such a clear, cogent and conclusive character that they embodied and themselves proved the actual terms of the agreement, in which case it would be wholly unnecessary for the plaintiff to make any reference to or rely in any way upon the parol agreement."

[11] Andrews LJ went on at page 158 to quote with approval a passage in the judgment of Lord O'Hagan in Madison v Alderton 8 AC 467 at 483:

> "It (i.e., the act which shall amount to a part performance) must be sufficient of itself, and without any other information or evidence, to satisfy a court, from the circumstances it has created and the relations it has formed, that they are only consistent with the assumption of the existence of a contract, the terms of which equity requires, if possible, to be ascertained and enforced."

See also Steadman v Steadman (1976) AC 536, which is an authority, inter alia, for the need to plead the Statute of Frauds. I bear in mind that English authorities on this topic have to be read with caution because different statutory provisions apply. But I note that Lord Simon of Glaisdale at page 559 also quoted from Madison v Alderton. He cites the Earl of Selborne LC at 479:

> "All the authorities show that the acts relied upon as part performance must be unequivocally, and in their own nature, referable to some such agreement as that alleged."

He proceeds to emphasis, as do other members of the House, that the acts of performance need not prove every element of the agreement but must refer to "some contract". See also Mackie v Wilde [1998] 2 IR 570, S. Ct.

[12] The acts of part performance here are entirely compelling. They include the exchange of contracts between the solicitors. They include, importantly, the auctioning of the contents of the yard by Mr Kevin Judge with a view to concluding his business and giving vacant possession to Mr Hamilton. Indeed Mr Judge said that he had subsequently had great difficulties because he had wound up his business in this way, leaving some lesser part of it to his sons to carry on in another smaller yard. Furthermore, Mr Hamilton's servants or agents, with the consent of Mr Judge, carried out

the digging of a number of bore holes in the yard with a view to assisting in preparations for house building on the land. Even if there were no note or memorandum (contrary to my finding below) there are sufficient acts of part performance here.

[13] I consider that Mr Hamilton would lose in any event on one, or in all likelihood two, further bases. The General Conditions of Sale of the Law Society of Northern Ireland (2nd Edition), which governed the exchange of contracts between the solicitors here. provides at 5.1:

> "The contract (other than in a sale by auction) shall be formed upon receipt by the purchaser or his solicitor of a copy of the purchaser's offer as accepted by the vendor (or on his behalf)."

The purchaser's solicitor did receive a copy of the purchaser's offer as accepted by the vendor. That acceptance by the vendor included the insertion of figures in the two memoranda sale amounting to a total of £2.5m. I incline to the view that by sending the memoranda of sale on the 27 June 2007, signed by Mr Hamilton as purchaser but without the price being inserted an offer was being made to the solicitors for the vendor which they were entitled to accept. The need for certainty of terms is supplied by the finding of the court that in fact the parties have agreed £2.5m prior to the sending of those contracts on 14 May 2007. However, it is not necessary for me to rule finally on that point.

[14] Even if there is any doubt as to whether that did constitute an offer there can be no doubt that if the return of the contracts, with the price now inserted and signed by all the parties, by the firm of J P Hagan on 17 July 2007 was not an acceptance of Mr Hamilton's offer it must, at least, have been an offer itself. On that basis Mr Ferriss QC submits that there was acceptance by or on behalf of Mr Hamilton by silence and conduct. As Chitty on Contracts, Volume 1, 30th Edition, para. 2-076 said:

> "An offer can be accepted by conduct; and this has never thought to give rise to any difficulty where the conduct takes the form of a positive act."

The conduct here of Mr Hamilton in standing by while Mr Judge sold off the means of his business and even more in carrying out bore holes would in my view amount to conduct. However as the learned authors go on to show the inaction on the part of Mr Hamilton and his solicitors in this matter may also constitute acceptance. This matter is consistent with the alternative approach put forward by counsel for the Judges. They submitted that where one party chooses to sign a contractual document leaving parts of it blank they are under a duty to take reasonable care. Mr Lavery relied, inter alia, on D'Silva

v Listerhouse Development Limited [1971] CH 17 but it must be borne in mind that the English practice as to the exchange of contracts is significantly different from that in Northern Ireland. Nor do I feel he is assisted by the decision of Gillen J in Redevco UK 1 Limited v W H Smith Plc [2008] NIQB 116.

[15] One factual matter remained in dispute between the parties. It was the contention of Mr Lavery for the plaintiff that the oral agreement between he and Mr Ferris, whatever the amount, was "subject to contract". Mr Lavery put to Mr Kevin Judge that he knew that until there were signed contracts either party could walk away. Mr Judge said no to that. It had never happened to him over a series of deals. There had been a telephone conversation between them where Mr Hamilton had rudely conveyed that he was abandoning the deal. But Mr Judge had not considered whether or not he was entitled legally to do so. Mr Judge only admitted that was possible. In any event I am quite satisfied there was no express statement between he and Mr Hamilton that the agreement was not binding until signed contracts had been exchanged. Mr Hamilton in his evidence in chief did not say that. I should say for these purposes that I have checked not only my note but the digital audio recording of his evidence. What he and Mr Judge said was really very similar. Mr Hamilton said that after they shook hands Mr Judge said we would have to instruct our solicitors. This is very similar to Mr Judge's own evidence that everything had to be done through the solicitors. I do not think the parties turned their minds to whether or not they had a legally binding contract. If the issue of price had been proven to be in dispute before there was a note of memorandum in writing or before the acts of part performance neither party would have been able to enforce the contract but that is a different matter from the nature of their oral agreement.

[16] In the circumstances I do not think I need set the matter out at length but I accept the submissions of Mr Ferriss based on the decision of the House of Lords in Gallie v Lee [1971] AC 1004 and the Court of Appeal in England in United Dominion Trust v Western [1976] 1 QB 513. As Lord Wilberforce said in Gallie v Lee at page 1027:

> "In my opinion, the correct rule, and that which in fact prevailed until Bragg's case [1911] 1 KB 489, is that, leaving aside negotiable instruments to which special rules may apply, a person who signs a document, and parts with it so that it may come into other hands, has a responsibility, that of the normal man of prudence, to take care of what he signs, which, if neglected, prevents him from denying his liability under the document according to its tenor. I would add that the onus of proof in this matter rests

> upon him, ie. to prove that he acted carefully and not upon the third party to prove the contrary."

See also the strongly expressed opinion of Lord Reid. I am satisfied, partly because of the judgment of Scarman LJ in United Dominion Trust that these dicta are of wide application and cover the factual situation before me.

[17] Mr Hamilton claimed and Mr Ferris accepted that he had not sent copies of the completed contracts to Mr Hamilton after receiving them from Mr Hagan. I have already mentioned that Mr Ferris had not checked them himself. It is manifestly obvious therefore that reasonable care was not exercised on the part of Mr Hamilton. The relations between him and his then solicitor need not be further addressed by me at this time.

[18] For these reasons I am satisfied that Kevin Judge and Damien Judge are entitled to specific performance of the contracts sent by Mr Hagan on their behalf on 17 July 2007, subject only to the points reserved by the parties as to the vendor's ability to convey good title in February 2008. I am not invited to at this stage and do not rule on any issues of consequential loss. I find the case for specific performance made out as sought and do not further address the issue of damages in lieu of contract. Clearly the purchaser is not therefore entitled to the return of his deposit as he will have to complete the contract.

[19] Reverting to the issues paper prepared Mr Ferris, and for the avoidance of any confusion I would therefore answer as follows:

(i) Yes.
(ii) Sale of the two properties in a total sum of £2.5m, with 15% deposit, completion to be delayed approximately six months.
(iii) Yes.
(iv) Not applicable but there were sufficient acts of performance if there had not been a sufficient note of memorandum compliant with the Statute of Frauds (Ireland) 1695.
(v) Yes.
(vi) Yes.
(vii) Specific performance.
(viii) No.