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Judgment: approved by the Court for handing down | *Delivered:* **23/11/10**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN:

MAYNARD HAMILTON

Appellant;

-and-

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

Respondents.

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Before: The Lord Chief Justice, Higgins LJ and Coghlin LJ

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HIGGINS LJ

[1] This is an appeal from the decision of Deeny J whereby he ordered that the respondents were entitled to an order for specific performance of a contract relating to the sale of two parcels of land at Obins Street, Portadown, Co Armagh, subject to the vendor's ability to convey good title. In addition he ordered that the appellant should pay interest in the sum of £233,981.30 together with interest thereon to the date of completion. The third respondent Damien Judge was the owner of a dwelling house situated at 168 Obins Street. To the rear was a large yard which included the gardens of a number of other dwelling houses in Obins Street, the titles to which were, at the material time, in the hands of the respondents. By the time of trial all the property, which comprised both parcels of land, was owned by the first respondent Kevin Judge. The parcels of land comprised, at the material time, a valuable site for development near the centre of Portadown.

[2] By a Writ of Summons, specially endorsed, and dated 18 February 2008 the appellant sought, inter alia, a declaration that a contract for the sale of both parcels of land at Obins Street, was null and void by reason of mutual mistake and/or failure to form a common intention, namely failure to agree the price of the lands. In the alternative the appellant sought a declaration that the agreed price was the sum of £2,250,000.00 (£2.25m). By the Writ of Summons the appellant contended that he had negotiated a contract with the

respondents on or about 12 June 2007, for the sale of both parcels of land for the sum of £2.25m. At the trial of the action it was common case that the negotiations that gave rise to the agreement to sell took place on 14 May 2007. In their Defence and Counterclaim the respondents denied the appellant's claims and counterclaimed asserting a binding contract and seeking an order for specific performance of the contract for the sale of the two parcels of land in the sum of £2,500,000.00(£2.5m). The appellant's amended Defence to Counterclaim denied any binding agreement and pleaded the Statute of Frauds (Ireland) Act 1695. At trial it was agreed that the issues relating to good title and consequential loss would be deferred until after judgment on the terms of any agreement and the binding or other nature of any agreement and the applicable remedies.

[3] Mr Kevin Judge had for many years carried on business from the yard at the rear of 168 Obins Street, Portadown. The other respondents were his sons. As Kevin Judge was advancing in years he was amenable to a sale of all the lands. He had rejected several offers of £2.25 from a property developer Mr Derek Harrison, some time previously. On 14 May 2007 the appellant called at the yard. Negotiations took place and the two men shook hands. There was considerable agreement about what took place, but disagreement about the agreed figure. Mr Kevin Judge maintained that the agreed figure was £2.5m and the appellant maintained that it was £2.25m

[4] The solicitor who acted for Mr Kevin Judge was Mr Hagan who was contacted by Kevin Judge on 14 May 2007. Mr Hagan completed an attendance note on that occasion in which he noted the name of the purchaser and the terms of the agreement as £2.5m with a deposit of 15%. The appellant first consulted his solicitor about the transaction on 12 June 2007, over four weeks after the meeting at the yard. The appellant informed Mr Ferris that the agreed price was £2.25m which he duly noted. The Specially Endorsed Writ of Summons alleged, wrongly, that 12 June 2007 was the date of the negotiations and agreement between the appellant and Mr Kevin Judge.

[5] In due course Mr Hagan forwarded to Mr Ferris the usual documents of title. An issue arose about a right of way which led ultimately to a special endorsement on the Memoranda of Sale. On 26 June 2007 Mr Ferris then returned to Mr Hagan two Memoranda of Sale signed by the appellant one in respect of each parcel of land, but with no figures inserted for the consideration for the agreement. This was done deliberately as Mr Ferris was unaware of how Mr Kevin Judge wished to divide the price between the two parcels that were variously owned by the respondents. The letter which accompanied the Memoranda of Sale stated that the price was not endorsed as the appellant's solicitor needed to speak to the appellant about "the subdivision between the two contracts. Perhaps you would let us have your views on this". The letter contained no reference to the overall sum. The appellant was slow to pay the deposit. Mr Kevin Judge contacted the

appellant about this and there was a heated exchange about it. Eventually a deposit was paid on 4 July 2007 but this represented not 15% of the purchase price as stated by Mr Kevin Judge but 10% of the purchase price as maintained by the appellant, namely £225,000. Neither Mr Kevin Judge nor his solicitor complained about the amount of the deposit. The letter from Mr Ferris stated that the deposit was conditional on the Special Conditions being adhered to, otherwise the deposit should be returned. The appellant did not dispute that a deposit of 15% had been agreed but nonetheless instructed his solicitor to send only 10%.

[6] On 17 July 2007 Mr Hagan returned to Mr Ferris the two Memoranda signed by the appellant, now duly signed by Mr Kevin Judge with the consideration inserted in respect of each contract. One contract contained the price of £2.25m and the other £250,000 making a total consideration of £2.5m. These contracts were not checked against the appellant's instructions, probably due to absence on holiday and the difference in the total consideration remained unnoticed until the amended date of completion, namely 11 February 2008 (the original date being November 2007). In the meantime the appellant was engaged in obtaining suitable finance in order to complete the sale and develop the land. Documents completed as part of this process stated that the overall purchase price was £2.25m. Mr Kevin Judge wound down his business and engaged Wilson's Auctions to dispose of his outstanding stock. In addition he permitted the appellant's servant or agents on several occasions to carry out drilling of bore holes in the yard as part of the appellant's preparations for developing the land by the construction of dwelling houses on it. On discovery of the total amounts entered in the Memoranda of Sale, completion of the sale and purchase of the lands broke down and the proceedings outlined above were commenced. At the trial before Deeny J each party maintained that his version about the purchase price was correct. Thus a major issue before the learned trial judge was the credibility of the appellant and Mr Kevin Judge and the weight to be attached to their evidence.

[7] It was contended by the appellant that he persuaded Mr Kevin Judge to sell to him at the same price that he had refused Mr Harrison, on the basis that he, the appellant, was there to do business and was in a position to complete the sale quickly. The learned trial Judge did not find that a persuasive argument as Mr Kevin Judge had refused the offers of Mr Harrison at the same figure. The Judge found Mr Kevin Judge, who had made a contemporaneous note of the figure in a diary, to be a credible witness and noted that he was supported in his claim about the figure of £2.5m by testimony from his solicitor about the price as well as the size of the deposit. The learned trial Judge noted that it was common case that the earliest date for completion was 25 October 2007, though this was later extended to January and then to 11 February 2008. In those circumstances the Judge found it "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". The learned trial judge found Mr Kevin Judge to be generally credible. He could not say his memory was exactly right in every respect but found it "generally credible" and that he stood up well to skilful cross-examination. He did not form the same impression of the credibility of the appellant. He stated that he did not find his demeanour or his evidence convincing. The Judge noted inconsistencies in his evidence about bank loans and the amount he was prepared to advance in cash towards the sale, when compared with documents from the Bank. Equally he was unimpressed with the appellant's evidence that he considered there was nothing wrong with sending a deposit of 10%, when he was well aware that he had agreed 15%. The Judge noted that the deposit which in fact was sent was 10% of £2.25m. However Mr Judge had to pursue the appellant for the deposit which was only paid after correspondence between the solicitors and telephone conversations between Mr Judge and the appellant, during one of which the appellant threatened to abandon the agreement. Ultimately the Judge was satisfied that the agreement reached between the two parties on 14 May 2007 was for the sale of the two parcels of land in the sum £2.5m. He did not consider it unreasonable that the subdivision of the total price was left to the respondents as the two parcels of land were owned at that time by all of them and it was a matter for them how the consideration was distributed between the various properties. The Judge stated that the "likely explanation" for the error by the appellant in informing his solicitor that the price was £2.25m was due to the passage of time from the negotiations on 14 May 2007. The appellant had simply forgotten the true price. However the Judge did not rule definitively that the explanation was that he forgot the price or whether there was some other reason whereby the appellant thought "it would be advantageous to him to try and alter the price". The Judge noted that other documents relating to loans to the appellant to finance the purchase and development of the site stated the total price as £2.25m. However the learned trial Judge considered the competing claims but preferred the evidence of Mr Judge as to the total price agreed between them.

[8] It was contended on behalf of the appellant before the learned trial Judge that the oral agreement between the appellant and Mr Kevin Judge was "subject to contract". The appellant did not give evidence to this effect. On reviewing the evidence the Judge was satisfied that the evidence of each of the principal parties was very similar, that there was no reference to "subject to contract", but that each agreed that the matter would then have to be taken forward by their solicitors. He rejected the contention that the agreement made on 14 May 2007 was "subject to contract" being satisfied that there was no express statement between the appellant and the respondent that the agreement made on 14 May 2007 was not binding until signed contracts had been exchanged. The Judge did not think that either party had turned his mind to whether or not they had a legally binding contract. The learned trial Judge stated at paragraph 15 of his judgment –

> "If the issue of price had been proven to be in dispute before there was a note or 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."

[9] At paragraph 9 of his judgment the learned trial judge referred to the submissions made on behalf of the appellant in which he relied on the Statute of Frauds (Ireland) Act 1695. The judge found that this legislation did not ultimately assist the appellant for the reasons which he then set forth in the remaining paragraphs of his judgment. The reasons were that there was compelling evidence of significant acts of part performance which rendered a written memorandum setting out the terms of the contract including consideration, as required by the Statute of Frauds (Ireland) Act 1695, unnecessary. The learned trial judge then proceeded to set out the relevant law relating to part performance and the acts of part performance which he found to be significant. They were three in number. Firstly, the exchange of contracts between the solicitors, secondly, the auctioning of the contents of the yard with a view to winding up the business conducted there by Mr Kevin Judge and thereby ensuring vacant possession, and thirdly, the digging of test boreholes in the yard to further the development of the site for multiple housing. The learned trial judge then considered two other bases on which he considered that the appellant would not succeed in his claim. The first was that the Memoranda of Sale, without the price inserted, sent by the appellant's solicitor to the respondents' solicitor amounted to an offer which was accepted by the respondent and the contract was formed when the two documents were then returned to the appellant's solicitor. The General Conditions of Sale of the Law Society of Northern Ireland which govern the exchange of contracts between solicitors provides at paragraph 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)."

[10] The court's finding that the parties had agreed the price at £2.5m on 14 May 2007 before the sending of the Memoranda of Sale supplied the requisite certainty as to the consideration required by law. However the learned trial judge did not find it necessary to make a final ruling on this point.

[11] The second basis was that if the sending of the Memoranda of Sale without the insertion of the price was not an offer, the return of that Memoranda to the appellant's solicitor with the price inserted certainly was an offer, which was accepted by the subsequent silence and conduct of the

appellant. He referred to Chitty on Contracts 30th Edit Vol. 1 Chp 2 para 076 where it states –

> "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."

[12] The judge found that the conduct of the appellant in standing by whilst the respondent sold off the means of his business and the digging of test boreholes would amount to such conduct. Furthermore he considered that the inaction on the part of the appellant and his solicitor in not checking the Memoranda on their return might amount to sufficient acceptance of the offer.

[13] A further basis on which the judge would have found in favour of the respondents was on the principle that a person who signs a document and then parts with it in certain circumstances in which it may come into the possession of another, cannot deny his liability under the document if he has not taken prudent care of what he has signed. He accepted the summary of this principle as stated by Lord Wilberforce in Gallie v Lee 1971 AC 1004 where at page 1027 he said –

> "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."

[14] The learned trial judge considered this principle of wide application and that it covered the factual situation presented in this case.

[15] In advance of their submissions a list of issues, or questions for decision, was prepared and provided to the judge for his assistance. For the avoidance of doubt the judge set out in the last paragraph of his judgment his answers to those issues or questions. I set out below the issues as presented to the judge and his answers to them.

"1. Did the parties enter into a binding contract with each other on 14th May 2007?

Yes.

2. If the answer to 1 is yes, what were the terms of such contract?

Sale of the two properties in a total sum of £2.5m, with 15% deposit, completion to be delayed approximately six months.

3. If the answer to 1 is yes, do the two written and completed documents, each entitled "Memorandum of Sale", both signed by Maynard Hamilton as purchaser and one signed by Kevin Judge as vendor and the other signed by Damien Judge as vendor, constitute sufficient written memoranda or notes of such contracts to comply with Section 2 of the Statute of Frauds (Ireland) 1695?

Yes.

4. If the answer to 3 is no, does the evidence disclose acts of part performance on the part of the vendors, sufficient to counter the purchaser's plea in reliance on Section 2 of the Statute of Frauds (Ireland) 1695?

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.

5. Do the documents entitled "Memorandum of Sale" as referred to at paragraph 3 above constitute a binding contract made between the parties?

Yes.

6. If the answer to 5 is yes, do such documents satisfy the requirements of Section 2 of the Statute of Frauds (Ireland) 1695?

Yes.

7. Subject to evidence on the issue of the vendors' ability to convey good title, and evidence of consequential loss, are the vendors entitled to a

remedy of specific performance, and/or damages for breach of contract?

Specific performance.

8. Is the purchaser entitled to:
   (a) Return of the deposit?
   (b) Any interest thereof?

   No."

The Grounds of Appeal are –

1. That the verdict was against the weight of the evidence.

2. There was no evidence on which the Judge properly directing himself on the law and the facts and taking full account of the evidence could reasonably have found –

   (i) that the appellant had agreed to purchase the premises in question for the sum of £2.5m;
   (ii) that the "deal" that was struck between the parties on 14 May 2007 was intended to create a binding contract subject only to the production of a memorandum in writing to satisfy the Statute of Frauds;
   (iii) that such a memorandum did in fact come into existence;
   (iv) that in any event there was part performance of the said agreement;
   (v) that the said deal was not subject to the (sic) entering into and signing by both parties of a formal agreement with knowledge and acceptance of all the terms contained therein and that this did not happen;
   (vi) that the appellant had not mistakenly or otherwise believed that the purchase price of the lands in question was £2.25m;
   (vii) that there was no mutual mistake between the parties which would have had the effect that no binding contract was ever entered into between them;
   (viii) that the signing by the appellant of the contracts with the purchase prices in blank enabled the respondents' solicitors to bind them in contracts at whatever price they inserted;
   (ix) that the return of contracts with the purchase prices left in blank by the appellant's solicitors constituted an offer within the meaning of the Law Society's Terms of Contract or at all to purchase the said lands and that the binding contracts were created when the contracts with the prices inserted by the respondents' solicitors were returned to the appellant's solicitors;

(x) that the appellant's solicitor had power to bind the appellant into binding contracts at all without the express authority of the appellant or alternatively only at the price of £2.25m;

(xi) that the appellant was bound in contracts by his or his solicitor's inaction or acquiescence in the contracts in which the purchase price had been inserted by the respondents' solicitor and returned to the appellant's solicitor.

[16] Mr C M Lavery QC, and Mr R Lavery appeared on behalf of the appellant and Mr Ferriss QC and Mr J Park appeared on behalf of the respondents. Detailed skeleton arguments were provided and supplemented by oral argument. The Court is grateful for the assistance provided by all counsel and I trust it is no disservice to them, if I summarise below the arguments put before this court.

[17] It was submitted on behalf of the appellant that this was a case of mutual mistake as to the total consideration for the two parcels of land. The judge made no finding that the adoption of a price of £2.25m and the payment of a deposit of 10% of that figure, was a dishonest tactic on the part of the appellant. It must therefore follow that this was the result of a genuine mistake and was consistent with the Bank documents relating to the appellant's application for finance. The findings of the judge that Mr Kevin Judge was a credible witness and the appellant not so, overlooked the evidence relating to the deposit which was highly damaging to the credibility of Mr Kevin Judge. It was objectively incredible that the latter should take no action on receipt of a deposit which represented 10% of £2.25m, when he expected, on his case, a deposit of 15% of £2.5m. This was particularly so as at the time Mr Kevin Judge was pursuing the appellant for the deposit. The evidence of the appellant about the amount of the loan sought and his personal financial contribution to the project, and the inconsistencies with his affidavit evidence, were not such as should have destroyed his credibility in the eyes of the court. This had to be contrasted, it was submitted, with criticisms of and deficiencies in, the evidence of Damien Judge.

[18] Mr C M Lavery QC submitted that the fundamental issue before the learned trial judge was whether any agreement reached between the parties following their negotiation was "subject to contract". The court was entitled to take judicial notice that in nearly all "handshake" contracts, no party was bound until a contract was signed by both. The evidence suggested that the solicitors thought the agreement was "subject to contract". This is the normal practice in such contracts, and clearly the appellant thought this was the position as well. It was submitted that the parties were never "in contract". At paragraph 15 of his judgment the judge stated "I do not think the parties turned their minds to whether or not they had a legally binding contract". It was submitted that this statement was entirely inconsistent with the judge's other finding that the parties regarded themselves bound by contract.

[19] Mr Lavery QC submitted that in order to satisfy section 2 of the Statute of Frauds (Ireland) 1695, a contract for the sale of land must be in writing and signed and contain all the terms of the contract. That was not the case here. The judge referred in paragraph 9 of his judgment to the reliance placed on the Statute by the appellant. It was pleaded on his behalf in the amended Defence to Counterclaim. The judge stated that the Statute did not assist the appellant. Later at paragraph 12 he stated that "even if there were no note or memorandum (contrary to my finding below) there are sufficient acts of part performance here". The findings to which he referred are set out at paragraphs 13 and 14 of the judgment. In paragraph 13 he referred to the General Conditions of Sale of the Law Society of Northern Ireland (2nd Edition), which govern the exchange between solicitors in Northern Ireland, of contracts for the sale of land. Paragraph 5.1 provides -

> "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)."

[20] The judge stated that the appellant's solicitor received a copy of the purchaser's offer as accepted by the vendor, which acceptance included the insertion of figures, totalling the amount of the consideration (£2.5m), in the two memoranda for sale. The judge considered that the sending of the memoranda of sale signed by the appellant, but without a price inserted, amounted to an offer made to the solicitors for the vendor which they were entitled to accept. The requirement for certainty of a term relating to the consideration was supplied by the finding of the court that the parties had agreed a price of £2.5m on 14 May 2007. The judge then stated that it was not necessary for him to rule finally on this point. Mr Lavery argued that the appellant's solicitor was not authorised to accept an offer on behalf of the appellant nor was any purported acceptance ratified by the appellant. In paragraph 14 the learned trial judge considered an alternative situation. This was that the return of the contract with the total price inserted and signed by all the parties was an offer in itself, which the appellant accepted by silence and conduct. The third question or issue for decision by the court (set out above) asked whether the written and completed memoranda of sale signed by the appellant and Kevin and Damien Judge respectively, constituted written memoranda or notes of contracts sufficient to comply with the requirements of Section 2 of the Statute of Frauds (Ireland) Act 1695. To that question the judge replied 'Yes'. Mr Lavery QC stated that the judge did not spell out in the body of the judgment how he arrived at that conclusion. In paragraph 13 of the judgment the judge supplied the missing term relative to the price by his finding based on the oral evidence of Kevin Judge. It was submitted that oral evidence could not add to or vary a written document. In relation to the suggestion in paragraph 14 that there was acceptance by silence and conduct Mr Lavery QC commented that the appellant was

unaware of the price inserted (until February 2008) and therefore could not approbate by silence and conduct, that of which he had no knowledge in July 2007. However one looked at the issue it was clear that there was no note or memorandum sufficient to satisfy Section 2 of the Statute of Frauds (Ireland) Act 1695. It was submitted that by relying on acts of part performance the judge was acknowledging the absence of a sufficient note or memorandum.

[21] Finally Mr Lavery submitted that the judge was wrong to conclude that part performance had occurred which would make it inequitable to permit the appellant to rely on the Statute of Frauds. It was submitted that part performance could not arise in the circumstances of this case unless there was a verbal agreement that was not subject to contract. To qualify as part performance an act must be performed by the party in furtherance of the contact, as well as an alteration in his position. Three acts of part performance were relied on by the learned trial judge. Firstly, by the exchange of memoranda of sale. These were then completed by the insertion of the price, signed and returned. Mr Lavery QC submitted that this was not a usual act of part performance. Significantly there was no exchange which would create a note or memorandum sufficient to satisfy the Statute. Rather it was merely the submission of memoranda signed by the purchaser. Mr Kevin Judge did not alter his position in any way as a result. Secondly, the judge relied on the auction of the stock. It was submitted that this could not be said to be referable to any contract to sell the land. It was merely an act in contemplation of the performance of a contract or preparatory to it. It amounted to a mere selling of chattels without reference to land. Thirdly, the judge relied on the drilling of bore holes. It was submitted that this was not a sufficient act in furtherance of a contract to sell land, but merely preparatory to or in contemplation of such a contract and Kevin Judge had not altered his position merely by permitting such a survey.

[22] In response Mr Ferriss QC referred to the letter which accompanied the two memoranda of sale and highlighted the wording " sub-division of the price". He submitted that the reference to "the price" indicated that a price had been agreed. The return of the memoranda with the price inserted and the failure to raise any query relating to it, signified an adoption of what had been inserted as "the price". The appellant signed a blank document leaving the vendor to insert the price. Therefore he adopted what was inserted subject to his right to check it. When it was returned with the price added it became the memorandum in circumstances in which he failed to repudiate it. There was ample evidence for the learned trial judge to conclude that sufficient evidence existed for the conclusion that a note or memorandum existed which satisfied the Statute of Frauds. Alternatively the learned trial judge identified certain acts which he was entitled to conclude amounted to evidence of part performance sufficient to demonstrate the existence of a contract for the sale of land. Referring to paragraph 15 of the judgment where the judge stated that he did not consider that the parties "turned their minds

to whether or not they had a legally binding contract" Mr Ferriss submitted that this could mean one of two things. Either the parties had no intention to create legal relations between them or that their agreement relating to the land was subject to contract. Significantly it was never suggested to Mr Kevin Judge in cross examination that at the time of the negotiations there was no intention to create legal relations. In the absence of that issue the learned trial judge was entitled to conclude that the agreement was not subject to contract.

[23] The preamble of the Statute of Frauds (Ireland) Act 1695 declares that its purpose was to prevent many fraudulent practices which were "commonly endeavoured to be upheld by perjury and subornation of perjury". These practices included the "sale" of land. Section 2 of the Act, as it currently stands, provides -

> "2. AND no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person or 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 authorized.

[24] Simply put Section 2 provides that no agreement for the sale of land shall be actionable unless the agreement on which the action is brought is in writing or is evidenced by some memorandum or note in writing and signed by the defendant to the action or some person authorised on his behalf. Its purpose is to avoid the uncertainty that can arise from oral agreements. The absence of writing does not mean that there is no legal contract between the parties. An oral contract for the sale of land is valid provided it complies with the ordinary laws of contract. Section 2 merely provides that no action shall be brought on a contract for the sale of land unless it is in writing and signed by the party against whom it is being enforced. In order to benefit from the terms of the section the defendant, against whom the action is brought, must plead the Statute of Frauds (Ireland) Act 1695 in his defence – see McCarron v McCarron 1997 2 ILRM 349. That has been satisfied in this case. Section 2 requires an agreement in writing or a memorandum or note in writing of that agreement. Thus the first issue must be whether there has been an agreement. If there has been an agreement, is it in writing or is there a note or memorandum of that agreement? An agreement in writing and a memorandum or note in writing, are very different things. Whichever it is, the crucial matter is that it be signed by the party against whom enforcement is sought. The agreement or the note or memorandum must be of the contract upon which the action is brought. This is evident from the use of the word

"thereof". Therefore the agreement or note or memorandum relied on must contain all the essential terms of the contract and from those terms it should be evident that a contract has been concluded. The agreement of certain terms is essential, for example, the names of the parties (provided they are not apparent from other material), and the actual property concerned. However the exact price of the contract is essential – see Carr v Phelan 1976/7 ILRM 149 at 153. Thus, whatever agreement in writing or note or memorandum is relied on, and signed by the party against whom the action is brought, it should contain the price or sufficient information about it, for the price to be readily identifiable. At paragraph 9 of his judgment the learned trial judge states that the Statute of Frauds (Ireland) 1695 does not assist the respondent for the reasons that he then identifies. He then refers to the Memoranda of Sale sent to the respondent's solicitor with no price inserted and then to the same document returned with the total price of £2.5m inserted. Later at paragraph 12 he states - "even if there were no note or memorandum (contrary to my finding below) etc". What follows below is a suggestion that the sending of the memoranda without the price inserted was an offer made to the vendor's solicitors which they were entitled to accept and a conclusion that if the signed memoranda sent to the respondent's solicitors was not an offer, the return of the same signed memoranda with the price inserted was an offer in itself which was accepted by silence and conduct. Nowhere in the judgment does the judge specifically identify the agreement in writing or the note or memorandum thereof which he considered was sufficient to satisfy the Statute of Frauds. The only documents signed by the appellant were the memoranda sent by his solicitor to Mr Hagan. These documents did not contain the price. In those circumstances the requirements of Section 2 of the Statue of Frauds have not been complied with. Nor do the documents completed by the respondents' solicitor as the appellant did not sign those documents with the price stated on them. Therefore it was not open to the learned trial judge to conclude that there existed a sufficient agreement, note or memorandum in writing, signed by the appellant sufficient to satisfy the Statute.

[25] The learned trial judge was satisfied that there were acts of part performance sufficient to prevent the Statute being used to defeat an otherwise valid agreement for the sale of land. The doctrine of part performance developed in equity as a means whereby the Statute of Frauds, passed to prevent fraud, should not itself be used as an instrument of fraud. This equitable doctrine enabled a contract that otherwise would be caught by the Statute to be taken out of the Statute and become enforceable. Thus where one party to an agreement (A) has permitted or encouraged another party (B) to perform acts in the belief of an agreement, party A cannot insist that an agreement, not in writing sufficient to satisfy the Statute of Frauds, is not enforceable against him, on the basis that such agreement in fact never existed. To do so would be inequitable. However the acts performed must be

acts of part performance. In Steadman v Steadman 1976 AC 536 Lord Reid at page 540 explained the doctrine in these terms -

> "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 that courts of equity will not permit the statute to be made an instrument of fraud.
>
> It must be remembered that this legislation did not and does not make oral contracts relating to land void: it only makes them unenforceable. And the statutory provision must be pleaded; otherwise the court does not apply it. So it is in keeping with equitable principles that in proper circumstances a person will not be allowed "fraudulently" to take advantage of a defence of this kind."

[26] The learned trial judge found that there were significant acts of part performance which were compelling. These included the exchange of contracts between the respective solicitors, the auctioning of the contents of the business yard operated by Kevin Judge and permission for the digging of boreholes by the appellant, which he found was for the purpose of developing the land to its full potential. The gist of the submissions by the appellant was that the acts of part performance relied on by the trial judge were insufficient to prove part performance of a contract for the sale of land either individually or collectively. In particular it was alleged that the acts did not constitute acts of part performance of a contract for the sale of land nor were they in performance of a contract by the appellant nor did they disclose an alteration in the position of the respondent. The issue for the learned trial judge therefore was whether the acts found by him, or admitted by the parties, were sufficient part performance of the agreement relating to the sale of the two parcels of land to prevent the defeat of the agreement by the application of the Statute of Frauds. It was submitted by Mr Lavery QC that in order to qualify as part performance, the acts relied on must be performed in furtherance of the contract and amount to alteration in the position of the party relying on them. He submitted that the exchange of contracts could not amount to part performance. It was not in the performance of the contract but in the completion of it. The holding of an auction does not mean the land has been sold nor was it a physical act done which altered the nature of the land. The digging of boreholes was not a sufficient act in furtherance of a contract as they were merely preparatory or in contemplation of a contract, nor did the

respondent alter his position by merely permitting such a survey. He relied on the analysis of the doctrine by Romer J in Rawlinson v Ames 1925 Ch D 96 and passages from the decision in Maddison v Alderson 1883 8 A.C. 467. Romer J concluded his analysis with the following statement of the doctrine at page 113:

> "In accordance with this decision of the House of Lords in Maddison v. Alderson the law is thus stated in Fry on Specific Performance, 6th ed., p. 276: 'In order thus to withdraw a contract from the operation of the statute, several circumstances must concur: 1st, the acts of part performance must be such as not only to be referable to a contract such as that alleged, but to be referable to no other title; 2ndly, they must be such as to render it a fraud in the defendant to take advantage of the contract not being in writing; 3rdly, the contract to which they refer must be such as in its own nature is enforceable by the Court; and 4thly, there must be proper parol evidence of the contract which is let in by the acts of part performance."

[27] Romer J stated that the third and fourth conditions existed in that case and went on to consider whether the first two conditions were satisfied. He found that the conversion of premises into a flat and the expenditure of money on it was referable to a contract of the type alleged and that the acts of doing so were such as to render it a fraud in the defendant to take advantage of the contract not being in writing. He stated that anyone on the spot who saw what was being done and the way in which it was being done would inevitably have come to the conclusion that the party concerned must have a contract giving her some interest in the property. Mr Lavery QC submitted that this was a clear case of part performance by contrast with the present case.

[28] Having considered the decision in this court in Lowry v Reid 1927 N. I.R. 142 in which Andrews LJ quoted with approval the judgment of Lord O'Hagan in Maddison v Alderton, and Steadman v Steadman 1976 AC 536 the learned trial judge concluded that the acts of performance were entirely compelling. He stated at paragraph 12 –

> [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.

[29] We agree with the trial judge that these acts were sufficient acts of part performance. Anyone who had knowledge of the exchange of contracts, witnessed the auction of the stock with a view to winding down the business and observed the digging of the bore holes in the yard by the appellant would have concluded that he had a contract giving him some interest in the properties. It is clear that the respondents in winding down the business, selling the contents and allowing holes to be dug altered their position such that it would be a fraud in the appellant to take advantage of the fact that the memoranda signed by the appellant and sent to the respondents' solicitor for completion, omitted the price. The more so as this was done because there was an issue as to how the price (my emphasis) would be subdivided between the memoranda, about which the appellant's solicitor needed to speak to the appellant and about which the appellant's solicitor sought the views of the respondents' solicitor.

[30] Was the learned trial judge entitled to conclude that the parties had reached an agreement including the price on 14 May 2007? The principles which guide an appellate court in hearing an appeal from the decision of a judge sitting without a jury were considered and summarised by Lowry L. C. J. in Northern Ireland Railways Limited v Tweed 1982 15 NIJB 1 at page 10. The first principle was that a trial judge's finding on primary facts can rarely be disturbed if there is evidence to support it. This principle "applies strongly to assessments of credibility, accuracy, powers of observation, memory and general reliability…" These principles found echo in the speech of Lord Steyn Smith New Court Properties Limited and Citibank N.A. v. Scrimgeour Vickers (Asset Management) Limited and Another 1997 A.C. 254 where at page 274 he stated –

> "The principle is well settled that where there has been no misdirection on an issue of fact by the trial judge the presumption is that his conclusion on issues of fact is correct. The Court of Appeal will only reverse the trial judge on an issue of fact when it is convinced that his view is wrong. In such a case, if the Court of Appeal is left in doubt as to the correctness of the conclusion, it will not disturb it."

In the present case the learned trial judge had the undoubted advantage of seeing the principal parties and hearing their evidence. Clearly he preferred the evidence of the respondent Kevin Judge to that of the appellant. He was

alive to the points that were being made on behalf of the appellant both in cross-examination and submission. There was other evidence which supported that of the respondent Kevin Judge. The judge did not misdirect himself on any question of fact. In those circumstance and applying the principles referred to above there is no reason to disturb the judge's finding of fact. In particular the judge was entitled to conclude that the parties had reached an agreement, in the terms which he found, which was enforceable, subject to the Statute of Frauds. He also found as a fact that the words 'subject to contract' were not used. The comment by the judge at paragraph 15 of his judgment that he did not think the parties turned their mind to whether they had a legally binding contract is not inconsistent with his finding that they had in fact agreed on the terms for the sale and purchase of the properties. In so finding the issue whether it was 'subject to contract' could not arise. If it was 'subject to contract' no enforceable agreement could exist, contrary to the finding of the trial judge.

[31] In all these circumstances it is not necessary to consider the other matters, for example, the application of the General Conditions of Sale of the Law Society of Northern Ireland, in particular paragraph 5.1, about which the learned trial judge stated expressly that it was not necessary for him to rule finally on this point. Nor is it necessary to consider whether the return of the memoranda of sale constituted offers which were accepted by silence and conduct. While the judge expressed the view in paragraph 13 that the appellant would in all likelihood lose on this issue he made no express finding against the appellant on that basis in paragraph 14, where he dealt with this issue. For all these reasons the appeal is dismissed. The case will be returned to the trial judge for resolution of the outstanding issues relating to the ability of the respondents to convey good title and any questions relating to consequential loss, which were, by agreement, deferred until judgment on the terms of the agreement and the binding nature of same, had been given.