THE COURT OF APPEAL

UNAPPROVED
Appeal Number: 2019/95
Neutral Citation Number [2023] IECA 249

Murray J.
Collins J.
Whelan J.

BETWEEN/

MARIA KEENA

PLAINTIFF/APPELLANT

- AND –

THOMAS COUGHLAN, RAY DONOVAN, MICHAEL DEMPSEY, PROMONTORIA (ARAN) LIMITED, LUKE CHARLETON, SEAMUS WALSH AND KILKENNY WALSH LIMITED

DEFENDANTS/RESPONDENTS

JUDGMENT of Ms. Justice Máire Whelan delivered on the 13th day of October 2023

Introduction

1. This is an appeal against the judgment and order made by Mr. Justice Quinn in the High Court on the 8th February, 2019, wherein at the conclusion of the appellant's case claiming entitlement to a decree of specific performance of a contract for sale of the Ard Rí Hotel Waterford (the premises) (together with ancillary declaratory relief and damages in *lieu* of specific performance) as against the fourth and fifth named respondents, he acceded to an application made on behalf of the fourth, fifth, sixth and seventh named respondents for an order dismissing the proceedings by direction on the basis that the appellant had failed to establish a *prima facie* case. The alleged agreement of which specific performance was

sought was for the sale of the premises for a price of €1,600,000 with a payment of a non-refundable deposit of €160,000 handed over by her to the vendor's representative at the offices of Ernst & Young, of which the fifth named respondent ('the Receiver') was a partner. The contract was said to have been made at those offices on the night of 21 November 2016. The vendors did not complete that transaction and subsequently sold the premises to the seventh respondent (for the lesser sum of €1,500,000).

Judgment of the High Court

2. In the judgment [2019] IEHC 12 the claim is characterised at para. 1 as follows:

> *"The plaintiff claims that on 21st November, 2016, she entered into a contract with the fourth and fifth-named defendants to purchase the Ard Rí Hotel in Waterford for a price of €1.6m. She claims that the contract was entered into in a series of telephone conversations on that day between her representative, a Mr. Bob Lanigan, and a Mr. Terry Byrne, an employee of Cerberus European Servicing Advisors (Ireland) Limited, who she claims had authority to bind the fourth and fifth-named defendants [Promontoria (Aran) Limited and Luke Charleton]. She claims also that this contract was evidenced in writing by a receipt for a deposit of 10% of the purchase price paid later that day, coupled with certain e-mails which followed payment of the deposit. On 30th November, 2016, her representatives were informed that she did not, in fact, have a binding contract and that the hotel was being sold to a different party. The hotel was sold later by the fifth-named defendant to the seventh-named defendant, Kilkenny Walsh Limited."*

The judgment records at para. 4 that at the conclusion of the appellant's evidence at the plenary hearing, the fourth, fifth, sixth and seventh named respondents made an application for a direction to dismiss the appellant's action:

> *"They claim that even if the plaintiff's evidence is accepted (which it is not), and taking the evidence of the plaintiff at its height the plaintiff has not made out a prima facie case in that the essential ingredients of a binding enforceable contract for the sale of the hotel have not* [sic] *been established and accordingly, that the action should be dismissed."*

The court reviewed the principles derived from the decisions of the Supreme Court in *Hetherington v Ultra Tyre Service Limited & Ors.* [1993] 2 IR 535 and *O'Toole v Heavey* [1993] 2 IR 544, in addition to the High Court decision in *Moorview Developments Limited & Ors v First Active plc* [2009] IEHC 214. At para. 10 the judge observed:

> *"Many of the facts recited are not in dispute, but others are. Having regard to the test to be applied in deciding on this application, the narrative assumes the truth of the plaintiff's evidence."*

The court noted that the first, second and third named respondents had taken no part in the proceedings and that the fourth, fifth, sixth and seventh named respondents all indicated through their respective counsel that were the application for a dismissal to be refused, they would adduce evidence. The court identified the exercise to be carried out at para. 9 of the judgment as follows:

> *"Accordingly, this Court must now decide whether, if the evidence of the plaintiff is to be accepted as true and taken at its highest, the plaintiff has made out a prima facie case."*

3. The court then analysed the evidence of the key witness for the appellant, Mr. Bob Lanigan. That evidence disclosed that in early 2016 initial contact had been made by Mr. Lanigan with an auctioneer in connection with the property. Nothing came of that engagement. It appears that later in the year he made further contact with the auctioneer and

was advised that the loan secured on the property had been sold to an investment fund. The auctioneer advised him *"… that a company known as 'Cerberus' were now dealing with the loan."* In November 2016 Mr. Lanigan procured a contact number for Cerberus. On the 16th November, 2016 he spoke to one Terry Byrne, an employee of Cerberus. The evidence of Mr. Lanigan to the High Court was that Mr. Terry Byrne had said to him that if *"he could get in the region of €1.4 to €1.5m he would enforce the sale."* (emphasis added) The High Court judge noted that the contents of this conversation are in dispute but that for the purposes of the application for a direction to dismiss the appellant's case, *"the court will accept that these words were used"* (para. 19).

4. On or about Friday the 18th November, 2016 Mr. Lanigan had a conversation with Mr. Jim Treacy, father of the appellant and a successful hotelier and businessman. In the course of that conversation, it was agreed that Mr. Lanigan should engage further with Mr. Terry Byrne and that he was authorised to make an offer of €1.6m for the premises.

21 November 2016

5. The judgment considered in detail the events of Monday the 21st November, 2016 and in particular the evidence regarding a series of three phone calls that took place on that date between Mr. Lanigan, whom the High Court described at para. 14 as "*a friend and business associate to Mr. Jim Treacy and to the family for over 40 years*", and Mr. Terry Byrne. In the course of the first phone call between Mr. Lanigan and Mr. Byrne, Mr. Byrne advised that there was no contract or deposit in place but that he was in the course of making a deal for the sale of the hotel to a third party. *"Mr. Lanigan said that the person he represented was very interested in the property and wanted to purchase it. This was the first time in which he stated that he was representing a party other than himself."* (para. 23) He did not identify who he was representing but, importantly, it was clear that he was not negotiating for the sale on his own behalf.

6. In the course of the second call which again took place between Mr. Byrne on behalf of the vendor and Mr. Lanigan, the latter indicated "*that he was prepared to go to €1.6m*". The High Court found as follows at para. 24:

> *"Mr. Lanigan says that in this conversation he confirmed the purchase price of the hotel at €1.6m with Mr. Byrne. Again, nothing more was said about the identity of the party Mr. Lanigan was representing."*

Concerning the third call, the High Court found as follows:

> *"26. Mr. Lanigan phoned Mr. Byrne to confirm that he would have the deposit of 10% of the purchase price that day. Mr. Byrne said the deposit would have to be non-refundable and Mr. Lanigan agreed to this condition.*
>
> *27. Mr. Lanigan says that Mr. Byrne stipulated that the deposit should be paid on that same day to EY (formerly Ernst & Young) in the form of a bank draft for the sum of €160,000, being 10% of the purchase price, and that he, Mr. Byrne, would arrange that EY in Dublin stay late at their office to receive this. He would call Mr. Lanigan back to confirm that arrangement. The plaintiff's case is that, in these phone calls, the contract was made for the purchase of the hotel for €1.6m, subject to the condition that the deposit of 10% be paid that same day."*

Thus, throughout the phone calls the purchaser remained unidentified and Mr. Lanigan negotiated as agent for a disclosed but - at that point - unidentified purchaser. There was no evidence that Mr. Terry Byrne ever required the identity of the purchaser as a prerequisite to entering into a binding agreement to sell.

7. The judgment makes clear that Mr. Lanigan received a number of further calls during the afternoon of the 21st November, 2016 from, *inter alia,* Capita (an entity subsequently

renamed Links) seeking updates with respect to payment of the agreed non-refundable deposit that same evening.

8. Mr. Lanigan, together with the appellant and her father, attended at the offices of Ernst & Young, the firm of the Receiver Luke Charleton, the fifth respondent, at about 8pm on the 21st November, 2016. They met two individuals who were members of the staff of EY/the Receiver, namely Chris Allen and Ciara O'Mongain. The High Court noted *"This was the first occasion on which the plaintiff or any member of the Treacy family was revealed to any of the defendants or their agents. No evidence was given as to what was said at the initial introductions in terms of the respective capacities of Mr. Lanigan, Mr. Treacy, or the plaintiff."* (para. 32).

9. That evening the appellant, Maria Keena handed to Mr. Chris Allen, (who had been directed to stay back in the office to accept delivery of the non-refundable deposit on behalf of the vendors) a bank draft drawn on Ulster Bank payable to "Ernst & Young" in the sum of €160,000. *"Mr. Allen confirmed that this was 10% of the purchase price of €1.6 for the Ard Rí Hotel and adjoining lands."*, according to Mr. Lanigan's evidence which the High Court accepted (para. 34). The evidence was that Mr. Treacy requested a receipt for the deposit. While the trial judge noted that there was some difference in the accounts as to what precisely then transpired, the evidence was that Mr. Allen then left the room and made a photocopy of the bank draft. He returned with an A4 page which included a photocopy of the draft itself and on which the following was written:

This deposit is non-refundable, subject to title, freehold unencumbered.

_____	_____	_____
Signature of C. Allen	Signature of B. Lanigan	Signature of M. Keena
EY		
_____	_____	_____
Signature of C. O'Mongain	Signature of C. O'Mongain	Signature of C. O'Mongain
Witness	Witness	Witness

[Copy of Ulster Bank draft for €160,000 payable to Ernest & Young]

Capacity in which they signed

10. The High Court observed at para. 38:

> *"What is clear, however, is that the receipt does not describe the capacity in which any of Mr. Allen, Mr. Lanigan, or the plaintiff had signed. The word 'witness' appears directly under the signature of Ms. O'Mongain, who signed as such three times. Mr. Lanigan says that he believed that he was only witnessing the signature of the plaintiff as the purchaser and was unable to explain why only the signature of Ms. O'Mongain was described as that of a witness or why she so signed under all three signatures."*

The High Court noted that the receipt was of central importance insofar as one of the issues was whether it constituted a note or memorandum to satisfy the requirements of s. 51 of the Land and Conveyancing Law Reform Act, 2009 (the 2009 Act).

11. Certain findings are made by the trial judge in relation to the receipt document at para. 39, including the following:

> *"Taking the plaintiff's evidence at its height, it is clear that she and Mr. Lanigan, if perhaps not Mr. Treacy, believed that the deposit would be non-refundable."*

The judge was of the view that the words "subject to title, freehold unencumbered", were added to the receipt at the behest of the appellant's father and that they:

> *"would have the effect of introducing a new condition to a contract, the terms of which had already been agreed, on the plaintiff's case, in the course of the phone conversations earlier that day between Mr. Lanigan and Mr. Byrne."*

The judge observed that:

> *"On the face of the Receipt, there is nothing to say who were the parties to the transaction or the capacities of the respective signatories. The evidence of the plaintiff and of Mr. Lanigan is that the plaintiff signed as purchaser and that Mr.*

Lanigan signed only as a witness to her signature. Mr. Treacy's evidence is that the receipt was signed by both Mr. Lanigan and Ms. Keena, but that Mr. Lanigan 'wouldn't have signed as the purchaser'. Mr. Treacy, under cross-examination, stated that he didn't regard Mr. Lanigan as the purchaser and that the mention of Mr. Lanigan as a purchaser in his witness statement was a 'slip'. However, Mr. Treacy did accept that Mr. Lanigan signing it left open the possibility that the contract could have been taken in Mr. Lanigan's name in trust."

12. In the judgment the court considers the evidence of events subsequent to the 21st November, 2016, including correspondence from solicitors subsequently retained by the appellant which referred to their clients as Bob Lanigan and Maria Keena (in trust for Treacy Group). Letters written on behalf of the vendors denied the existence of any agreement. The court noted the content of the said correspondence in detail, including a letter from Messrs. M.W. Keller Solicitors for the appellant dated 12th December, 2006 which stated, *inter alia*, "*You will note from the document that the deposit paid was non-refundable, and therefore our clients could not have sought the refund of the money paid in the event that your clients failed to complete the contract."* The court notes that the appellant's solicitors furnished a copy of the receipt as evidence of the agreement to the solicitors for the receivers and Promontoria. The judge observed at para. 65:

"The title to the proceedings and the various titles to the letters issued by Messrs. Keller do not of themselves constitute definitive evidence as to the true identity of a contracted purchaser. However, at a minimum they illustrate a measure of confusion or, possibly disagreement on the part of and as between the plaintiff, Mr. Lanigan, Mr. Treacy, and Messrs. Keller as to the identity of the purchaser at the dates of the letters and commencement of the proceedings."

The court notes at para. 66: -

> *"The plaintiff's claim is that a binding contract for the sale of the property to her was entered into in the course of the telephone conversations between Mr. Lanigan and Mr. Byrne during Monday 21st November, 2016."*

The court observes at para. 67 –

> *"It was not until the meeting at eight o'clock that night that the identity of the Treacys was revealed. Even then, no evidence was proffered that in that meeting there was clear agreement – which would have to have been 'supplemental' to the agreement made in the earlier phone calls – as to who would be the purchaser. The only documentary evidence from the meeting is the Receipt which does not say who were the named vendors or purchaser."*

The court observed at para. 73 of the judgment: -

> *"The initial correspondence from M.W. Keller refers to the Receipt as the agreement, and later, in pleadings and submissions, importance is attached to it in the context of s. 51 of the 2009 Act. However, none of the witnesses, including the plaintiff, have suggested that the attendance at EY was intended to be more than delivery of the deposit in compliance with the only condition of the agreement the plaintiff says was made earlier that day, in telephone calls about which the plaintiff could give no evidence."*

The judge continues –

> *"The plaintiff's evidence is that she believed that, through the calls between Mr. Lanigan and Mr. Byrne, she had concluded an agreement to purchase the property and that this was always the intention in her mind and in the minds of Mr. Treacy and of Mr. Lanigan. Even accepting that evidence it does not go so far as to establish that an agreement was made with the defendants, a term of which was that she was the agreed purchaser."*

The judge observed at para. 78:

> *"... Mr. Treacy also acknowledged in evidence that when the deal was being done no decision had yet been taken as to who or what the purchasing entity would be."*

In his analysis with regard to issues concerning funding the judge observed:

> *"... I consider that the fact that a purchaser is sourcing its funding from other parties, whether connected to the purchaser or not, would not undermine its right to assert and enforce the contract were it otherwise entitled to do so."* (Para. 89)

13. The High Court noted from the evidence of Mr. Treacy and the appellant, supported by the other witnesses Mr. Lanigan and Mr. Wallace, that however it would be acquired in the first instance, *"their intention was that this property, when acquired, would be owned by the plaintiff. As to the structure by which it would be held for the plaintiff, this remained to be decided."* In that regard the judge observed at para. 91:

> *"For a purchaser to reserve, until after the completion of the acquisition of an asset, certain decisions, informed by tax and legal considerations, as to a structure by which the asset would be held is not unusual or improper. However, in this case, even accepting the plaintiff's evidence, there is no evidence that agreement was reached with any party on behalf of the defendants as to the identity of the purchaser, even in the first instance. The defendants have submitted that there is no agreement as to the identity of both the vendor and purchaser in the contract being asserted in these proceedings. I agree and I propose to consider each of these issues separately."*

The judge noted at para. 100 that he was not;

> *"determining the question of authority to bind the defendants, whether actual or ostensible. I must, for this purpose, accept that the evidence given by the witnesses*

> *on behalf of the plaintiff is that they believed that when they were dealing with Mr. Byrne and Mr. Allen they were dealing with persons who had authority to sell the property.*
>
> *101. If I take the plaintiff's evidence at its height, it would be somewhat unsatisfactory that the fourth defendant would, having appointed a receiver with a view to selling the property, permit its advisory firm Cerberus to enter negotiations regarding the sale of the hotel, including such a critical item as the price. It appears that the manner in which Mr. Byrne communicated with Mr. Lanigan at the minimum, brought about a degree of confusion as to the extent as to the identity of the vendor."* (Para. 101)

The judge noted at para. 104:

> *"...it seems to me that the inability of the plaintiff, in her evidence, to clearly identify the name of the vendor is caused in part by the manner in which the defendants and their representatives conducted themselves, in particular Mr. Byrne's engagement and indications that at a certain price, he would 'enforce the sale'."*

The court found in circumstances where, in light of the conduct of the vendor's representatives, including Mr. Terry Byrne, the appellant could not be faulted for a failure to identify the vendor, he was not prepared to accede to the application to dismiss on a direction on the ground of failure to identify the vendor.

14. The court then returned to the issue of the identity of the purchaser, noting that the respondents had submitted that *"if the court cannot have certainty as to the identity of the purchaser as a party as to the agreement, a prima facie case has not been made out and this Court could never grant a declaration on the terms sought in these proceedings."* (Para. 105) The court noted that:

> *"The defendants refer to the evidence given that the exact identity of the purchasing entity was a detail to be worked out later after taking tax and legal advice as regards structuring. The defendants submit that, on the contrary, the identity of the purchaser is one of the 'three Ps' and therefore is so fundamental that without knowing it the Court cannot declare the existence of a binding contract, let alone grant the remedy of specific performance."*

15. The court also considered the arguments of the respondents that the purchaser might have been any of (a) the appellant, (b) the appellant and Mr. Lanigan, (c) the appellant in trust or (d) Mr. Lanigan. The judge observed at para. 108:

> *"The witnesses are consistent in their repeated assertions that the intention, known to everyone on the plaintiff's side that the hotel would be acquired for the plaintiff. But none of them offered evidence that it was agreed with the defendants that the purchaser would be the plaintiff."*

The court noted that the appellant had acknowledged *"that the 'detail' of who would be acquiring and holding the hotel, had not been decided on 21st November."*

16. In his analysis of the law the trial judge attached weight to the decision of Clarke J. (as he then was) in *Greenband Investments v. Bruton & Ors* [2009] IEHC 67, noting his observation (at 5.4) that:

> *"...parties may also enter into oral discussions which cannot be properly characterised as involving either an express or an implied intention that the discussions concerned should not, if successful, give rise to a contract between the parties. In such circumstances, provided all of the relevant prerequisites for a binding contract are in place, then there is no reason why a court should not conclude that there is an oral agreement between the parties which amounts to a*

contract. It will, … be the case that any such oral agreement will not be enforceable unless and until there comes into existence a note or memorandum sufficient to satisfy the Statue of Frauds or a sufficient act of part performance to render it inequitable to allow a party resisting enforcement of the contract to rely on the absence of such a note or memorandum."

17. Clarke J. had emphasised that the fact *"that the parties may contemplate the possibility (or indeed the likelihood) that their oral agreement may come to be formalised in a written contract does not, of itself, necessarily give rise to an inference that the parties did not intend their oral agreement to be a contract."* The trial judge inferred, applying the said principles summarised by Clarke J. that *"the absence of such a contract is not fatal to the claim in these proceedings."* (para. 113). At para. 116 the trial judge noted that the appellant's witnesses had been remarkably consistent in their assertion that it had always been intended that the hotel would be acquired for the appellant; "*However, one searches in vain for any evidence that any of the witnesses identified the plaintiff as the purchaser in the course of making the agreement alleged."* At para. 117 the judge notes that during the course of the day on the 21st November 2016, *"Mr. Lanigan, for the first time, mentioned that he was representing another party, but did not disclose the identity of that party."* The judge emphasised at para. 117 that Mr. Lanigan in the course of those phone calls did not identify the purchaser to Mr. Byrne. *"…the plaintiff asserts that the 'deal was done' during these telephone conversations, at a time when the name of the purchaser had not been revealed and clearly, therefore, the first of the 'three Ps' has not been agreed."* At para. 118 he observes:

"For all the assertions that the plaintiff was the intended purchaser, nowhere in that evidence is it said that at the meeting it was made clear that the plaintiff was the

purchaser and the Receipt does not describe the capacity in which any of the three relevant persons signed."

The court noted of the appellant and her father that –

"...they truly believed that Mr. Lanigan was doing no more than facilitating the transaction and was never going to be the purchaser. However, this belief on their part appears to have translated itself into a belief also that the defendants knew or ought to have known not only that Mr. Lanigan was the (sic) not a purchaser, but also ought to have known the exact identity of the purchaser. Whilst those beliefs may have been genuinely held, the evidence does not support the claim that the identity of the purchaser was agreed with any of the defendants." (Para. 119)

18. The judgment suggests a requirement that the vendor must agree to the actual identity of a purchaser in advance of a binding agreement coming into existence. It appears to be predicated on the principle that certainty as to the purchaser required not alone clarity as to the identity of the individual but that the vendor should have given prior agreement to same before a valid memorandum for the purposes of s. 51(1) of the 2009 Act could be created. Reliance was placed by the judge on s. 51(1) of the 2009 Act and Buckley, Conroy and O'Neill, *Specific Performance in Ireland* (Bloomsbury, 2012) (p. 60), McDermott and McDermott, *Contract Law*, (2nd edn., Bloomsbury, 2017) (p. 283) and the decision of Kingsmill Moore J. in *Godley v Power* (1961) 95 ILTR 135.

19. The court considered two alternative propositions as to the constituent elements of the memorandum to meet the requirements of s. 51(1) being either the Receipt of the night of 21st November, 2016 referred to above, or in the alternative, the said Receipt, taken together with emails exchanged between Darren Das of Capita Asset Services and Mr. Terry Byrne, Frank Cronan and Barry Cunningham at 20.18 on the 21st November, 2016 and an email from Christopher Allen to Andrew Geraghty and Darren Das at 20.41 on the same night.

20. As to the identity of the parties, reliance was placed by the judge on the dictum of Costello J. (as he then was) from *Guardian Builders v Kelly* [1981] WJSC-HC 1674, [1981] ILRM 127 where the court was of the view, on the facts of that case, that *"the parties could be readily identified from the memorandum"*. The trial judge observed at para. 127:

> *"The Receipt, alone, does not provide any sort of description for each of the signatures apart from that of Ciara O'Mongain as witness."*

The judge relied on the decision in *Dewar v Mintoft* [1912] 2 K.B. 373 for the proposition that the memorandum must state both who was vendor and who was purchaser. It was not sufficient that a name merely appears on a document. The judge expressed the view at para. 128:

> *".. I have already found that the plaintiff's evidence, at its highest, does not identify the precise parties to the alleged contract, nor does it bring clarity to the capacity in which any of the three signatures were applied. The Receipt does not contain or reference any description of the property."*

The court concluded (para. 128) *"the Receipt on its own clearly fails the test for the first two 'Ps'."* Viewing then the joinder of the documents comprising the receipt and the emails referenced above, the court was of the view that since the emails were exchanged almost immediately after the appellant departed from EY's offices on the night of the 21st November, 2018, *"I take the view that this, although a separate event entirely, was sufficiently close in time for this test".* The judge considered that the critical absent reference was to the parties. He also expressed the view that an email from Mr. Das which referred to *'the proposed purchaser (or his representatives)'* was *"a formulation at odds with any understanding that Maria Keena is the sole purchaser."*

Part performance

21. The judge then considered the alternative plea seeking specific performance of a concluded agreement based on acts of part performance. He observed:

> *"…if the facts justify application of the doctrine of part performance, this will cure the absence of an adequate note or memorandum. It will not cure the absence of a concluded contract containing the essential terms. That is the end of the matter."*

The court noted that the payment of the non-refundable deposit was the act of part performance being relied upon. He noted that the respondents had never lodged the bank draft and had purported to return it to the appellant's solicitors –

> *"…the fact remains that although the plaintiff and her witnesses consistently describe it as a 'non-refundable deposit', it was, in fact, never lodged by the defendants and was tendered for repayment: a factor considered by McWilliam J. in Howlin v Power to undermine the claim of prejudice."* (para. 137)

To the argument that the conduct of the respondents was unconscionable in causing the appellant to procure the draft and travel to Dublin, the judge observed:

> *"In circumstances where the deposit was not retained by the defendants, it does not seem to this court that the act of driving to Dublin in reliance on Mr. Lanigan's report of his view, now found to be mistaken, that an agreement had been concluded, gives rise to an application of either the doctrine of part performance or any other principle which would overcome the absence of a note or memorandum for the purposes of s. 51."* (para.138)

The court concluded that:

> *"…in no case can the existence of a concluded contract for the sale of land, however basic or rudimentary, be declared if there is any one of the 'three Ps' absent. … In this case I have found that, accepting the evidence of the plaintiff's witnesses and*

taking it at its height, the plaintiff has not demonstrated that there was an agreement between her and any of the defendants in which this fundamental ingredient – the identity of the purchaser – was known to the defendants, much less agreed. Accordingly, the plaintiff has failed to make out a prima facie case and I shall grant this application to dismiss."

Grounds of Appeal

22. The appellant in a very lengthy notice of appeal essentially contends that the trial judge erred, *inter alia*, in the application of the test for a motion to dismiss on the basis of no case to answer, instancing paras. 91, 108, 115, 116, 118 and 119;

(i) In finding there was no evidence that an agreement was reached with any party on behalf of the respondents as to the identity of the purchaser (para. 91)

(ii) *"The court in assessing the foregoing information imposed a higher standard of proof in respect of an application to dismiss. ... In light of the fact that the witness statements of the defendants were put to the plaintiff the lower standard of proof was applicable."*

(iii) *"The learned trial judge erred in fact and law in failing to take the plaintiff's case at its height in that the plaintiff was identifiable as the purchaser"* at para. 108 where the trial judge found that the witnesses giving evidence on behalf of the appellant did not offer *"evidence that it was agreed with the defendants that the purchaser would be the plaintiff."*

(iv) At para. 118 where the court held *"nowhere in that evidence is it said that at the meeting it was made clear that the plaintiff was the purchaser and the Receipt does not describe the capacity in which any of the three relevant persons signed".*

The appellant contended that whilst the court stated it took the appellant's case at its height, the judge failed to take into account the following evidence from which it could be inferred that the appellant was the purchaser:

(a) That Mr. Lanigan said to Terry Byrne that *"the person he was representing was very interested in the property and to purchase it".* (Para. 23 of judgment)

(b) The evidence of Mr. Lanigan that he revealed he was acting for someone else (Day 5, Page 43, Q. 263, Lines 5 – 14)

(c) The appellant Maria Keena handed the bank draft to Chris Allen at the offices of EY.

(d) The bank draft was accepted by Chris Allen of EY from the appellant without question or query. [Evidence of Bob Lanigan, Day 4, Q. 471 – Lines 23-26 and Day 5, Lines 1-2.]

(e) That a subsequent request for proof of funding was made without querying who the purchaser was.

(f) The proof of funding provided was accepted without querying who the purchaser was.

(g) The proof of funding was not provided by Bob Lanigan (para. 89 of judgment).

(h) The evidence of the appellant that at the meeting on the night of the 20th November, 2016 Mr. Allen looked up at her stating "*You know this deposit is non-refundable"*. Her evidence was that she replied *"Yes"* as he was writing. (Day 1, Page 81, Q. 362, Line 7 – 17)

(i) That in response to a question as to whether Mr. Allen of EY, the Receiver's firm, had indicated to the appellant any understanding of who the purchaser was, she had stated that he *had "indicated to me who the purchaser was? No, well – he said who was purchasing it so I just signed as purchaser. 'Who wants to sign this' he said. So I signed obviously as the purchaser."* In response to a question put on behalf of one

of the respondents that the two signature blocks were for the purchasers to sign, she indicated *"I don't know if they were both for the purchasers to sign. That wasn't qualified on the night."*

(j) On Day 2, Page 46, Q. 226 in response to the question *"So you didn't actually identify yourself to Mr. Allen as the purchaser?"*, she responded, *"Oh no I did yeah. Like I didn't say to him exactly it's me and only me is buying it and we're not buying it in a company name or go into the whole rigmarole of it, but yes. And I was the one that handed him the deposit. Because the deposit came from me."*

The appellant contends that the evidence before the High Court, insofar as an application to strike out was being considered, meets the low threshold for an application of no case to answer/ a dismiss by direction. In particular, the appellant complains that notwithstanding the excerpts from the Transcript referenced above, the judgment refers to a requirement that it was incumbent on the appellant to demonstrate that an agreement had to be reached, *vis á vis* the identity of the purchaser and the conclusion at para. 91 of the judgment that:

> *"…there is no evidence that agreement was reached with any party on behalf of the defendants as to the identity of the purchaser, even in the first instance."*

Appellant's arguments as to identity of purchaser

23. The appellant contends that the purchaser's identity was communicated to the respondents' agents as of the night of the 21st November, 2016 and acquiesced in such that the identity of the purchaser was not raised specifically at the meeting or thereafter. Reliance is placed on para. 117 of the judgment where the court reiterates its earlier observation from para. 23 of the judgment that Mr. Lanigan in the phone call mentioned that he was representing another party but did not disclose the identity of that party. The appellant places reliance on the following excerpt in para. 117:

> *"It is also not unusual or improper for a party negotiating on behalf of a purchaser to withhold the identity of his 'principal' until a late stage, provided the vendor is willing to negotiate on such a basis."*

The judge then goes on to state –

> *"However, in this case, the plaintiff asserts that the 'deal was done' during these telephone conversations, at a time when the name of the purchaser had not been revealed and clearly, therefore, the first of the 'three Ps' has not been agreed."*

The appellant contends that it was known to the vendor's agent Mr. Terry Byrne that Mr. Lanigan was not the purchaser but was acting on behalf of a prospective purchaser and on that basis there was a concluded oral agreement. The appellant contends that it was clear from the evidence that the vendor was willing to operate on the basis of the name of Mr. Lanigan's principal being initially withheld. The appellant argues that it was self-evident that Mr. Lanigan was agent for the purchaser and that she was subsequently identified as Maria Keena at the meeting at about 8 pm in Dublin. Her identity was made known when she tendered the draft and signed the Receipt. It is contended that undue weight was afforded by the trial judge to the issue of the identity of the purchaser which had not been expressly raised by either Mr. Terry Byrne of Cerberus or at the EY offices by Chris Allen on the 21st November, 2016. The appellant takes issue with the trial judge's treatment of the evidence concerning demands for proof of funds, particularly the demand made by Mr. Terry Byrne on the morning of the 22nd November, 2016. It is said to be apparent from para. 44 of the judgment that there was evidence before the High Court that Mr. Lanigan stated to Mr. Terry Byrne that the Treacy's accountant would deal with the request for proof of funds. It is evident that Mr. Terry Byrne was dealing with Mr. Lanigan as the point of contact with the purchaser.

24. The appellant places reliance on the fact that when Chris Allen of EY contacted Mr. Lanigan subsequent to 21st November, advising him that the proof of funds were in order, no issue was raised by him concerning the identity of the purchaser. It is submitted that:

> *"The issue ... simply was not raised at the relevant time or during the relevant interactions between the parties."* (3.3(d)).

25. It was contended in the notice of appeal that the judge erred in failing to give due weight and consideration to the evidence of Maria Keena that when she got *"my Receipt from Chris Allen it was confirmed that it was myself that was buying the hotel."*

26. It was asserted in the notice of appeal at 3.4 *"The learned trial judge erred in fact and law in failing to give due consideration and weight to the plaintiff's evidence of signing the receipt as purchaser."* Various excerpts from the Transcript are relied upon contending that:

> *"The court in concluding that the plaintiff's evidence at its height did not go so far as identify the purchaser failed to give any weight or consideration to the evidence of both the plaintiff and Mr. Lanigan, two persons present at the signing of the receipt, that the plaintiff signed as the purchaser. Additionally, it is evident from the foregoing that the circumstances of the signing as set out in the evidence before the court."*

It is further asserted that the trial judge erred in fact and law in giving undue weight and consideration to the fact that the Receipt did not state the capacity in which the appellant signed thereon: *"It is clear from the evidence already set out herein that such evidence was given to the court. The court erred in finding that there was no such evidence."* (ground 3.5)

The test applied

27. The appellant asserts that insofar as the trial judge states at para. 39(iii) of the judgment *"… nowhere does any of the evidence go so far as to say that it was clearly agreed and intended by all those present that the plaintiff and only the plaintiff was signing as purchaser and that Mr. Lanigan's signature was only in his capacity as a witness",* this purports to impose an incorrect test that all those present in the room at the point of signature had to expressly agree that Maria Keena alone was signing as purchaser and such is not supported by any authority. It is alleged in that *"…the court failed to take the plaintiff's case at its height".* (3.6)

28. At 3.7 the appellant contends that the trial judge erred in finding (at para. 127) that the appellant's evidence did not bring clarity to the capacity in which any of the three signatures to the note/memorandum were applied. *"This was not the correct application of the test".* It is contended that the error arises by reason that the court in making its finding (at para. 127) *"disregarded the evidence of the plaintiff and Bob Lanigan wherein they identify the plaintiff signing the note/memorandum as the purchaser.. Moreover, the court failed to give due weight and consideration to the entire email of the 21st November 2016 wherein it is stated*:

> *'The proposed purchaser (or his representatives) at €1.6m has hand delivered a bank draft for €160,000 to EY's office in the last few minutes.'"*

The appellant argues that it can be inferred from this email that the appellant was the person being referred to as the "*Proposed Purchaser*" when one considers the fact that the appellant had handed the draft to Chris Allen. It is contended that the trial judge erred at para. 133 of the judgment in stating that the use of the words *"proposed purchaser (or his representatives)"* was a formulation at odds with the understanding that the appellant was

the sole purchaser. It is contended that the High Court erred in failing to consider the email in its entirety in light of the fact that *the "proposed purchaser"* was identified by the evidence as the appellant – the person who handed over a bank draft for €160,000.

29. At 3.9 of the Notice of Appeal it is contended that the High Court incorrectly attached weight to the fact that the title to the proceedings and the various titles of letters *"illustrated a degree of confusion as to who the purchaser was at the relevant time",* it being submitted that same were *"irrelevant to the identity of the purchaser at the time".*

30. At 3.10 it is contended that the trial judge erred in failing to consider the appellant's evidence in its entirety. Issue is taken with para. 118 *"nowhere in that evidence is it said that at the meeting it was made clear that the plaintiff was the purchaser, and the Receipt does not describe the capacity in which any of the three relevant persons signed."*

31. Concerning events subsequent to the 21st November, 2016 it is alleged at 3.11 that the trial judge erred in attaching undue weight to events subsequent to the said date. Reliance was placed on para. 78 of the judgment concerning a purchasing entity. The appellant contends *"…that the court attached significance to factors that had no bearing on whether the plaintiff was identifiable as a purchaser or not."*

Respondents' arguments

32. Very extensive submissions were filed and detailed arguments made on behalf of the respondents, all of which have been carefully considered. Briefly put, it was denied that the trial judge erred in the application of the test for an application to dismiss by direction nor did he imposed a higher standard of proof in respect of the application to dismiss. It is contended that the identity of the purchaser was an ingredient to be established by the appellant in respect of the cause of action being maintained by her and the trial judge did not commit any error of fact or law in respect of any of the issues raised in the notice of appeal.

33. It was contended that the trial judge correctly applied the relevant test. *"The test is not whether there is any evidence from which the identity of the purchaser can be inferred. The onus is on the plaintiff to make a prima facie case that there was an identified purchaser and an identified vendor."*

34. The fourth and fifth respondents contend that the trial judge was correct in his approach and findings and that there was no *prima facie* evidence that the purchaser had ever been identified. Further, it was contended that the trial judge applied the principles governing a non-suit correctly. Though not explicitly cross-appealed, it was contended that the trial judge ought to have concluded that there was no *prima facie* evidence that the vendors had been identified. Whether there was a sufficient note or memorandum for the purpose of s. 51 of the 2009 Act or sufficient acts of part performance of a concluded oral agreement had been correctly decided. The respondents place reliance on paragraphs 10, 19, 39(i), 101, 128 and 139 of the judgment where the trial judge *"explicitly says he is taking the plaintiff's evidence at its height"*. It was denied that the judge fell into error, particularly the error identified in *Murphy v Callanan* [2013] IESC 30 of failing to take the plaintiff's case at its highest, or that he had instead weighed it up with the case of the defendants.

35. It was argued that since the respondents had all indicated an intention to go into evidence in the event that the application was not successful, the trial judge correctly articulated the applicable test at paras. 9 and 139 of the judgment. Further, it was argued that the heading "*Was there a concluded agreement*" at para. 115 of the judgment was not the test *actually* applied by the trial judge in determining the respondents' application to dismiss. The test applied was whether, if the appellant's evidence was accepted and taking same at its height, had she made out a *prima facie* case for the existence of the alleged concluded agreement for the sale of the hotel to the appellant as purchaser. It was contended

that the findings of the trial judge at paras. 91, 108, 116, 118 and 119 were made following application of the correct test aforesaid.

36. It was denied that the trial judge imposed a standard of proof higher than the *prima facie* test.

> *"The learned trial judge did not hold that the plaintiff was required to establish that there was an agreement as to the identity of the parties at the stage of the defendant's application to dismiss."* (para. 6 of respondent's notice on behalf of the sixth and seventh named respondents)

It was contended (citing para. 139 of the judgment) that the trial judge correctly held that the requirement for there to be an agreement as to the parties was so fundamental that it applied equally to the identity of the purchaser and of the vendor. It was contended that the evidence of the appellant and her witnesses did not make out a *prima facie* case that there was a concluded oral agreement as contended for by the appellant. It was argued that on the evidence of the appellant and her witnesses the name and identity of the purchaser was not disclosed during the telephone calls between Mr. Lanigan and Mr. Terry Byrne, the fact that the vendors or their agents including Mr. Chris Allen did not raise the issue of the identity of the purchaser at the meeting on the 21st November, 2016 or subsequent thereto, must be seen in that context. It was contended, with reference to Ground of Appeal 3.8, that the trial judge correctly found in para. 133 of the judgment that the emails on the night of the 21st November, 2016 insofar as they refer to "*the proposed purchaser (or his representatives*)" suggest the proposed purchaser was not Maria Keena, by the use of the word "*his*". The respondents contended that the appellant had not made out a *prima facie* case that there was an agreement between her and the vendor respondents in which the fundamental ingredient of the identity of the purchaser was known (much less agreed to) by the said respondents.

37. With regard to part performance, it was contended that the judge's findings in that regard at para. 134 to 138 of the judgment inclusive were correct. It was contended that the respondents did not act unconscionably.

38. Reliance was placed on *Moorview* (*supra*) for the proposition that the trial judge made correct findings at para. 118 of the judgment and the judge's finding that *"nowhere in that evidence is it said that at the meeting it was made clear that the plaintiff was the purchaser and the Receipt does not describe the capacity in which any of the three relevant persons signed."*

39. In the instant case the first, second and third named respondents, evidently defaulting mortgagors, took no part in the litigation and are not parties to this appeal. They were the original owners of the property which was sold by the Receiver appointed by the mortgagee. The sixth and seventh respondents asserted that decision of the trial judge to grant the application should not be disturbed in light of the principles set out in *Hay v O'Grady* [1992] 1 IR 210.

THE LAW

Non-suit

40. Applications to dismiss at this point in a civil action are sometimes referred to as non-suit applications. The term "non-suit" tends to be used informally in the sense of connoting a "*judgment for the defendant*" – *Westgate v Crowe* [1908] 1 KB 24. Strictly understood there is not now any process or application in this jurisdiction that could correctly be characterised as a *non-suit* in the sense that a plaintiff could claim as of right to be non-suited with an automatic entitlement to then bring a fresh action in the same matter as was held in *Fox v The Star Newspaper* [1900] AC 19. The phrase was ascribed in civil proceedings to circumstances where there is no evidence sufficient to go to a jury and where thereby the judge is entitled in the exercise of the inherent jurisdiction to dismiss the action on the basis

of a demurrer so that the plaintiff is then precluded from bringing any fresh action on the same issues. Clarke J. analysed the evolution of the application in a series of judgments between *Moorview Developments Ltd. & Ors. v First Active Plc & Ors* including those reported at [2008] IEHC 211, [2009] IEHC 214 and [2010] IEHC 34.

41. In *McGrath on Evidence* (3rd ed., Round Hall, 2020), 2-163, the author suggests that the jurisdiction to dismiss by direction*; "stems from the inherent jurisdiction of the court to order its procedure for the purposes of preventing injustice so that, if it becomes apparent that the plaintiff cannot succeed, and if there are no countervailing factors which might lead to a different view being taken, then the justice of the case requires that the proceedings be brought to an end."*

Procedure for application to dismiss by direction

42. An order dismissing the plaintiff's claim for failure to establish a *prima facie* case at the conclusion of the plaintiff's evidence is an exercise in the inherent jurisdiction of the court to order its own processes and procedures.

43. Two significant decisions from the Supreme Court clarified the principles governing an application seeking a dismissal of a plaintiff suit by direction at the conclusion of the plaintiff's evidence: *Hetherington v Ultra Tyre Service Limited* (*supra*) and *O'Toole v - 28 -eavy* (*supra*). Both were referred to in the course of the judgment. In *Hetherington* Finlay C.J. observed:

> *"If a defendant to an action being tried by a judge sitting without a jury applies for a direction on the basis that the evidence adduced by the plaintiff is not sufficient to establish a case against him, I think it is reasonable for a judge if he sees fit on a trial to inquire from that person as to whether he intends to stand on that application. If he indicates that he intends to give evidence in the event of the*

application failing, the judge may well properly defer the decision on the issue as to whether a case has been made out by the Plaintiff until he has heard all the evidence.

Secondly, and more importantly, in the light of this case, I am quite satisfied that if two Defendants are sued and if one of them seeks an application for non-suit at the conclusion of the Plaintiff's case, that it is open to a judge and, in my view, probably very desirable in the interests of justice that he should enquire from the second or other defendants involved in the case as to whether it would be their intention, if they are left in the action, to present a case against the party seeking a non-suit at that time. If they are going to present a case by evidence or submission against their co-defendant, seeking to blame him, all the requirements of justice are that all that evidence should be heard before a final determination of the case."

The Supreme Court elaborated the principles further in *O'Toole*, where Finlay C.J. observed:

"1. If an action is brought either in tort or contract against one defendant only, and if at the conclusion of the evidence for the plaintiff the defendant applies for a dismiss, then it seems appropriate that the trial judge should enquire from the defendant as to whether in the event of a refusal of the application the defendant would intend to go into evidence.

2. If... the indication given by counsel in making the application is that, if refused, his client intends to go into evidence, then, it seems to me that the issue that has been raised as a matter of law before the trial judge is to reach a decision as to whether the plaintiff has made out a prima facie case. This would be consistent with the procedure which would be appropriate in a case where such an application was made and the case was being tried with a jury. In that instance the judge would be required to consider whether on the evidence the plaintiff had submitted, it will be

open to a jury, if no other evidence was given, or if they accepted that evidence, even though contradicted in its material facts, to enter a verdict for the plaintiff.

3. If upon applying for a non-suit at the conclusion of the plaintiff's case, in a case where one defendant only has been sued, it is indicated that the defendant does not intend, if the application is refused, to go into evidence, then, in effect, the learned trial judge is being asked to determine the following question, which is: having regard to his view of the evidence of the plaintiff whether the plaintiff has (that being the only evidence before him) established as a matter of probability the facts necessary to support a verdict in his favour. Unless he is so satisfied, he must dismiss the action; if he is so satisfied it appears to me that he must give judgment for the plaintiff.

4. The question as to whether the defendant is going to go into evidence or not, arising in the situation where an application for a non-suit is made in a case where one defendant only is sued, necessarily involves the going into evidence on the issue of liability. Where a defendant indicates that he is going to go into evidence on the issue of damages but not of liability, the situation would be as set out in paragraph 3 hereof.

5. Where more than one defendant is sued and where claims or cross-claims for contribution have been made between the defendants on the basis that they are joined tortfeasors, the trial judge should not, it seems to me, decide on an application for a non-suit made at the conclusion of the Plaintiff's evidence unless he is completely satisfied that the eventual outcome of the case could not result in the patently unjust anomaly that a plaintiff having sued more than one defendant and one of the defendants having been dismissed out of the action at the conclusion of the plaintiff's

evidence the other defendant or defendants could also escape liability by affixing the blame through their evidence on the defendant already dismissed.

The only way, apparently, in most instances a trial judge could satisfy himself that such a risk did not exist would be to ascertain what the intention of all the defendants was in relation to the calling of evidence and the precise nature of the case which each of them would be making in the event of giving such evidence.

… where a plaintiff has not made out any form of plausible or arguable case against any of the defendants, it must remain clearly within the discretion of a judge to dismiss the action in its entirety at that stage."

Egan J. in *O'Toole observed –*

"Prior to ruling as he did at the end of the plaintiff's case, the learned trial judge had been informed by counsel for the defendant that he would be calling evidence if his application for a direction was unsuccessful. This meant that if he agreed with the opinion expressed by Finlay C.J. in Hetherington v Ultra Tyre Service Limited & Ors. 1991… it would have been open to him to defer his decision on the issue until he had heard all the evidence. "

Dismiss by Direction

44. The parties agree that the test adumbrated by the Supreme Court in *Hetherington* and *O'Toole* is the applicable test in the instant case and fell to be applied by the trial judge.

45. Where defendants contemplate invoking the inherent jurisdiction of the court to dismiss by direction at the conclusion of the plaintiff's evidence, the variety of potential implications of such litigation strategies need to be forefront in their minds. Hardiman J. in *Bradley v Independent Star Newspapers* [2011] IESC 17, [2011] 3 IR 96 noted that such a defendant may face tactical issues in deciding whether to go into evidence, particularly

where the case presented by a plaintiff is weak in material respects on issues such as liability, since there is a risk that the evidence adduced by the defendant may ultimately improve the plaintiff's case, particularly through the mechanism of adept cross-examination.

46. The principles set forth in *Hetherington* and *O'Toole* require a defendant who seeks a direction for the dismissal of the plaintiff's action for failure to disclose a *prima facie* case, to indicate to the trial judge whether or not it is intended to call evidence on behalf of the defendant or defendants. It is clear from the principles set forth in the jurisprudence that a defendant is not entitled to have a ruling on an application to dismiss by direction on the basis that the plaintiff has failed to establish a *prima facie* case unless the defendant informs the court that it is intended to go into evidence in the event that the application is unsuccessful. In the aftermath of an unsuccessful application to dismiss by direction the defendant proceeds to call evidence and the High Court decision is based on balance on the entirety of the evidence of the parties.

Reserving the Defendant's right to go into evidence

47. If at the point of applying to the trial judge for a direction to dismiss, the defendant informs the court that he does not intend going into evidence in the event that the application fails, then the court makes no ruling on the existence or otherwise of a *prima facie* case having been made out by the plaintiff at that point. Instead, the court determines the entire action on its merits – on the balance of probabilities – based on the evidence adduced by the plaintiff alone.

48. In *O'Neill v Dunnes Stores* [2011] 1 IR 325 it was argued in the Supreme Court that that the trial judge in the High Court had been wrong to refuse the defendant's application to dismiss by direction at the end of the plaintiff's case. It was contended that almost all of the evidence on which the trial judge had proceeded to make his findings of liability against

the defendant subsequent to the refusal to grant a direction to dismiss derived from the defendant's own evidence. O'Donnell J. (as he then was) observed;

> *"Looked at critically, it is suggested, there was no prima facie case at the close of the Plaintiff's case. It was argued that the trial judge had failed to give separate reasons for the refusal of the non suit application, his reasons being subsumed in the general reasons upon which he found the Defendant negligent."*

49. O'Donnell J. agreed that it was clear *"there was very little evidence to sustain a finding at the close of the plaintiff's case: the bulk of the evidence helpful to the Plaintiff was elicited in the cross-examination of the Defendant's witnesses".* He further observed:

> *"In the circumstances, I do not consider it necessary to analyse whether there was just sufficient evidence to establish a prima facie case at the close of the Plaintiff's case. Instead, I will consider the entirety of the evidence and whether the trial judge was correct to find that the Defendant was liable to the Plaintiff."*

O'Donnell J., on the evidence, concluded –

> *"... notwithstanding the somewhat rudimentary nature of the case made and the tenuous evidential basis for the trial judge's conclusions, I consider that the appeal in this case should be dismissed."*

The Standard of Review on Appeal from a direction to dismiss decision – "*the decision is fully reviewable on appeal*"

50. O'Donnell J. in *Schuit v Mylotte* [2010] IESC 56 drew a distinction between the test in *Hay v O'Grady* and that in *Hetherington* and *O'Toole*, observing that the latter decisions provide:

> *"...in truth little scope for the application of the principle in Hay v O'Grady since it is rare that a Court will proceed to assess the credibility of witnesses at the end of*

the plaintiff's case. While I do not rule out the possibility that a Court could come to the conclusion that the plaintiff's evidence was so wholly incredible that there was no plausible or viable case, in most cases the issue is simply a matter of logic: is there evidence, whatever its relevant cogency or strength, upon which a Court could conclude that a defendant was liable. That exercise is very similar to that set out in Hay v O'Grady. It does not normally, ... involve the type of assessment of the cogency or credibility which attracts the rule in Hay v O'Grady, and accordingly the decision is fully reviewable on appeal." (emphasis in original)

51. O'Donnell J. made clear that the principles laid down in *Hay v O'Grady* were not applicable since the core question on appeal is one of logic: *"Is there evidence, whatever its relative cogency or strength, upon which a Court could conclude that a defendant was liable"* at para. 41. When that test was applied by the Supreme Court in *Schuit*, the court was satisfied that the trial judge had erred in acceding to the application to dismiss. The appeal was allowed. Assertions of the sixth and seventh respondents at para. 29 of their Grounds of Opposition that the principles in *Hay v O'Grady* apply are incorrect.

52. The correct approach is articulated in *McGrath on Evidence (ante)* at para. 2 – 161:

" A party will have made out a prima facie case when, on the evidence given, it would be open to the tribunal of fact, if no other evidence was given, or if it accepted that evidence even though contradicted in its material facts, to enter a verdict for that party. If a plaintiff has failed to discharge the evidential burden upon him or her with regard to the constituent elements or his or her cause of action then…the case will be dismissed."

Such applications have their history and provenance in procedures governing trials by jury and it is worthy of recollection as was noted in *Alexander v Anderson* (1932) NI 158 at 171

and referred to in *McGrath on Evidence* at 2.161 that *"..a case should only be withdrawn from a jury in circumstances where a jury could not reasonably conclude that it is more likely than not that the plaintiff's version of events is true or correct."*

Judge must take plaintiff's case at its highest

53. As Keane C.J. emphasised in *O'Donovan v Southern Health Board* [2001] 3 IR 385 on an application moved at the conclusion of the plaintiff's case to dismiss by direction of the trial judge on the basis of the inherent jurisdiction, it is necessary for the trial judge to take the plaintiff's case at its highest:

> *" If [the learned trial judge] had been informed by counsel that he would not be going into evidence then the trial judge would have applied the appropriate test which is whether the plaintiff had at that stage discharged the onus of proof and had satisfied him on the balance of probabilities that he was entitled to judgment.*
>
> *However, counsel having reserved the right to go into evidence, which I think is the best way to put it, in the event of an application being unsuccessful, the learned trial judge was required to approach the question of whether the plaintiff should be non suited at that stage in accordance with the well established test dating, .. from the days of trial by jury, in these cases, ... as to whether, assuming that the tribunal in fact was prepared to find that all the evidence of the plaintiff was true, and in other words treating the plaintiff's case at its highest, whether in those circumstances the tribunal of fact would be entitled to arrive at the conclusion that making those assumptions, sometimes thought perhaps not entirely accurately described as the prima facie test, the defendant had a case to meet."*

Trial Judge is entitled to defer a decision on application to dismiss by direction

54. In *Murphy v. Callanan & Ors* (*supra*) the options available to a judge where an application to dismiss by direction is made at the conclusion of a plaintiff's evidence were

considered, it being recalled by Denham C.J. that Egan J. in *O'Toole v Heavey* had observed that where on such application the trial judge is informed by counsel for the defendant that the defence will go into evidence if the application for a direction is unsuccessful then one option open to the judge is to defer a decision on the issue until all of the evidence has been heard.

55. The High Court judge had stated in *Murphy v Callanan & Ors*. that when it came to an application for a non-suit, he didn't have to consider whether if there was no other evidence he would, as a matter of proof, be satisfied on the balance of probabilities that negligence had taken place.

Denham C.J. observed:

> *"In my opinion, this is not a proper test where a judge is informed that other evidence will be available in the event of the failure of the application for a direction."*

She was of the view that all the judge had to decide is whether there is any evidence from which it could be inferred that there was negligence. She was satisfied that there was an undoubted difference between the following two tests:

(a) *"Whether there is any evidence from which negligence may be inferred, or*

(b) *Whether negligence has, in fact, been established on the balance of probabilities."*

In *Murphy v. Callanan & Ors* the trial judge had refused the defendants' application for a direction to dismiss at the conclusion of the plaintiff's case. The application had been moved on the basis that the defendants indicated they would be going into evidence if their application for a dismiss by direction was refused. On the facts, Denham C.J. was satisfied that the trial judge had erred in failing to consider an expert report in making the ruling on the application.

> *"24. In considering an application for a non-suit by a defendant, the trial judge must consider whether there was any evidence from which negligence may be inferred against the defendant or whether there was evidence, whatever its relative cogency or strength, on which a court could conclude that a defendant was liable. In essence this means that the trial judge must take the plaintiff's case against the defendant seeking the non-suit at its highest."*

56. The Supreme Court was further satisfied that the High Court judge erred by failing to assess the plaintiff's case at its highest and instead having engaged in balancing the appellant/plaintiff's case against that asserted by the second and third defendants and finding in the latter's favour. Denham C.J. observed at para. 32 regarding the High Court judgment references to the plaintiff's oral evidence and remarks made in regard to her credibility:

> *"While it is a factor to which a trial judge may refer and have as part of a reason for a decision, in all the circumstances of this case it could not be effectively the reason to dismiss the appeal, where the Court is required to take the appellant's case at its highest."*

The Supreme Court concluded that the trial judge had erred in not applying the correct test by failing to take the appellant's case at its highest. The court, however, acknowledged that the judge, though bound to take the plaintiff's case at the highest mark, would be entitled to dismiss if a plaintiff had not established a *prima facie* case or if a plaintiff's case manifestly lacked credibility and no sufficient weight could be attached to it. (Para. 33)

57. Denham C.J. was of the view that since *"there was evidence from which negligence could be inferred and it was not necessary or proper to rule at the stage of the application whether or not it had been established as a matter of probability"*, a new trial was directed.

58. The approach of the Supreme Court in *Murphy v Callanan & Ors* accords with English jurisprudence and highlights the importance of the court giving consideration as to whether it is more appropriate that the entire case be heard before reaching any concluded view as to the merits. In *Muller & Co. v Ebbw Vale Steel Iron and Coal Co. Limited* [1936] 2 All ER 1363 Branson J. observed at p. 1365 that it was for the judge to decide:

> *"whether, in the particular case before him, and having regard to all the circumstances of it, it is likely to save the litigants before him expense and time and trouble to deal with the case by way of ruling upon the submission without putting any terms upon counsel upon either side, or whether it is better to say:*
>
> > *'in this case I think it would be desirable that before I rule I should hear the whole of the evidence.'"*

An inherently difficult exercise

59. Mance L.J. in *Boyce v Wyatt Engineering* [2001] EWCA 692 observed at para. 4:

> *"…where a defendant is put to his election in a case, that is the end of the matter as regards evidence. The judge will not hear any further evidence which might give cause to reconsider findings made on the basis of the claimant's case alone. The case either falls or even succeeds, even on appeal. But, where no such election is called for, the judge is required to make up his mind as to the facts on the basis of one side's case, and then, if he is against the defendant, to hear further evidence and to retain and apply an open mind in relation to all the facts at the end of the trial. That is an inherently difficult exercise."*

Does the Defendant have a case to meet?

60. In *Moorview Developments Limited & Ors. v First Active plc and Ors* [2009] IEHC 214 Clarke J. offered reasons for a ruling previously made by him wherein he had directed

that all of the issues which had been at trial and which had not been abandoned by the Cunningham Group were, with a limited exception, *"dismissed on the basis of having come to the view that each of the defendants had made out the case for a non-suit on those issues."* It is a case which to a significant extent turns upon its own exceptional facts. The judgment was directed towards setting forth the reasons for making the said order and is considered hereafter in detail. Clarke J. cited *Delany & McGrath on Civil Procedure* (2nd edn., Round Hall, 2005) para. 19 – 44, at 5.1 of the judgment:

> *"In general the question of whether a party has discharged the burden of proof upon him by proving his case on a balance of probabilities is decided, once, at the conclusion of the case by the trier of fact. However, an issue will not even reach the trier of fact for this adjudication if a party fails to satisfy the evidential burden placed upon him to make out a prima facie case. Whether a party has done this can be tested by a defendant by means of an application for a non-suit after the conclusion of the plaintiff's case. On such an application the question for the trial judge is whether, assuming that the trier of fact was prepared to find that all the evidence of the plaintiff was true and taking the plaintiff's case at its highest, the defendant has a case to meet."*

61. Clarke J. noted at 5.4 –

> *"The overall approach identified in Delaney and McGrath is not the subject of any dispute between the parties. As indicated earlier there are, however, two issues of some relevance to these proceedings that were the subject of debate in the submissions on the non-suit application. The first is the question of the degree of scrutiny to which a plaintiff's evidence can legitimately be subjected in circumstances where the relevant defendant has reserved a right to go in to evidence. As pointed out earlier, First Active reserved a right to go in to evidence in*

the event that its application for non-suit was unsuccessful. Therefore the test to be applied, so far as the case against First Active is concerned, is as to whether the Cunningham Group has made out a prima facie case or, to put it another way, whether, on the evidence adduced by the Cunningham Group it would be open to a jury, if no other evidence was given, to enter a verdict for the plaintiff. In passing I should refer to O'Donovan v. The Southern Health Board [2001] 3 I.R. 385, where, when dealing with an application for a non-suit, the trial judge expressed an opinion that if he were dealing with the case on the basis that the defendants were not going to go into evidence, he would find in favour of the defendants at that stage as, in his opinion, on the balance of probabilities, the plaintiff was not entitled to succeed. The Supreme Court held that the trial judge had not dealt with the application for a non-suit in a satisfactory manner and that where a trial judge believed there was no case to meet then that was all the trial judge was required to say. At page 388 of his judgment Keane C.J. had stated:-

> *'Where a trial judge had before him an application for a non-suit, then of course if he is granting it the plaintiff is entitled to a reasoned judgment from the trial judge as to why his case is being dismissed at that stage. Where, as was the situation in this case, the trial judge was of the view that there was, to use the convenient though not altogether accurate, shorthand of a case to meet, then that was all that he was required to or indeed should have said.'"*

62. Reviewing the test for an application for dismiss by direction on the inherent jurisdiction at 5.13, Clarke J. observed:

> *"The overall test derives from the role of a judge in respect of a trial where facts are to be determined by a jury. The case is not permitted to go to the jury (and will be dismissed by direction) where the evidence is not such as would permit a jury*

properly directed to reasonably find for the plaintiff. Where expert evidence does not stand up, even on a prima facie basis, to scrutiny then it follows that it would have been unsafe to allow a case dependent on such expert evidence to go to a jury, and it equally follows that in a case being tried without a jury a non-suit should be allowed."

Moorview - where court does "*not consider the evidence…to be adequate or credible*"

63. In response to an argument from First Active that the court should treat some of the plaintiff's evidence with a certain degree of scepticism, Clarke J. observed in *Moorview* [2009] IEHC 214 at 5.15:

"… it did not seem to me to be appropriate to form any generalised views as to the credibility of Mr. Cunningham's evidence or as to the consequences of the absence of evidence which, it might be argued, could and should have been led. To the extent that the absence of relevant evidence or a specific failure on the part of the Cunningham Group to provide explanation for apparent inconsistencies in its own evidence, arose in individual circumstances then I had regard to such matters and make reference, where relevant, to same in the course of this judgment. I did not, however, form any more generalised view of the evidence but rather accepted it at its high watermark save where, for reasons specified, and in accordance with the general test which I have sought to analyse, I did not consider the evidence in question to be adequate or credible."

Clarke J. cited with approval the decision of Burton L.J. in *Bentley v Jones Harris & Co.* [2001] EWCA Civ. 1724 where a decision of the High Court to dismiss a claim which

depended on the plaintiff's evidence as to what had occurred at a series of meetings was upheld. Clarke J. noted concerning the evidence adduced before him:

> *"All of the notes or minutes were entirely inconsistent with the factual assertion which the plaintiff sought to make. The plaintiff, in the view of the trial judge, had given no arguable explanation as to how all of the relevant documents could be incorrect and his recollection be correct. In those circumstances the High Court Judge acceded to an application for a non-suit."*

64. Having considered the Court of Appeal judgment in *Bentley v Jones Harris & Co.*, Clarke J. observed at 5.17:

> *"It seems to me that the position adopted in Bentley also represents the law in the jurisdiction. Where, as a result of internal contradiction, inability to offer an explanation as to the inconsistency of evidence with other facts, or the like, a witness' account, although maintained under cross examination, lacks any real credibility, then it is open to a trial judge on a non-suit application to disregard that evidence for the purposes of assessing whether there is sufficient evidence to discharge the onus of proof at a non-suit stage."*

General views as to credibility to be avoided – unless evidence "*lacks any credibility*"

65. Clarke J. further stated –

> *"5.18 In making that comment I would again wish to emphasise that I do not believe that it is the role of a trial judge at the non-suit stage to give effect to any general view of the credibility of a witness or witnesses. Those are matters which properly fall for consideration at the close of the evidence. However, where, in respect of a particular aspect of a witness's evidence, same lacks any credibility for reasons such*

as those which I have sought to identify, then it seems to me that that evidence can be properly disregarded."

Is there no case to answer?

66. At the end of a plaintiff's case a defendant may submit that there is no case to answer. If the submission succeeds, judgment may be given for the defendants without requiring them to present their case. The submission may be made on grounds of law, fact, or mixed fact and law. The traditional submission of no case to answer is based on whether realistically there is no basis upon which a jury could, properly directed, find in favour of the claimant on the evidence that she had adduced. As most civil cases are now tried without a jury, the question to be asked is in effect whether *"... there was no such case for the judge to put to himself, wearing his jury hat."* (*per* Burton L.J. in *Bentley v Jones Harris & Co.* [2001] EWCA Civ. 1724, at para. 64)

67. The procedure in an application to dismiss by direction in the exercise of the inherent jurisdiction is reflective of the fact that a civil trial is an adversarial dispute resolution process in which the plaintiff, being the party who alleges, is obliged to prove their case on the balance of probabilities. It follows that a defendant is entitled to say that the plaintiff must prove her case without any assistance from him. The traditional rationale for the existence of the procedure in civil litigation is that it can have the advantage of saving the litigants expense, time and trouble. It can also in appropriate cases be of assistance in the management of limited court resources.

No real prospect of success

68. The development of the general rule for a direction to dismiss in civil proceedings in England and Wales can probably be traced back to *Alexander v Rayson* [1936] 1 KB 169. Clarke J. suggests in *Moorview Developments v First Active* that in this jurisdiction the

existence and exercise of such inherent jurisdiction is of greater antiquity. If a defendant is not put on his election there is a risk that if the claim is dismissed and there follows a successful appeal a retrial could result in greater delays and further expense.

The exercise to be carried out: *Is there evidence which if true would warrant the plaintiff succeeding?*

69. In his judgment in *Moorview*, [2009] IEHC 214, Clarke J. comprehensively analysed all of the evidence adduced on behalf of the plaintiff and concluded that *"... claims which sought to question the validity of the possession taken by either Mr. Jackson or First Active entirely lacked merit, such that no prima facie case had been established. Those claims were, in my view, therefore, properly the subject of the non-suit."*

Clarke J. noted in his later judgment in *Moorview* [2010] IEHC 34:

> *"7.9 The distinction between the two types of application at the close of the plaintiff's case, which was the subject of analysis by the Supreme Court in Hetherington v. Ultra Tyre Services Ltd [1993] 2. I. R. 535, is a logical and purely procedural distinction. Where a defendant reserves a right to go into evidence, then there are obvious reasons why the defendant's application should be assessed on the basis of considering whether the plaintiff has made out a prima facie case. The obligation on a plaintiff is to put forward evidence which, if true, would warrant the plaintiff succeeding. It is only if the plaintiff fails to meet that threshold, that the proceedings should be brought to an end. To invite a court, where it may well hear further evidence in the event of refusing the defendant's application, to nonetheless approach the plaintiff's evidence on a balance of probabilities basis is a recipe for disaster."*

Clarke J. continued –

> *"7.10 … where it is clear that there will be no further evidence, then, in substance, the case is at an end subject to the submissions of the parties and it is obvious that the court should then consider the case on the basis of the balance of probabilities, for it will not have any other evidential material to take into account. In the former case there is nothing, of course, at all unsatisfactory in the court indicating, at the close of the plaintiff's case, that the plaintiff has made out a prima facie case, but in the nonetheless rejecting that case when the court has had the opportunity of hearing the defendant's evidence."*

This latter scenario did not arise in the instant case as the respondents asserted they intended to go into evidence.

Clarke J. observed at 7.11:

> *"… to invite the court to give one view, on the balance of probabilities, having heard only the plaintiff's evidence and then, in the event that the defendant's application failed, to be required to give a second view as to the same facts having heard additional evidence and applying the same test, would give rise to very obvious difficulties."*

He observed that –

> "7.12 *The distinction made in Hetherington is, therefore, based purely on procedural considerations as to how the rest of the case is going to run and does not, in my view, offer any basis for suggesting that there is or should be a difference in substance between the nature of the applications made or, thus, in the consequences which flow from a successful application. For the reasons which I have sought to analyse, I am not satisfied that, even at a technical level, there is any legitimate basis for the contention that the Victorian form of imposed non-suit has survived into*

modern times. Rather, it seems to me to be clear that the term non-suit has come to be used to refer to an ordinary application made at the end of the plaintiffs' case for what is, in substance, a dismissal on the merits on the basis that the plaintiff has failed to discharge the onus of proof on it."

The jurisdiction is to be sparingly exercised

70. Clarke J. reviewed jurisprudence including *White v Spendlove* [1942] IR 224, a decision of Murnaghan J. in the Supreme Court which approved and followed the English Court of Appeal in *Fox v The Star Newspaper Co.* [1898] 1 QB 63 which held:

"It is quite true that since 1883 the term 'non-suit' has been used in some cases instead of 'judgment for the defendants'…; but in my oponion there is now no such thing as a non-suit in the proper sense of the term." (*per* A.L. Smith L.J.)

That view was upheld on appeal by the House of Lords, reported at [1900] AC 19. Clarke J. expressed the view (at 7.5) that in England and Wales, in particular:

"… courts have considered themselves to have had such a jurisdiction at all material times since. That the practice in this jurisdiction was not necessarily the same in that regard as in England is also clear. For example, in Fletcher v. London and North Western Rail Company [1892] 1 QB 122, it was held that a trial judge had no right to non-suit a plaintiff without his consent on his counsel's opening statement. … the Irish Courts have always considered that they had a jurisdiction to dismiss on the plaintiff's opening in an appropriate case, albeit that the relevant jurisdiction was one to be sparingly exercised."

Approach of trial judge in a complex case

71. The judge must proceed on the basis that as trier of fact they are prepared to find that all the evidence of the plaintiff was true and further to take the plaintiff's case at its highest

and having done so, assess whether the defendant has a case to meet (*per* Keane C.J. in *O'Donovan v Southern Health Board*).

72. O'Donnell J. in *Schuit* agreed with the views of McCarthy J. in *Hetherington* that the appropriate course of action for the trial judge in a complex case where it had been indicated that the defendants intend to go into evidence, in the event that the application to dismiss by direction of the trial judge at the conclusion of the plaintiff's evidence is unsuccessful, is to adjourn the application until all of the evidence of the defendants has been heard.

73. In his judgment O'Donnell J. approved of the practice adopted by judges in this jurisdiction on applications to dismiss by direction for the court to give reasons for doing so only if the court decides to grant the application for a direction but if it decides to reject the application on behalf of the defendants, that the court should not elaborate on its reasons because doing so may distort the trial and the prospects of any compromise should the court express its views on the state of the case.

Agency and admissibility of extrinsic evidence to prove identity of purchaser or vendor

74. *Bowstead & Reynolds on Agency* (22nd ed., Sweet & Maxwell, 2022) attaches critical importance to the distinction between disclosed and undisclosed principals. The authors identify disclosed principals as including all cases:

> "…*where the third party knows that there is a principal involved, and it does not matter whether the principal is named to or even identifiable by, the third party so long as the third party realises there is a principal involved and does not at the time of the transaction think that he is dealing with the agent alone.*" (at 1-041)

The transcripts show that Mr. Terry Byrne knew on 21 November 2016 that Mr. Lanigan was acting on behalf of a prospective purchaser and not on his own behalf. Mr. Terry Byrne knew that there was a principal involved but not their name.

Immaterial that either or both parties named in a memorandum are agents

75. It is generally immaterial that a party or parties named in the memorandum are agents of the vendor and/or purchaser so long as agency is known to the other side. Parol evidence is admissible to prove the identity of the principal/s. *Bowstead & Reynolds on Agency* observe in connection with the Statute of Frauds and the sufficiency of a memorandum, in the context of contracts unenforceable without compliance with same, that such a document might instead be signed by an agent "*thereunto by himself lawfully authorised*". This echoes the final words in section 51(1) of the 2009 Act which provide that a valid memorandum can be signed by *"that person's authorised agent"*. There was no finding by the trial judge that Mr. Lanigan was authorised to sign the contract on behalf of any identified principal in that capacity.

76. In the instant appeal we are concerned primarily with the identification of the purchaser. Mr. Lanigan had made clear to Mr. Terry Byrne earlier in the day that he was acting for "A. N. Other". Such a scenario is captured by *Bowstead & Reynolds* where it is observed:

> *"9-016 … there may indeed be cases where the third party can be regarded as being willing to deal with the principal, whoever he is. Indeed it has been said that in an ordinary commercial transaction such willingness may be assumed by the agent in the absence of other indications."*

77. The basic rules of agency apply to conveyances and contracts for the sale of land and provide;

> "*A disclosed principal, whether identified or unidentified, may sue or be sued on any contract made on his behalf…"* (*Bowstead & Reynolds*, op. cit. 8.001)

This evidences that Maria Keena *prima facie* signed as purchaser and as such was the correct plaintiff. By signing the receipt there was, when taken with her earlier conduct, at least a

prima facie case that she had rendered herself liable as a contracting party. Her right to sue and be sued derived from her execution of the receipt or memorandum *per Lovesy v Palmer* [1916] 2 Ch. 233, which is authority for the proposition stated in the headnote that "*the principal can sue on it [the contract] only if his name appears in the memorandum of the contract or his identity from the description of him therein appearing cannot fairly be disputed."*

The excerpt from *Bowstead & Reynolds* provides –

> *"… where the agreement was made by the agent in such terms that the agent was not personally liable as a contracting party, the principal could sue or be sued only if the principal's name appeared in the memorandum, or if, from the description of the principal therein, the principal's identity as a party was clear."* (at 8.003, citing *Lovesey v Palmer* (*supra*)

78. Wylie and Woods in *Irish Conveyancing Law*, (4th edn., Bloomsbury Professional, 2019) observe at para. 9.20:

> *"The memorandum or note must contain either the names of the parties to the contract in question or such description of them as enables them to be identified with certainty. It must refer to both the vendor and the purchaser and indicate which party is the vendor and which is the purchaser."*

79. In the footnotes to the latter statement the authors reference the maxim "*id certum est quod certum reddi potest"* (certain is that which can be rendered certain) observing that the maxim is often applied in regard to ascertainment of the identity of a vendor or a purchaser. The footnote references *Viscount Massereene v Finlay* [1850] 13 Ir LR 496 which pertained to an alleged contract for a sale of a brewery in County Antrim. The matter was tried before a jury. Counsel for the defendant sought a direction from the trial judge contending, *inter*

alia, that there was no evidence of a memorandum sufficient to satisfy the Statute of Frauds as regard to the estate alleged to have been agreed to be sold. Blackburne C.J. on appeal from the Chief Baron expressed the view that the latter had properly received evidence to show what precise interest the defendant had in the property in sale based on the principle "*id certum est quod certum reddi potest.*"

80. *Wylie and Woods* also referenced the decision in *Waldron v Jacob & Millie* (1870) Ir. 5. Eq 131 where a vendor of a premises wrote a letter to her solicitor stating "I have closed with Mr. W. for *this place*". Subsequently she purported to sell her interest in the premises to the second named defendant for a higher price and the latter sale was completed. The plaintiff instituted proceedings seeking specific performance, joining the vendor and the subsequent purchaser as defendants. The Vice-Chancellor considered the three issues arose for determination (i) whether there was a binding agreement concluded between the plaintiff and the first defendant, (ii) whether there was a sufficient note under the Statute of Frauds and (iii), whether the second named defendant was entitled to retain the property as a *bona fide* purchaser without notice.

81. The court was satisfied on the evidence that there had been a concluded verbal agreement between the plaintiff and the first defendant for the sale of the property. With regard to compliance with the Statute of Frauds, the Vice-Chancellor noted:

> *"The expression used is 'this place'. It appears that there is not any place mentioned by name in the letter. However, id certum est quod certum reddi potest, and there is evidence, which I consider is both admissible and sufficient, that the letter was written at Thornbury, and that, therefore, 'this place' means Thornbury."*

It had been argued on behalf of the first defendant that it was uncertain what quantity of land was meant by "*this place*". The Vice-Chancellor held at p. 137:

> *"…in my opinion, as a matter of construction, the words mean the entire holding, of which Mrs. Jacob was tenant. There has not been either argument or evidence to show that anything else was in the contemplation of the parties."*

The court decreed specific performance against both defendants.

82. The decision in *Waldron v Jacob & Millie* was cited with approval by the Supreme Court (upholding Kenny J. in the High Court) in *Law v Roberts & Co. (Ireland) Limited* [1964] IR 292. In that case the Supreme Court was of the view that a reference in writing taken together with oral evidence which was given constitutes sufficient identification of the defendants who were the purchasers;

> *"I do not think that the memorandum of a contract required by the Statute of Frauds should be held to be defective because one or two words in the name of a company are omitted."*

It had also been suggested that the memorandum failed to comply with the Statute of Frauds because the interest being sold was not identified. The Supreme Court upheld the High Court granting the plaintiff a decree of specific performance:

> *"In my opinion, the written memorandum relied on to satisfy the provisions of the Statute of Frauds need not state the estate or interest of the vendor in the premises if the purchaser is prepared to take the interest which the vendor has. In this case, the plaintiffs are prepared to accept the interest which the defendants have in the premises … ."*

"if you can spell out of the document a reference in it to some other transaction"

83. The decision in *Stokes v Whicher* [1920] 1 Ch. 411 concerned the sufficiency of a written memorandum wherein the purchaser was not named. The document failed to identify who the purchaser was and merely used the word "I". Russell J. observed the issue to be –

> *"…can I ascertain, either from the document itself, or with the assistance of properly admissible evidence, or from some other document sufficiently connected with it to be read with it, who is meant by 'I'? I will not refer to all the authorities. The most important is Long v Millar [4, C.P.D. 450].... The only document signed by the defendant was a receipt for the deposit in the following terms 'Received from Mr. George Long the sum of 31l. as a deposit on the purchase of three plots of land in Hammersmith.' That document, although it contained the purchaser's name and some description of the land sold, contained nothing from which the price could be ascertained. The 31l. might be any percentage of the purchase money. It was argued that there was no sufficient memoranda within the statute. But the Court held that there could be got out of the document, though not on the actual face of it, a reference to some other documentor transaction. The Lords Justices read the receipt as a reference to a deposit on an agreement to purchase, and then said: 'We are at liberty to enquire what that agreement is, and we find it to be a document in writing; it is an agreement referred to in the receipt, and the two can be read together.' That is what the case decided."*

Russell J. held in *Stokes v Whicher* that the decision in *Long v Millar "…comes to this; that, if you can spell out of the document a reference in it to some other transaction, you are at liberty to give evidence as to what that other transaction is, and, if that other transaction contains all the terms in writing, then you get a sufficient memorandum within the statute by reading the two together."* Russell J. concluded:

> *"The difficulty caused by the Statute of Frauds in this case can be overcome in two or three ways. First, I think this is a document which shows on its face payment on the same date … of 50l. part of the purchase-money of 2000l., as a deposit to the vendor. There has been produced cheque for 62l. signed by the plaintiff in favour of*

… bearing the same date, and that cheque has been proved to include the 50l. I am of opinion that I am at liberty to connect these two documents, read them together and so ascertain the purchaser's name: and thus I get what, in my view, is a sufficient memorandum under the statute."

The court entitled to hear oral evidence to identify the purchaser and/or vendor

84. Russell J. in *Stokes* observed of the deficiency in the documentation:

"It does not contain the purchaser's name. To be a memorandum within the statute a document need not contain the purchaser's name; it is sufficient – for that, there is abundant authority – if the purchaser is sufficiently described so as to be capable of identification. Does this document sufficiently identify 'I'? I think it does. Taking the document as a whole, it shows that 'I' is the person who has undertaken and discharged the obligation to pay 50l. and it has been proved that the person who paid the 50l. was Mr. Stokes; I am entitled to take that verbal evidence and so identify the person who is described as 'I' as the person who has undertaken to discharge and has discharged that obligation. I am justified in doing that on the authority of Carr v Lynch [[1900] 1 Ch. 613 at 615]."

In the latter case Farwell J. stated:

> "*According to the rule as stated in Potter v Duffield [(1874) L.R. 18 Eq. 4], the statute is satisfied if the parties are sufficiently described, so that their identity cannot be fairly disputed. In this case it is plain on the memorandum that the lease is to be granted to the person who paid the 50l. This is quite as good a description as the word 'proprietor', which was held sufficient in Sale v Lambert, and it is admitted in the defence that the person was Jayne. …. Id certum est quod certum reddi potest'"*

Who is it who fills the description

85. Russell J. then applying that approach to the facts of the case before him, observed:

> *"I think, following that, and applying it to the case before me, I am at liberty to ascertain the identity of 'I' by seeing who it is who fills the description of 'I' in this document – namely, as being the person who has undertaken to discharge and has discharged the obligation to pay 50l."*

Sign as a party intended to be bound

86. Russell J. noted that the person ultimately found by the court to be the purchaser in *Carr v Lynch*, an individual named "*Jayne*", had signed not in his capacity as purchaser but had been expressly described as a "*witness*". The court considered the report of the judgment in *Carr v Lynch*:

> *"The plaintiff was prepared if necessary to call evidence to prove that Jayne intended to sign as a party to be bound, and that the word 'witness' was left in by mistake, the memorandum having been drawn on the assumption that a witness was necessary. The defendant admitted the receipt of the 50l."*

Russell J. observed –

> *"So, apparently, Farwell J. was prepared, if necessary, to hear evidence explaining how it was that Arthur Frederick Keeves Jayne came to be a witness, and to show that that was a mistake: he had not really signed as witness but had signed as a party intending to be bound."*

Russell J. concluded:

> *"Upon all these grounds, I think the defendant fails, and there must be a decree for specific performance."*

Memorandum - s.51(1)

87. To obtain a decree of specific performance of a concluded agreement for sale/purchase of property there must be a sufficient memorandum to satisfy s.51. The parties to a contract for sale of property must be capable of ascertainment so that their identities cannot fairly be disputed. The overriding principle, however, is that s. 51(1) of the 2009 Act should not itself be used as an instrument of fraud.

88. It is noteworthy that in the case of *Dewar v Mintoft* (*supra*) concerning the alleged sale of property at auction, Horridge J. cited *Sims v Landray* [1894] 2 Ch. 318, a case where the purchaser did not sign at all where the agent (an auctioneer) signed the contract, the statute was found nonetheless to have been complied with. The court held that the contract was enforceable on the grounds that the jury had found that the verbal contract, letters and particulars and conditions, constituted a sufficient memorandum. *Dewar* is distinguishable from the instant case in a number of material respects. Firstly, it concerned sale of property at an auction. Secondly, the purchaser paid no deposit at all and refused to carry out the purchase. In *Dewar* the purchaser was bound, although he had not signed, nor had the auctioneer signed on his behalf as purchaser. The purchaser's name was entered on the documentation but nowhere was he described as "*purchaser*".

Admissibility of oral or extrinsic evidence of the surrounding facts and circumstances to prove capacity in which a party signs a memorandum

89. J.C.W. Wylie in *The Land and Conveyancing Law Reform Acts: Annotations and Commentary*, (2nd ed., Bloomsbury Professional, 2017) observes at footnote 8 of the annotations on s. 51 that the wording of s.51(1) repeats the provision in s. 2 of the 1695 Statute and confirms that:

> *".. s 51 does <u>not</u> require the contract to be in writing; it is sufficient if there is some written <u>evidence</u> of the contract which can be produced to the court: McQuaid v Lynam [1965] IR 564 at 573 (per Kenny J.) This written evidence may come into existence after the agreement is made (see Powell v Dillon [1814] 2 BA & B 416) but must exist at the time of the action to enforce the agreement is commenced."* (emphasis in original)

90. The authorities confirm that evidence of surrounding circumstances is admissible to resolve ambiguity in relation to the capacity in which parties sign a document asserted to constitute a memorandum within s.51(1). This was clarified in decisions such as *Newell v Radford* [1867] L.R. 3 C.P. 52, *Carr v Lynch* (*supra*) and *Stokes v Whicher* (*supra*). The decision of Costello J. in *Guardian Builders Limited v Patrick Kelly & Anor. (supra)* is authority for the proposition that the court can go outside the document and receive oral evidence to ascertain or identify the key terms of a contract e.g. to identify the property agreed to be sold (page 9 of judgment). Wylie & Woods reference *Carncross v Hamilton* (1890) 9 NZLR 91 as authority for a court looking at the "*surrounding circumstances*" under which the document was signed to identify the capacity in which each party signed. In *Shirley Engineering Ltd v Irish Telecommunications Investments plc* [1999] IEHC 204 paras. 3/4 Geoghegan J. observed*;*

> *"In considering whether the agreement arrived at is conditional on a written contract being entered into, the Court must assess all the evidence and look at all the surrounding circumstances and the entire context in which an expression such as 'subject to contract' was used."*

The Courts prefer to find a contract is enforceable.

91. McDermott and McDermott, *Contract Law* (*supra*) note regarding the admissibility of evidence of surrounding facts and circumstances to clarify the capacity in which a party signed a memorandum;

> *"The test is whether both the parties to the contract have been named in the memorandum or can be readily identified. The courts will interpret this requirement broadly and prefer to find that a contract is enforceable rather than that it is not. The courts are prepared to travel outside of the four corners of the memorandum and look at the surrounding facts and circumstances under which the document was signed in order to see if the party described can be identified beyond doubt."*

92. Thus, in *Bacon v Kavanagh* (1908) 42 ILTR 120, the words '*you*' and '*your employer*' in a contract of guarantee were held to be sufficiently clear to identify the party charged after the surrounding circumstances were examined. Kenny J. stated:

> *"... it is not necessary that the actual names of the parties should appear in the memorandum, but if the parties are sufficiently described or indicated or referred to, so that there is no real doubt as to their identity, the statute is satisfied."* (p.121)

In *Bacon* the court found on the evidence that the plaintiffs were the persons referred to by the words "*you*" and "*in your employment*" and evidence as to identity was complete for the purposes of a sufficient memorandum within the Statute of Frauds to establish that a valid contract of guarantee had been created.

<u>Authorised agents</u>

93. The decisions in *Bacon & Co. v Kavanagh*, *Guardian Builders Limited v Patrick Kelly & Anor.* (supra), *Rossiter v Miller* (1878) 3 App. Cas. 1124 and *Ballyowen Castle Homes Limited v Collins* (Unreported, High Court, 26th June 1986) all offer authority for the proposition that the circumstances surrounding the transaction can be taken into account by the court and parol evidence admitted on that behalf to indicate the circumstances

surrounding the signature by an individual of the document in question. In *Ballyowen Castle*, Keane J. (as he then was) found on the evidence of the witnesses that it was merely part of the estate agent's function to find a buyer but he didn't have authority to bind the vendor nor did he have express or implied authority to accept any offer at the time when he purported to accept an offer on her behalf. As Clark, *Contract Law in Ireland* (9th ed., Round Hall, 2022) notes:

> *"The facts of each case will determine the scope of the agent's authority."* (4 - 46)

94. Wylie and Woods (*op. cit.)* in their analysis of s. 51(1) of the 2009 Act observe that the provision requires the memorandum to be signed "*by the person against whom the action is brought or <u>that person's authorised agent</u>*". (emphasis in original) They observe at 9.34:

> *"It is clear that the authority to sign does not have to be given in writing, it may be given orally. It is also clear that the agent need not sign expressly as agent, n or necessarily intend that the signed document should operate as a memorandum or note for the purposes of s 51 of the 2009 Act."*

The decisions in *Wallace v Roe* [1903] 1 IR 32 and *Lavan v Walsh* [1964] IR 87 are offered as authority for this proposition.

<u>Application of above principles to the facts and evidence</u>

The standard of review on appeal from a direction to dismiss

95. The correct approach was articulated in clear terms in *Schuit (supra)*, particularly at para. 41 where O'Donnell J. identified the key question as being *"is there evidence, whatever its relative cogency or strength, upon which a Court <u>could</u> conclude that a defendant was liable."* It is apparent from the judgment under appeal that the approach adopted by the trial judge encompassed an inquiry to more than a *prima facie* standard of proof. The fundamental difficulty lies in the overall analysis and in particular the conclusions from para.

115 onwards of the trial judge. Para. 115 finds that taking the evidence of the apppellant's witness at its height, the judge was *"unable to identify with any degree of precision whatsoever, the parties to the contract alleged".* That is not consistent either with the required approach to take the appellant's evidence at its height or at the threshold of the *prima facie* standard of proof, however.

Analysis of the evidence and judgment

96. The High Court's approach to construction of the Receipt document was flawed insofar as it disregarded contemporaneous relevant evidence of facts and circumstances and the testimony of the appellant and her witnesses which pointed towards the appellant alone being the purchaser as against all of the other signatories.

97. The analysis at para. 117 of the judgment concerning Mr. Lanigan's evidence makes clear that there was uncontradicted evidence before the judge that he had told the vendor's own agent, Mr. Terry Byrne earlier in the day that he was representing another party, yet the judge attached insufficient weight to the import of that fact in light of the relevant test. Mr. Lanigan had unequivocally excluded himself as a purchaser. It is true that he did not in that conversation identify who his client was, *i.e.*, who the purchaser was. It was not necessary. The memorandum/receipt offers *prima facie* evidence, by a process of simple elimination and the application of common sense to establish that the purchaser was Maria Keena. Another way in which the evidence could be characterised was that in the earlier conversation between Mr. Lanigan and Mr. Terry Byrne, Mr. Lanigan had confirmed that he was an agent for an intended purchaser. The vendor and its agents were thus fixed with notice of Mr. Lanigan's status as agent which eliminated the possibility of the vendor or the

court ascribing any other capacity to his. Ms. O'Mongain signed as a witness. Mr. Chris Allen took the deposit monies and thus his signing was only consistent with agency on behalf of the vendors. The execution by Maria Keena was *prima facie* as purchaser and no other stateable capacity was identified in light of all the evidence.

No evidence that identification of purchaser a pre-requisite

98. The court's determination, insofar as based on a finding that there was no prior agreement by the vendor as to the actual identity of the purchaser injected a novel prerequisite element into the transaction for which no legal authority was identified by the respondents in this appeal. A valid agreement for sale of property could be concluded by or between agents without such prior agreement unless the vendor had expressly stipulated to the contrary. There was no evidence that such a prerequisite to a valid concluded agreement coming into existence was stipulated in this case.

99. With regard to the statement at para. 118 of the judgment that "*[f]or all the assertions that the plaintiff was the intended purchaser, nowhere in that evidence is it said that at the meeting it was made clear that the plaintiff was the purchaser and the Receipt does not describe the capacity in which any of the three relevant persons signed."*, the Receipt and emails as comprise the memorandum fall to be construed in light of the facts and surrounding circumstances. The evidence is *prima facie* consistent only with Maria Keena being the intended purchaser when one considers all the factors and case law outlined above. The approach of the judge was erroneous.

100. The vendors knew from earlier in the day that Mr. Lanigan was not the purchaser and was acting for the purchaser. He was thereby wholly eliminated from being characterised as the purchaser when signing the receipt. Concessions said to have been made by witnesses including Mr. Treacy under cross-examination could not dilute the practical consequences of that fact.

101. While the trial judge may be technically correct insofar as he found at the end of para. 118, *"the Receipt does not describe the capacity in which any of the three relevant persons signed"*, it is, however, as authorities such as *Stokes v Whicher* make clear, "*highly significant*" that Chris Allen appended under his signature his name and the letters "EY" thereby designating himself – at least to a *prima facie* level - as signing on behalf of the vendor. The evidence of Mr. Lanigan and Ms. Keena was that Mr. Lanigan signed as witness to her signature. Such was the appellant's evidence and was to be taken at its height. Whatever the respective capacities of Mr. Allen and Mr. Lanigan, neither sign the receipt as purchaser.

102. The analysis by the trial judge of the evidence of the appellant's witnesses and of the appellant herself and the conclusions drawn from same is more consistent with the line of jurisprudence from the High Court in *Keohane v Hynes* [2014] IESC 66 and *Barry v Buckley* [1981] IR 306, authorities on the principles governing an application to strike out proceedings pursuant to the inherent jurisdiction of the court rather than the applicable standard in a direction to dismiss - the *prima facie* level of proof. It appears from a reading of the Transcripts that arguments advanced on behalf of the respondents were at times more consistent with the proposition that the court ought to dismiss the proceedings as being not proven on balance, rather than being proceedings in respect of which at the conclusion of her evidence the appellant had failed to establish a *prima facie* case. The latter is a different and lower test. That the higher test was being applied is evident from the approach of the judge in taking into account extraneous factors subsequent to the events, and in extrapolating excerpts from emails, or statements within emails that selectively could be suggested to favour the respondents. The trial judge in his approach deviated from the approach as summarised by *Delany & McGrath on Civil Procedure* and cited with approval by the trial judge himself at para. 7 of the judgment (referred to above).

103. The tenor of the statement at para. 104 of the judgment calls for scrutiny.

> *"If a purchaser was serious about acquiring a property, one would expect it to make its own enquiries at the earliest stage, as to the identity of the vendor."*

It is difficult to see how this statement squares with the obligation to take the plaintiff's case at its highest.

104. Regarding the identity of the vendor, the judge expresses the view:

> *"…it seems to me that the inability of the plaintiff, in her evidence, to clearly identify the name of the vendor is caused in part by the manner in which the defendants and their representatives conducted themselves, in particular Mr. Byrne's engagement and indications that at a certain price, he would 'enforce the sale'."*

That assessment is reasonable in light of the facts. However, it is to be observed that both sides, on the evidence, concluded the agreement and executed the receipt through their respective agents.

105. Insofar as the identity of the vendor was relevant at all, and the respondents assert that it was, the evidence at the hearing and the documentation was sufficient (if required) to support a *prima facie* finding of Mr. Terry Byrne being the vendors' agent, including the statement that he would "*enforce the sale*" at the price of €1.6m and with authority to bind them. There was also *prima facie* evidence that the conduct of Mr. Terry Byrne contributed to lack of clarity as to the precise identity of the vendor as the trial judge correctly found.

106. The appellant handed a draft order of €160,000 to Mr. Chris Allen, signed the receipt and gave evidence that she did so as purchaser. This deposit was accepted by Mr. Allen on behalf of the vendors and it is hard to see how, at the stage of a direction and to the standard required for such an application to succeed, it could have been concluded (and this was in reality the effect of the trial judge's decision) that this was not referable to an identified

agreement, between identifiable parties for the sale of a specified property at an agreed price. Moreover, the trial judge in concluding that the appellant's evidence at its height did not go so far as to identify the purchaser, failed to give any weight or consideration to the evidence of both the appellant, Jim Treacy or Mr. Lanigan, each of whom were present at the signing of the receipt that the appellant signed as purchaser.

107. The requirement of s.51(1) of the 2009 Act for the purposes of evidencing her signature were proven to a *prima facie* level to have been complied with by the receipt when executed by Maria Keena, since, in light of evidence of surrounding circumstances and prevailing context and facts and taking the appellant's case at its height, she was the only signatory who could be characterised as having signed *qua* purchaser.

The position of the sixth and seventh respondents

108. In construing the evidence from the perspective of the appellant, taking same at its height, it is again to be stressed that she paid over a non-refundable 10% deposit of €160,000. It was a bank draft and so the appellant was at an immediate loss of the said sum. The proceedings seeking specific performance were instituted on 23 December 2016. The seventh respondent entered into the second contract to purchase the property for a lesser price on 16 March 2017 with full notice of the appellant's claim and proceedings. It appears that such sale completed thereafter, circa early April 2017 when the entire purchase price was paid over to the fourth and fifth respondents. It is a matter for legal argument at the conclusion of the hearing as to whether and how the subsequent unilateral attempts by the vendors to return the non-refundable deposit for €160,000 could alter the respective rights of the parties.

109. Such detail may (or may not) have relevance at the conclusion of a substantive hearing in the context of the alternative claim for specific performance based on alleged acts of part performance at the conclusion of a substantive hearing. It also could have relevance in the

context of the fact that the appellant has invoked the jurisdiction of the High Court seeking in the alternative damages against the vendor defendants/respondents in lieu of specific performance. I express no view on these aspects since the appellant would first have to establish her claim to the standard of the balance of probabilities.

110. The extent to which the various arguments advanced on behalf of the respondents' hypothetical scenarios, such as at paras. 106 and 107, were entertained by the judge was inconsistent with taking the appellant's claim at its highest.

111. Insofar as Mr. Lanigan entered into an agreement on the 21st November 2016 and that same was a concluded parol contract, he did so explicitly on behalf of a third party. *Prima facie* the evidence established that that unidentified purchaser was Ms. Maria Keena and the non-refundable deposit was duly paid by her later that evening. The documentation comprising the receipt and the emails *prima facie* evidenced same. Those matters of fact were established to a *prima facie* standard and in consequence a *prima facie* case has been established on behalf of the appellant that she has a contract that is specifically enforceable against the said respondents. That was sufficient to require the trial judge to move to the stage of a full hearing. The respondents, further, offered no persuasive authority for the proposition that Mr. Lanigan ought to have brought the proceedings in his own name.

The purchasing entity issue

112. Further, as the authorities referred to show, the judge fell into error insofar as he considered that the possibility that the ultimate purchase deed would be executed by an as yet unidentified entity undermined the appellant in establishing a *prima facie* case. *Farrell on Irish Law of Specific Performance* (Butterworths, 1995) emphasises at para. 8.12:

> *"If, for example, it turns out that a plaintiff was in fact buying for himself and someone else, that does not cause a problem; a purchaser is normally entitled to take his conveyance in any names he wishes and this is frequently done."*

113. The decision of McWilliam J. in *Guerin v Ryan* (Unreported, High Court, 28th April, 1978) at para. 9 is cited as authority. *Wylie & Woods* state in *Irish Conveyancing Law (op. cit.)* at para. 18.18, concerning the general right of a purchaser to tender a nominee or nominees to take under the purchase deed;

> *"Subject to any agreement to the contrary, the purchaser can require the vendor to convey the land to a nominee or nominees as directed, eg, where he has effected a sub-sale."*

Insofar as it was contended to the contrary on behalf of the respondents, such arguments appear to have been erroneous, as was the assessment of the judge in that regard.

114. In adverting to matters around the point of completion and inferring from statements made in particular by Mr. Jim Treacy in the course of his evidence that the purchase deed might be executed in the name of a company, the trial judge fell into error and in particular considered an irrelevant factor which formed no part of the assessment as to whether the appellant had established her case to a *prima facie* level of proof – that there was a concluded agreement which was specifically enforceable by compliance with s.51 or by acts of part performance in lieu.

115. The judge erred in determining at para. 78:

> *"Critically, Mr. Treacy also acknowledged in evidence that when the deal was being done no decision had yet been taken as to who or what the purchasing entity would be. He said that these were matters which could be worked out later."*

At para. 76 the judge observed *"As a matter of basic logic"* the addition of the words "*subject to title, freehold title, unencumbered" "can only mean a qualification to the words 'this deposit is non-refundable'"* but that is not necessarily so either. Strictly speaking, the words were not necessary and as Farrell (*op. cit*.) observes *"An agreement to sell implies the*

whole of the vendor's interest in the land to be sold and, in the absence of anything to lead to a contrary view, the interest is implied by law to be a fee simple." He cites *Godley v Power* (*supra*) at 145. Those words were arguably not an injection of additional provisions above and beyond what already was impliedly agreed by act and operation of law, including in particular the implied covenants as to title operating under Part 9, Chapter 4 of the Land and Conveyancing Law Reform Act, 2009, and the relevant Schedules.

116. If necessary, as the respondents contend (but I do not consider that it was necessary for all the reasons correctly identified by the trial judge) it was open to the court to find that Mr. Terry Byrne was at all material times agent for the vendor and further Chris Allen of EY was at all material times in the course of his involvement in the said transaction also acting for and on behalf of the vendors. Such involvement was as agent for a disclosed but unidentified vendor in that regard. It is significant that no cross-appeal was brought in regard to this aspect of the judgment. The instrument representing the deposit was made out to EY who was the Receiver's firm. That is a material fact. The trial judge was accordingly correct at paras. 101, 104 and 115 in his assessment of the conduct of the vendor. There was no suggestion in the immediate aftermath by either Mr. Terry Byrne or any of the recipients of the emails that Mr. Chris Allen did not have authority to sign the Receipt in the manner which he did. Likewise, the evidence established that the vendors' agent having received the email on evening of 21 November, 2016 acquiesced in, acknowledged or implicitly agreed that Maria Keena was the vendor.

Section 51(1)

117. The suggestion (para. 38, 71, 119, 128) that a memorandum for the purposes of s. 51 is not created in the event that there is a failure to specify expressly on the face of the memorandum the respective capacity of each signatory is not supported by the wording of the statute or any authority. Section 51(1) states:

"(1) Subject to subsection 2, no action shall be brought to enforce any contract for the sale or other disposition of land unless the agreement on which such action is brought, or some memorandum or note of it, is in writing and signed by the person against whom the action is brought or that person's authorised agent."

118. Undue weight was attached (para. 133 of judgment) to the use of the word "*proposed*" in an email in respect of the purchaser who had just paid a non-refundable deposit of €160,000. It was open to the trial judge to take the two emails which he did and read them in conjunction with the Receipt. For all the reasons outlined above, it was proven to a *prima facie* level that the appellant who had signed was the sole purchaser. The other signatories were eliminated from being capable of being characterised as the purchaser.

Part Performance

119. Farrell (*op. cit.)* observed at para. 6.13:

"Before Steadman v Steadman [1976] AC 536 it was thought that the mere payment of money could never be a sufficient act of part performance...

As Lord Salmon explained:

> *'Although I accept the authorities which show that acts of part performance if they are to take a parol contract out of the statute must be acts from which the nature of the contract can be deduced, I do not accept the line of authority which … laid down that payment can never constitute such an act because it is impossible to deduce from the payment the nature of the contract in respect of which the payment is made. It is no doubt true that often it is impossible to deduce even the existence of any contract from the payment. … Nevertheless the circumstances surrounding a payment may be such that the payment becomes evidence not only of the existence of the contract under which it was made but also of the nature of the contract. What the payment*

> *proves in the light of its surrounding circumstances is not a matter of law but a matter of fact. There is no rule of law which excludes evidence of the relevant circumstances surrounding the payment – save parol evidence of the contract on behalf of the person seeking to enforce the contract under which the payment is alleged to have been made.'"*

120. The argument of the respondents that the doctrine of part performance was not engaged because the non-refundable deposit was subsequently tendered back by the vendors required closer scrutiny. The doctrine is only engaged if the appellant otherwise does not establish her entitlement to a decree of specific performance of a concluded oral agreement for the purchase of the hotel property on the balance of probabilities evidenced by a sufficient memorandum. The decision in *Howlin v Power* might (or might not) arguably be distinguishable insofar as the deposit in that case was paid by cheque and never stated to be *non-refundable*. McWilliam J. in *Howlin* had observed of the decision in *Steadman v Steadman* that it was authority that if the payment of the money is referable only to the contract alleged it was a sufficient act of part performance. In the instant case the evidence was that the bank draft was paid over on the basis that it was non-refundable.

121. This being an equity suit, closer scrutiny was warranted in the judgment regarding the sequence of events in connection with the purported sale of the property and what significance (if any) might attach in equity to the fact that the deposit was not offered back (if such be the case) until after the proceedings for specific performance were instituted and /or until after the seventh respondent signed a binding contract on 16 March 2017 (if such be the case) and/or paid over a deposit of €150,000 to the vendors (if such be the case) and/or whether the deposit draft was only returned after completion of the sale to the seventh respondent in late March or early April, 2017 (if such be the case). Given the views of the trial judge as stated in his conclusion that in effect a parol agreement on the key terms had

not been concluded, it is understandable that he did not consider the doctrine of part performance, which is expressly preserved by s.51(2) of the 2009, to be of much relevance.

122. Taking the appellant's case at its highest, there was *prima facie* evidence of a concluded parol agreement for sale and documents which when "read side by side" were capable of constituting a s.51 memorandum evidencing that agreement. If the appellant establishes that contract on the balance of probabilities but fails to prove on balance that same was evidenced in accordance with s.51, then it will be for the trial judge to engage with the doctrine of part performance. The fourth and fifth respondents contend that they have not ultimately attempted to rely on its non-refundability. But if the appellant demonstrated that the act of part performance was effected on 21 November 2016 when the non-refundable deposit was paid over, which *prima facie* she did, the burden would shift to the respondents to establish that as a matter of law that they could unilaterally by tendering back the deposit be entitled to escape from an otherwise binding contract for sale. These are or may become issues for the trial judge to determine.

Determinations in light of the transcripts

There was *prima facie* evidence that Mr Lanigan concluded a parol agreement with Mr Terry Byrne to purchase the property on 21 November 2016 on behalf of a 3rd party

123. The key significance of the evidence concerning the phone conversation/s between Mr. Lanigan and Mr. Byrne on 21 November, 2016 is that it establishes to the *prima facie* level, at the least, that Mr. Lanigan informed Mr. Byrne (who clearly was the decision-maker on the vendor's side in connection with determining sale price and to whom the property would be sold) that he was not the purchaser and that he was agent for a third party. The vendor knew that Mr Lanigan was not the purchaser and was acting for a disclosed but unidentified purchaser. Therefore, there was no basis for any finding that Mr. Lanigan could be characterised as a purchaser – as the respondents had asserted (para. 106).

124. The proposition advanced on behalf of Promontoria and the Receiver on day 2 of the hearing was that the document was tendered to Mr. Lanigan for signature because *"Mr. Lanigan is named as a client and identified as a purchaser is because Mr. Lanigan represented to Mr. Byrne that he was the purchaser"*. This line of questioning suggests that Mr. Lanigan was the purchaser. This is not consistent with the evidence given by Mr. Lanigan that he had informed Mr. Byrne that he was acting for an unidentified purchaser. There was no evidence elicited, during cross examination or otherwise, to suggest that Mr. Lanigan had ever represented to Mr. Terry Byrne that he was the purchaser.

125. Mr. Lanigan on Day 5 of Transcript extract 16, made clear that Terry Byrne *"was aware that there was a purchaser".* He confirmed that he hadn't identified to Mr. Byrne who the purchaser was. Ms. Keena's evidence was that she anticipated a formal legal contract in due course. She indicated that Terry Byrne had said *"he'd enforce the sale but we would have to give the cheque to EY".* Her evidence indicated, Day 6, Page 103 lines 3-7 that Mr. Chris Allen of Ernst and Young had stated that he was the agent for Luke Charleton.

126. It is significant also that the evidence of Mr. Lanigan under cross-examination was that he *"had received assurances from Cerberus that Chris Allen, the agent of the Receiver Luke Charleton would remain at the office of EY at Harcourt Centre until approximately 8.30 for the purposes of taking a non-refundable deposit."* (Day 5, Page 67 *et sequitur*). He confirmed that the word used to him in connection with Chris Allen was "*the agent of the Receiver Luke Charleton*". Thus, there was *prima facie* evidence before the High Court that Chris Allen of EY was the agent for the vendor when the receipt/memorandum was executed.

There was *prima facie* evidence that Mr. Lanigan advised Mr. Terry Byrne that he was not the purchaser but was acting on behalf of an unidentified purchaser

127. It is clear in the High Court judgment that Mr. Terry Byrne of Cerberus was actually aware from earlier in the day that Mr. Lanigan was not the purchaser, he was merely representing a third party and acting on behalf of that third party. Likewise, insofar as relevant, Mr. Lanigan knew that Mr. Terry Byrne was acting on behalf of the vendors. Both were agents for disclosed but unidentified principals.

There was *prima facie* evidence that Mr. Lanigan was acting on behalf of the appellant

128. The trial judge found at para. 37;

> *"In his witness statement, Mr. Lanigan says that Mr. Allen asked that he and the plaintiff sign as purchasers. However, in his evidence to the Court, he swore that he was signing only as a witness to the signature of the plaintiff as purchaser."*

The trial judge was obliged, however, to take Mr. Lanigan's evidence at its highest since he was the appellant's witness.

129. Ms. Keena's evidence with regard to the circumstances surrounding Mr. Lanigan's signature of the Receipt is material, particularly given the nature of the application and such evidence must be taken at its height. She explained on Day 2, Page 47 in response to a query as to *"why Mr. Lanigan signed" "Because Chris Allen handed him the paper".* That can be accepted as true to a *prima facie* level. There was no evidence before the High Court that it was at the instigation of either Ms. Keena or Mr. Lanigan that a third line was drawn on the receipt by Mr. Allen of Ernst & Young document or that it was proffered to him for signature. Ms. Keena further amplified her answer stating:

> *"Well we didn't realise now this that it was only the purchaser had to sign, we were under the impression that I was signing because of the purchaser. Bob was signing because we needed a witness for mine."*

There was *prima facie* evidence as to the respective capacities in which each party signed the receipt

130. A receipt was furnished for payment of the non-refundable deposit comprising of a photocopy of the bank draft aforementioned which was signed by Chris Allen, self-described as "*Chris Allen EY"*, Bob Lanigan and the appellant. Ciara O'Mongain witnessed each of the signatures. Events surrounding the creation of same are considered in great detail above. The evidence points to the fact that Mr. Lanigan and the appellant signed at the request of Mr. Allen of EY who drew three short lines in parallel horizontally across the photocopied non-refundable bank draft.

131. Chris Allen characterising himself as "*Chris Allen, EY*" in signing the receipt to accept the deposit for the purchase of the property as earlier agreed between the two agents. The authorities on agency referred to above suggest that, had it been necessary to determine the issue (and I reiterate that I am satisfied for all the reasons stated by the trial judge that it was not) there was a *prima facie* case made out that Chris Allen of Ernst & Young signed the receipt and emails as agent for the vendors so as to bind the vendors pursuant to s.51(1) of the 2009 Act. The trial judge was correct in his assessment that the documentation ought to be read together.

The proposition that lack of evidence that the vendor had given prior agreement to the appellant being the purchaser rendered the agreement unenforceable was not proven

132. It appears that a misunderstanding has crept into the analysis which derives from the repeated implicit suggestions on behalf of the respondents during cross examination to the effect firstly that no binding agreement could exist before the vendor knew the actual identity of the purchaser and secondly, that the party taking the purchase ultimately under the Deed of Transfer had to be one and the same as the party signing the memorandum as purchaser.

This question is posited in a variety of ways by the trial judge, particularly at paras. 91, 108, 115 and 116 – 119 inclusive of the judgment. The respondents identified no persuasive relevant authorities for either proposition. A purchaser is generally entitled to take the conveyance or Transfer Deed in any name he/she wishes unless the vendor has stipulated to the contrary– *Guerin v. Ryan* (*supra*).

133. Insofar as the judge suggests or implies throughout the judgment that the prior agreement of Mr. Terry Byrne as to the identity of the purchaser as being Maria Keena was necessary (e.g. paras. 39, 65, 67, 78, 91, 105, 108, 116, 118, 119) that does not appear to be correct and no authority for that proposition was identified by the respondents.

There was some *prima facie* evidence capable of supporting part performance

134. Para. 73 of the judgment suggests the court adopted the respondents' argument that the non-refundable deposit should be viewed as compliance with a condition and to exclude its characterisation as part performance of the contract. However, that approach does not take the appellant's case at its highest.

135. In regard to the issue of part performance the finding of the trial judge that the appellant could not in the alternative rely on the doctrine of part performance was erroneous – but followed inevitably from his erroneous analysis as to the existence of the " 3 Ps"- particularly the finding at para. 137 of the judgment as to the consequences of the fact that the bank draft was not lodged. The court had already held at para. 39(i) of the judgment on the evidence that Ms. Keena and Mr. Lanigan (if perhaps not Mr. Treacy) had acknowledged that the deposit would be non-refundable, it being contended that the appellant acted to her detriment when she handed over the bank draft on the night of the 20th November, 2016. The fact that the respondents had apparently subsequently unilaterally chosen not to lodge the draft was not necessarily dispositive of the issue. Since the trial judge had held that the essential terms

of the contract were never the subject of a parol agreement, the issue of part performance in the context of s.51(2) was not the subject of proper consideration. The issue would strictly only come into focus for proper consideration if at the conclusion of the evidence the memorandum was not *prima facie* sufficient for purposes of s.51(1).

There was *prima facie* evidence that Maria Keena was the purchaser

136. The surrounding circumstances on the night of 21 November 2016, including Maria Keena's attendance in Dublin, her payment over of the non-refundable deposit, acknowledgement in response to query by Chris Allen that she understood it was non-refundable and her execution of the receipt all provide *prima facie* evidence that the purchaser is thereby disclosed to be Maria Keena. All other signatories were eliminated logically from such a characterisation. The appellant established *prima facie* that she was the purchaser.

137. The judge observed:

> *"While conflicting versions have been given, nowhere does any of the evidence go so far as to say that it was clearly agreed and intended by all those present that the plaintiff and only the plaintiff was signing as purchaser and that Mr. Lanigan's signature was only in his capacity as a witness. Further, only the signature of Ms. O'Mongain is described as that of a witness."* (para. 39)

However, as outlined above, what may or may not have been "…*clearly agreed and intended by all those present...*" is not dispositive of the question whether a sufficient memorandum evidencing a binding contract for the purposes of s.51 has come into existence. The case law makes clear that evidence of surrounding facts and circumstances are admissible to prove the respective capacities of signatories or to prove the so called "3 P's".

138. The agreement was specifically enforceable against her with effect from her signing the receipt. I conclude that there was *prima facie* evidence that a binding agreement had been concluded and further that, as required by the statute in accordance with the authorities, including *Globe Entertainment Limited v Pub Pool Limited* [2016] IECA 272, a sufficient memorandum of that agreement was proven to the *prima facie* evidential standard.

The proposition that a different entity might take the purchase deed was capable of rendering the agreement unenforceable was not established as a matter of law

139. What was at issue was whether there was a sufficient memorandum for the purposes of s. 51(1), not who would ultimately take the Transfer at completion. The question was who was "*the purchaser*" within the meaning of s. 3 of the 2009 Act. Considerations around the entity which might ultimately take an assurance of the property were not material to the issue as to whether a specifically enforceable agreement was in existence.

Conclusions

140. In my view the trial judge, whilst he correctly adumbrated that what was required of the appellant was to make out a *prima facie* case, in substance erroneously applied a different and higher test. The correct test involved an assessment as to whether there was *prima facie* evidence from which it could be inferred that Mr. Lanigan, acting as representative for an unidentified purchaser, concluded a parol agreement earlier on 21 November 2016 for the purchase of the premises for €1,600,000 and agreed for the payment over of a non-refundable deposit of 10% to be made that same evening and whether there was *prima facie* evidence to support a claim for specific performance of that agreement on any basis.

141. The evidence adduced by the appellant established to a *prima facie* level the following:

a. That the hotel was intended to be purchased for Maria Keena.

b. Mr. Lanigan informed the vendor's agent Mr. Terry Byrne in the first phone call of the 21st November, 2016 that he was not the purchaser but was acting on behalf of a prospective purchaser – "*A N Other*".

c. The vendor was fixed with notice that Mr. Lanigan was an agent for a disclosed (but initially unidentified) principal/purchaser.

d. Thereafter there was no basis for construing Mr. Lanigan's involvement in the transaction as that of purchaser or joint purchaser.

e. Insofar as relevant, as the respondents contend, Mr. Terry Byrne held himself out as agent having authority to bind the vendors with capacity to enter into a binding agreement for sale of the hotel property.

f. Mr. Lanigan and Mr. Byrne engaged with each other as agents for the purchaser and vendor, respectively.

g. Mr. Terry Byrne on 21 November 2016 in telephone conversations, as agent for the vendors, agreed with Mr. Lanigan, who acted as agent for the purchaser, to sell the hotel premises for the price of €1,600,000 to the disclosed but at that point unidentified purchaser subject to a non-refundable deposit of €160,000 being paid over that evening.

h. Mr. Terry Byrne never required that the actual identity of the purchaser be subject to prior agreement before a binding agreement for sale could be concluded.

i. The handing of the non-refundable draft by Maria Keena directly to the vendor's designated agent "Chris Allen EY" and her signature of the Receipt document *prima facie* identified her as the purchaser.

j. Mr. Lanigan gave consistent evidence, as did Maria Keena, that he signed the receipt at the offices of EY in Dublin as witness to her signature.

k. Ms. O'Mongain signed expressly as a "witness".

l. As was evident from the face of the receipt Mr. Chris Allen having signed the receipt designated himself as "Chris Allen EY" – which identified him *prima facie* with the payee of the bank draft (EY) and the Vendors.

m. The surrounding facts and circumstances establish to a *prima facie* level of proof that Chris Allen accepted the non-refundable 10% deposit bank draft as agent on behalf of the vendors.

n. Chris Allen secured the parol and written acknowledgment of Maria Keena that the draft she had handed him was "*non-refundable*".

o. Chris Allen attended and acted throughout the meeting on the authority of the vendors and at the behest of Mr. Terry Byrne who had earlier in the day concluded the parol agreement.

p. There was no reasonable basis for considering that Mr. Chris Allen signed in any capacity other than on behalf of the vendors.

q. Applying common sense and logic in light of the surrounding circumstances and the totality of the evidence and taking the appellant's case at its highest, Maria Keena signed *prima facie* as the purchaser. This could be inferred also from the evidence of the surrounding facts and circumstances, including:

(i) Her acts in and towards procuring the bank draft;

(ii) Her travelling to Dublin in connection with the furnishing of the monies;

(iii) Her approach to Chris Allen of Ernst & Young in introducing herself;

r. Common sense indicated that had the vendors wished to seek specific performance, the payee of the non-refundable 10% deposit, Maria Keena, signatory to the receipt was *prima facie* the correct defendant.

s. By a process of elimination, the evidence and logic excluded the possibility that either Ms. O'Mongain (the witness), Mr. Lanigan (the disclosed agent who negotiated on behalf of the purchaser) or Mr. Chris Allen of EY (the agent who took possession of the 10% non-refundable deposit on behalf of the vendor) could be characterised as the purchaser.

t. The emails sent by Chris Allen to sundry parties, including Mr. Terry Byrne, on evening of 21 November 2016 were sufficient to formally communicate to the vendors the identity of Maria Keena as the purchaser.

u. Insofar as acquiescence in or agreement to Maria Keena being the purchaser was required (which in my view it was not), same was nevertheless actively acquiesced in or implicitly assented to by the vendors and their agent as their subsequent conduct attests.

All these factors were material and point *prima facie* to establishing that the appellant was the purchaser. In the language of O'Donnell J. in *Schuit* there was evidence, *"whatever its relevant cogency or strength, upon which a Court could conclude that a defendant was liable"* to the *prima facie* level of proof required. The trial judge erred in concluding to the contrary and granting the direction sought.

142. Accordingly, the order of the High Court falls to be set aside and the trial resume and proceed at the convenience of the High Court.

Costs

143. The appellant, having entirely succeeded in this action, is entitled to her costs of this appeal. The costs of the application to the High Court should be addressed at the conclusion of the trial. If any party contends for a different order as to costs, written submissions no longer than 2,000 words are to be furnished within 21 days from the date hereof.

144. Murray and Collins JJ. concur with this judgment.