



THE COURT OF APPEAL

Appeal No. 2014/811

McGovern J.
Baker J.
Costello J.

BETWEEN

JOHN GIBBONS

PLAINTIFF/
APPELLANT

- AND -

DANIEL DOHERTY AND ADT INVESTMENTS LIMITED

DEFENDANTS/
RESPONDENTS

JUDGMENT of Ms Justice Baker delivered on the 30th day of October, 2019

1. This appeal concerns the execution by a purchaser of a contract for sale of real property in trust or as agent in the light of the provisions of General Condition 30 of the Law Society General Conditions of Sale, 2001 Edition (the "General Conditions of Sale").
2. The appeal is from the order of Murphy J. made on 19 March 2013 following delivery of a written decision on 14 March 2013, *Gibbons v. Doherty* [2013] IEHC 109, by which he ordered specific performance against the second defendant/respondent, ADT Investments Limited ("the Company"), of an agreement executed in writing dated 21 December 2006 and made between the plaintiff/appellant, Mr Gibbons, as vendor and the first respondent/defendant, Mr Doherty, as purchaser in trust. By implication, the trial judge refused to order specific performance against the first defendant/respondent.
3. For convenience I propose to refer to the plaintiff/appellant and the first defendant/respondent by their names or, where appropriate, as "purchaser" or "vendor".
4. There is relatively little dispute between the parties regarding the factual context and the primary issue for determination arises from the execution by Mr Doherty of the contract for sale in trust and his subsequent nomination of the Company as beneficiary and purchaser. At the date of the contract, the Company had not yet been incorporated.
5. No issue arises concerning the application of s. 37 of the Companies Act 1963 (now s 45 of the Companies Act 2014) as the parties accept that the section has no application, as the contract was not made expressly by way of a pre-incorporation contract and Mr Doherty did not execute the contract on behalf of a company yet to be incorporated.
6. The matter is to be determined by reference to the provisions of the General Conditions of Sale, the legal effect of the execution of a contract in trust by a purchaser, and the facts surrounding the nomination of the Company as purchaser.

7. Mr Gibbons argues that he is entitled to specific performance against Mr Doherty and not just against the Company, and he makes this assertion for the practical reason that the Company does not have the financial means to complete the sale.

Background

8. By plenary summons issued on 21 May 2009, Mr Gibbons sought an order for specific performance of a contract in writing made on 21 December 2006 for the sale of three plots of land, part of Folios 1984 and 17310F of the Register of Freeholders, County Donegal, comprising 7.93 hectares or thereabouts. He also claims damages for breach of contract in addition to, or in lieu of, specific performance.
9. The contract for sale made in writing incorporated the General Conditions of Sale and Mr Gibbons thereby agreed to sell to Mr Doherty the folio lands therein described for the total price of €4m and subject to the general and special conditions therein contained. The purchaser Mr Doherty is defined as acting "in trust".
10. The sale was agreed to be closed in three lots and the sales of lot 1 and lot 2 were closed without difficulty in accordance with the special conditions in that behalf, which provided for the closing of the first lot within fourteen days after the receipt of loan finance, and of the second lot twelve months thereafter. The purchase price was apportioned as to the first lot in the sum of €2m, and as to lots 2 and 3 in the sum of €1m each. It is in respect of the completion of lot 3 that the claim for specific performance was brought and the Special Conditions provide that completion of that sale was to take place twenty-four calendar months from the date upon which the first completion had taken place. In the event, the sale was therefore agreed to close on or before 29 March 2009.
11. On 28 February 2007 the solicitors for the purchaser identified the Company as the purchaser, and thereafter raised requisitions on title and furnished a draft deed of transfer on its behalf. The sale of the first two lots closed to the Company by direct sale to the Company and not by sub-sale. The transfer of 29 March 2007 from Mr Gibbons of lot 1 was made to the Company as was that of 24 April 2008 of lot 2. The sale of lot 3 did not close as agreed.
12. The correspondence from the solicitors for the purchaser thereafter identified the Company as purchaser, and some of the correspondence from the vendor's solicitor did likewise, although I note that the name of another company in which Mr Doherty was personally involved appeared in the heading on correspondence on most, but not all occasions, and that that company was also named as purchaser in correspondence from the solicitors for the purchaser in 2008. I will return below to the argument made on the part of Mr Doherty that the actions of the vendor in treating the Company as purchaser of the two first lots are inconsistent with the case it now makes against Mr Doherty personally and that the vendor is estopped from seeking specific performance against Mr Doherty personally.

13. By completion notice served pursuant to General Condition 40 of the contract for sale and dated 3 April 2009, the vendor called upon the purchaser to close the sale in respect of lot 3 within 28 days from the service thereof.
14. The purchaser was identified in the completion notice and in the subject line of the cover letter of 3 April 2009 as "Daniel Doherty in trust for ADT Investments Limited and A.D.T. Investments Limited." The completion notice had been served after a "without prejudice" letter was sent by the solicitors for the purchaser dated 20 November 2008, in which it was stated that the Company would be unable to proceed to close the sale of lot 3 as the severe downturn in the economy and general banking conditions made it impossible for the Company to obtain finance. It seems from the letter that Mr Gibbons had been informed of this fact at a meeting with Mr Doherty personally some weeks earlier. That letter invited the vendor to vacate the remainder of the agreement and was met some ten days later by the completion notice.

The High Court decision

15. The trial judge, having reviewed the sequence of events, made findings of fact which I now propose to outline. At p 13, under the heading "decision of the court", the trial judge stated that the first two lots were:

"purchased by the second named defendant without any issue being raised by the vendor."

16. The events surrounding the difficulty in obtaining finance to close the purchase of the third lot were described and the trial judge recites the fact that the solicitors for the vendor did not understand that the contract was to close by means of a deed of sub-sale to which Mr Doherty and the Company would be parties. At p 25, the trial judge made the finding of fact on which the legal issues in this appeal centre:

"The court is satisfied that the plaintiff accepted the second named defendant as purchaser in respect of lots 1 and 2. The completion of the purchase of lot 3 was not pursuant to a separate contract, but to the same contract of the 21st December, 2006.

The contract in question was in respect of freehold registered land, was of a commercial nature, the first named defendant had contracted in trust, the identity of the company was made known prior to the closing of the first lot, was not subject to loan approval and was closed by the second named defendant in respect of lots 1 and 2."

17. In the circumstances, the trial judge, having taken the view that the sale of the third lot was also to be completed by the Company, and that Mr Doherty, as trustee, had no personal obligation to complete the sale, made the order for specific performance against the Company only.

18. Mr Gibbons argues that the trial judge failed to make any finding of fact but these extracts from his judgment are, in my view, findings of fact and are to be treated as such for the purposes of the appeal.

The grounds of appeal

19. Mr Gibbons has appealed the order of Murphy J. by notice of appeal dated 16 April 2013 on grounds which may be summarised as follows:
- (1) the trial judge failed to properly interpret and/or apply the provisions of General Condition 30 of the General Conditions of Sale of the contract;
 - (2) the trial judge erred in not finding that the correct interpretation and meaning of General Condition 30 is that the person signing a contract in trust must be acting in reality for or on behalf of another real and, then, existing person whom he can truthfully later identify as principal or other person on whose behalf, as a matter of law, he was acting at the time of signing the contract. In the circumstances where the Company was not incorporated at the date of the execution of the contract, and was not incorporated until 23 February 2007, two months or thereabouts following the signing of a binding contract for sale, Mr Doherty was properly to be held personally liable;
 - (3) the trial judge erred in law in finding that the provisions of General Condition 30 of the contract for sale relieved Mr Doherty from personal liability under the contract signed by him.
20. The respondents argue that, as a matter of law, the signing in trust of the contract for sale by Mr Doherty meant that he had no personal liability once he identified the Company as the beneficiary of the contract, and that, on the facts surrounding the closing of the contract in respect of lots 1 and 2, the vendor had accepted the Company as purchaser. It is argued that the contract is indivisible and that the approach for which the vendor contends is inconsistent with the indivisible nature of the contract in that it is sought to make Mr Doherty personally liable in respect of part only of the contract and where the Company has closed the sale of the 2 out of the 3 lots for which the contract provided.

General Condition 30 of the General Conditions of Sale

21. It is common case that General Condition 30 governs the contractual relationship, and both parties rely on the meaning and import of the General Conditions of Sale.
22. General Condition 30 was expressly incorporated into the contract and reads as follows:
- “A Purchaser who signs the Memorandum “in Trust”, “as Trustee” or “as Agent”, or with any similar qualification or description without therein specifying the identity of the principal or other party for whom he so signs, shall be personally liable to complete the Sale, and to fulfil all such further stipulations on the part of the Purchaser as are contained in the Conditions, unless and until he shall have disclosed to the Vendor the names of his principal or other such party.”

23. The words in quotation marks are those already defined in the Memorandum of Agreement and, as I have noted, the purchaser was defined or identified as "Daniel Doherty in trust".
24. Mr Gibbons argues that the provisions of General Condition 30 could not have been intended to allow for substitution of any natural or legal person as principal, and that a person signing a contract in trust must, in truth, be acting for a person on whose behalf he is actually acting in trust at the date of signing the contract. In the absence of such actual existing beneficiary, it is argued that the person signing in trust is personally liable as purchaser.
25. Mr Gibbons argues that the contractual right engaged by Mr Doherty was the right to require a sub-sale, explained in Wylie, *Irish Conveyancing Law* (3rd ed., Tottel Publishing, 2005), para 18.18:

"Subject to any agreement to the contrary, the purchaser can require the vendor to convey the land to a nominee or nominees as directed, e.g. where he has effected a sub-sale."
26. That is an uncontroversial proposition and one established by the authorities. The closing of a contract for sale by sub-purchase deed would not, of course, relieve the purchaser from liability under the contract, as the purchaser remains primarily liable to complete the sale.
27. The appeal therefore centres on the correct interpretation of the contractual provisions by which a person purchases in trust, and whether and how a person is to be considered as acting in a representative capacity, whether as trustee or agent.
28. What then falls for consideration is whether Mr Gibbons, as vendor, is correct that Mr Doherty could not have been acting in trust for the Company when it did not exist as a legal entity at the time the contract was signed.
29. A further limb of the argument on appeal is that General Condition 30 does not avail a purchaser who openly states at or near the time of signing that the transaction may at his or her option be completed in his or her name or in the name of a company to be identified, or in the name of a company not yet formed.
30. This arises from a letter dated 20 December 2006, before the purchase of the first lot was completed, from the solicitors for the purchaser to the solicitors for the vendor, in which it was said that Mr Doherty "has signed the Contract in Trust for the present", but that "[t]he property may ultimately be acquired in his own name or in the name of a Company to be determined."

Contracting in a representative capacity

31. An agent who expressly contracts in a representative capacity on behalf of an unnamed principal may be excused from personal performance and the general rule is explained in Peel, *Treitel on The Law of Contract* (14th ed., Sweet & Maxwell, 2015) at para 16.071

relied on by counsel for Mr Doherty in his written submissions, in which the authors state as follows:

“Where the principal is undisclosed the agent is both entitled and liable; but this rule does not apply where the agent uses words of representation and the principal is only unnamed. The agent’s failure to name the principal may make it easy to infer that he intended to contract personally; but there is no general rule to that effect.”

32. The execution of a contract expressly in a representative capacity where the principal is unnamed, therefore, is capable of excluding personal liability by the agent or trustee. A number of different scenarios may prevent the operation of the rule, such as where a person is not, in fact, an agent, or acts in excess of authority.
33. Counsel for Mr Gibbons relies on the judgment of Costello J. in *Dublin Laundry Company Ltd v. Clarke* [1989] ILRM 29, the conclusions in which have not been varied or rejected in subsequent case law. Costello J. was dealing with a number of questions concerning the execution of a contract for the sale of land and the relevant part of his judgment is that relating to General Condition 5 which is in identical terms to General Condition 30.
34. Costello J. was dealing with a contract for the sale of land where the purchaser had signed the contract at a time when he did not know whether title would be taken by a new company or by an existing company. The contract was not expressly made by the purchaser in trust or as agent, and thus, on its face, there was no reason to believe that General Condition 5 was engaged.
35. The first issue to be determined is whether the purchaser had in fact entered into the contract in a representative capacity or as agent for a principal. Costello J. found that the defendant did not, on the facts, contract in a representative capacity. The evidence of the purchaser was that he intended that a company would develop the land, but that at the date of the contract he did not know whether title would be taken by a new company or a company in which he already had an interest with a co-director. Various candidate companies were identified in evidence.
36. Costello J. relied on the principles stated by Budd J. in *Lavan v. Walsh* [1964] IR 87, at p 96, that:

“The question as to whether an agent is to be deemed to have contracted personally in the case of a contract in writing depends on the intention of the parties as appearing from the terms of the written agreement as a whole.”

37. At pp 38 and 39 Costello J. stated the proposition as follows:

“It seems to me that this is not a case of a person entering into a contract on behalf of a principal whose name has not been disclosed. The defendant had no principal at the time of the contract and he did not enter into it in a representative capacity. It is the case of a person with the intention that the obligations and

benefits would be taken over by a third party, a limited company, which might not yet be in existence. In these circumstances condition 5 of the conditions of contract have no application to the facts of this case [...]."

38. The judgment of Costello J. in *Dublin Laundry Company Ltd v. Clarke* can readily be distinguished from the facts in the present appeal, as that defendant/purchaser had not signed the contract either in trust or as agent and, as a matter of contract, the general condition had no application. Costello J. did not determine that the purchaser had not entered into the contract in a representative capacity because he had no existing principal at the time of the contract, but that, as a matter of fact, he had not entered into the contract on behalf of any other person or body. Thus, the judgment is not authority for the proposition that a contract signed in trust or as agent could not relieve a trustee or agent of personal liability if he had, in fact, no principal or beneficiary at the time of the contract, and insofar as Costello J. determined otherwise, his conclusion was *obiter*.
39. Mr. Doherty did sign in trust and the vendor accepted the capacity in which the purchaser signed, and this is further embodied in the description of "the Purchaser" in the first page of the contract. Whether Mr Doherty contracted in a representative capacity is readily determined as he clearly did so on the plain words of the contract, and both parties contracted on that basis.

The beneficiary did not exist at the time of the contract

40. It is the balance of the paragraph from which I quoted at para. 38 *supra* that is central to the argument in the present appeal. Having determined that, on the facts, the purchaser had not contracted in a representative capacity, Costello J. went on to say:

"[I]t seems to me that even if the defendant had signed as agent he could not now claim to avoid a personal liability on the contract if he was not an agent, as I have found. Therefore, I think the pleas in the defence have not been established."

41. The argument of the vendor centres on the issue of whether a person who purports to act as trustee or agent must have an identified principal in mind at the time of the contract, and whether such identified beneficiary or principal must exist at that time.
42. By letter of 28 February 2007, the solicitors for the purchaser informed the solicitors for the vendor that a new company, ADT Investments Limited, had been incorporated "as a vehicle for the lands", and Mr Gibbons argues that this fact means that, as a matter of law and fact, Mr Doherty was not, at the time of the contract, acting as agent for the Company, and the nomination of the Company as purchaser did not retrospectively constitute it as principal or beneficiary on whose behalf Mr Doherty had signed the contract.
43. Counsel for Mr Gibbons argues, in reliance on the *obiter* comment of Costello J., that General Condition 30 does not avail a purchaser even where he or she signs a contract "in trust" or "as agent" where, as a matter of fact, he had no principal at the time of signing,

but hoped or expected to vest his rights under the contract in a third party or company yet to be incorporated and not yet identified.

44. Counsel for Mr Gibbons argues that it is fatal to Mr Doherty's argument that the Company had not been incorporated at the date of the contract and that, as a matter of fact, as no trust or agency existed at the date of the contract for sale, General Condition 30 has no application.
45. It is argued, therefore, that whilst the purchaser in *Dublin Laundry Company Ltd v. Clarke* had not expressly contracted in a representative capacity, the judgment of Costello J. remains the relevant authority as a signature in a representative capacity may not be made in a vacuum and where, in fact, no beneficiary or principal exists or is in contemplation at the time of the contract.
46. Counsel relies on the decision of the House of Lords in *Keighley, Maxted & Co. v. Durant* [1901] AC 240. There, the House of Lords was considering the liability of a contracting party who intended to contract on behalf of a third party but without his authority and who did not profess at the time of making the contract to be acting on behalf of a principal. The question was whether that third party could ratify the contract. McNaughten L.J. considered that, as civil obligations are not to be created by, or founded upon, undisclosed intentions, the doctrine should not be extended to a case where a person intends to act for another but, as he put it:

"keeps his intention locked up in his own breast", at p 247.
47. He referred to the judgment in *Brogden v. Metropolitan Railway Company* (1877) 2 App Cas 666, at p 692, and said that the principle is well established.
48. These conclusions can be distinguished, as the contracting party made no suggestion he was acting for anyone but himself and seems to have had merely a hope or expectation that the appellants would ratify or adopt the transaction. The case was decided on the terms of the contract and on the principles of authority generally. It does not offer any guidance in the present case.
49. The case of *Kelner v. Baxter* (1866) LR 2 CP 174 is relied on frequently as authority for the proposition that when an agent contracts as agent or trustee, the principal or beneficiary must be in existence at the time the contract is made in order that the principal or beneficiary may validly ratify the contract thereafter. There, certain persons executed as agent for a company but were held to be personally liable as no subsequent ratification by the company, which was later incorporated, could relieve them from liability without the assent of the plaintiff. That judgment centred to a large extent on the admissibility of parol evidence to show that personal liability was not intended, but insofar as the judgment is relevant, it is noteworthy that Erle C.J. observed that:

"an inchoate liability might be incurred on behalf of a proposed company, which would become binding on it when subsequently formed: but that notion was

manifestly contrary to the principles upon which the law of contract is founded”, at p 183.

50. That decision is rooted in the general proposition that the rights and obligations created between the two parties to a contract “cannot be transferred by one of them to a third person who was not in a condition to be bound by it at the time it was made”, at p. 183.
51. The authors of Watts (ed.), *Bowstead and Reynolds on Agency* (20th ed., Sweet & Maxwell), at para. 2-060, explain this case as being authority for the proposition that:

“The only person who has power to ratify an act is the person in whose name or on whose behalf the act was purported to be done, and it is necessary that he should have been in existence at the time when the act was done, and competent at that time and at the time of ratification to be the principal of the person doing the act; but it is not necessary that at the time the act was done he was known, either personally or by name, to the third party.”
52. While this may be a correct general proposition, and I am not required to decide that in the present appeal, it seems to me that this appeal does not concern the law relating to agents in general, but to a contract for the sale of land on precise express terms.
53. General Condition 30 has as its purpose the regulation of mutual obligations and rights by providing that an agent or trustee who signs in that capacity remains personally liable until and unless the condition precedent for excluding such personal liability is met. It means that a purchaser who contracts on behalf of an unnamed principal in trust or as agent remains personally liable until the principal or beneficiary is identified and unless that person is expressly identified. The use of the word “until” imports a temporal condition which permits the identification of a principal or a beneficiary in due course, but rests liability with the agent or trustee until that happens.
54. By signing as agent or trustee a person reserves onto himself or herself the right to so nominate the beneficiary or principal at any time until the sale closes. It seems to me that General Condition 30 must be read as permitting a person who expressly contracts as agent or as trustee to nominate or identify a person or body on whose behalf the contract has been entered into even if that person or body did not exist or did not know of the contract at the time it was made. General Condition 30, in its plain language, is permissive and permits the nomination of the beneficiary or principal, but protects the vendor as it makes the agent or trustee personally liable until such time as this is done.
55. The provisions of General Condition 30 mean that a purchaser who signs in a representative capacity has an agreed right, at some future time, to nominate the person who, upon nomination, assumes contractual liability. The General Condition permits the trustee or agent to be relieved from liability under the contract when, and if, that is done.
56. To that extent, the provisions of General Condition 30 do not depend on the general principles of the law of agency or those which permit the ratification by an undisclosed

principal of a contract made or purported to be made on his or her behalf. The General Condition provides a means by which personal liability may be shifted to another person or body and makes the trustee or agent personally liable until and unless that happens. The corollary is that once it happens and once a principal or beneficiary is identified, that person or body is entitled to call for completion of the sale and is the person or body who may be obliged to close.

57. The General Condition therefore makes relevant not the time of the contract, but the time at which the trustee or agent identifies the person on whose behalf he has agreed to purchase the lands. It means that that person may eventually be identified, and when so identified, becomes the party entitled to the benefit and subject to the obligations of the contract, and absent a special condition to vary that provision, is the express basis on which a party may be nominated as purchaser and the named agent or trustee excused from performance.
58. It seems to me that the present case does not fall to be determined on the question of whether Mr Doherty, who expressly contracted as trustee, contracted on behalf of a then existing beneficiary, as the vendor bound himself to a contract in which Mr Doherty purchased in trust and which permitted the purchaser, provided he met the conditions precedent to avoiding personal liability contained in General Condition 30, to nominate another person or body to take the contract.
59. This appeal concerns the construction of the contract, the identity of the parties expressly identified in the contract, and the meaning and effect of General Condition 30. The intention of the parties is not relevant, and even if it could have been shown on the evidence that Mr Gibbons intended to contract with a personal and not a corporate purchaser, or with Mr Doherty and not one of his companies, the interpretative exercise does not admit of an analysis of his intention, and neither party has argued that any ambiguity exists in the express language of the contract.
60. The trial judge made a finding of fact that the first defendant, Mr Doherty, contracted in trust and that the Company was identified as purchaser prior to the closing of the first lot. The factual matrix, therefore, against which the appeal is conducted, does not admit of or require an analysis of intention other than that which finds expression in the written contract itself.
61. The completion notice, in fact, bears out the construction for which Mr Doherty contends, as it describes the purchaser as "Daniel Doherty in trust for ADT Investments Limited and ADT Investments Limited", and in its express terms called upon one or both of the named addressees to complete the sale but does not, in its terms, call upon Mr Doherty in a personal capacity to complete.
62. The contract did permit Mr Doherty to nominate a purchaser and that once he did so he thereupon was relieved of personal liability under the contract. I consider that the trial judge was correct as a matter of law to so conclude.

A possible injustice?

63. Counsel for Mr Gibbons argues that an injustice could result were a contracting party to identify a straw man as principal or beneficiary after the contract was entered into. The frailty with that argument is that the parties to a contract for sale are free to nominate the terms on which they agree, and a vendor may reject a contract signed as agent or trustee and insist on personal liability. Equally, a vendor may exclude or otherwise restrict the permissive terms of General Condition 30 or insist on a special condition that he or she has may reject a nominated beneficiary or agent or insist on proof of funds. A vendor could, by a suitable special condition, prevent a purchaser from later seeking to avoid personal liability by nominating a person who could not close the sale by nominating a man of straw or a limited liability company without assets or means.
64. A myriad of special conditions come to mind, including that a vendor could expressly provide for the forfeiture of a deposit, or require a larger deposit, in the event that a nomination was made of a purchaser who was not in a financial position to close.
65. In short, a vendor may refuse to contract with a purchaser in trust or as agent, or may require that the beneficiary or principal be identified at the date of the contract, or may reserve onto himself or herself as vendor the right to approve or reject the person nominated as principal or beneficiary.
66. The matter comes down to the express contractual terms and the language of the contract. Mr Doherty did sign in trust, was accepted to have signed in trust, and General Condition 30 was not varied by any of the special conditions. Mr Doherty could avoid personal liability provided he identified a principal and remained personally liable until and unless he did so.
67. I reject the argument of Mr Gibbons that the interpretation favoured by the trial judge could lead to an injustice on that account.

Reservation of right to take the deed personally

68. Counsel for Mr Gibbons argues that the letter from the solicitors for the purchaser dated 20 December 2006 is inconsistent with a true agency or trust as Mr Doherty, by that letter, retained or reserved onto himself the right to close the sale of his own name. In that context, Mr Gibbons makes a further argument that because the solicitors for the purchaser by the letter of 20 December 2006 had expressed the possibility that Mr Doherty might take the property in his own name or in the name of a company, and thereby reserved onto himself the option to complete by either means, General Condition 30 had no application.
69. That argument fails to recognise that Mr Doherty was personally liable on the contract for sale and remained so unless and until he identified another party as purchaser. The letter of 20 December 2006, in my view, does no more than reflect that fact and is to be read as an acknowledgement of his contractual rights and obligations by Mr Doherty, viz that he could take the deed in his own name and choose not to identify a beneficiary or trustee, and that he was, as things then stood, entitled not to disclose a principal, and not to rely on his entitlement to do so further to General Condition 30.

70. That letter, in my view, does not vary the provisions of General Condition 30, nor can it be read as a reflection of the view of Mr Doherty that no true trust or agency existed.
71. I make this observation without taking any view as to whether the parol evidence rule might mean that the letter could not be admissible as an interpretive tool.

Is the contract divisible?

72. The argument that the vendor has accepted the Company as purchaser may depend, to an extent, on whether it is possible to treat the contract for sale of the lots as divisible, and whether the vendor was entitled to reject the nomination of the Company as purchaser of the third lot.
73. Whether the contract was divisible in this sense requires an examination of its terms and conditions.
74. The contract provided for the sale in three separate lots of the folios therein described as lot 1, lot 2, and lot 3. The proceedings related to the sale of lot 3. The Particulars and Tenure describe the lands in sale by reference to the folios and read as follows:
- “ALL THAT AND THOSE that part of Folio 1984 County Donegal together with ALL THAT AND THOSE that part of Folio 17310F County Donegal as outlined in red on the map annexed hereto containing 7.93 hectares otherwise 19.595 or thereabouts statute measure.”
75. A plain reading of that term suggests that what was in contemplation was one contract for the sale of the land outlined on the one map attached to the contract. The Special Conditions provided that title was to commence with the two folios and was to be deduced therefrom and Special Condition 5 made provision for the closing of the sale in three lots and at the dates provided. Special Condition 5(1) provides as follows:
- “The within sale shall be effected in three lots and the total consideration shown in the Contract shall be apportioned as between the said lots in the following manner [...]”.
76. The singular word “sale” is used.
77. The contract then goes on to define the three lots by reference to the map attached to the contract on which the lots were shaded blue, green, and orange and marked with different letters. The three lots were defined by reference to the map and to the number of hectares comprised in each lot.
78. Special Condition 5(2) provided that, in respect of the completion of each lot, the consideration was to be apportioned out of the total purchase price. The consideration for lot 1 was €2m, described as “portion of consideration”.
79. The closing date for the sale of lot 1 was linked to the date at which the purchaser received finance and contained a proviso that the vendor could rescind the contract in its

entirety should finance not be obtained by 16 March 2007, with a further provision for the refund of the deposit.

80. The evidence, therefore, was that the vendor reserved to himself the entitlement to rescind the entire contract had the purchaser not been in a position to fund the sale of the first lot. No special condition dealing with loan finance is contained by which the closing dates for lots 2 and 3 were to be ascertained, such closing dates being linked to the closing in each case of the contract in respect of lot 1. All the relevant indices in the written contract and the Special Conditions point to parties having intended that the contract would be indivisible and was to be treated as a single contract. The trial judge recognised this in his finding recited on p. 25 of his judgment where he said:

“The completion of the purchase of lot 3 was not pursuant to a separate contract, but to the same contract of the 21st December, 2006.”

81. A reading of the contract would suggest that what was intended and agreed was that there would be one sale and that the contract price would be apportioned between the three lots, and the sale close in respect of each lot on different sequential dates. The singular is used, and the reference is to the “total consideration”, the “within sale”, and the total consideration is then apportioned as was the total area of land in sale.
82. The trial judge had ample evidence on which to make that finding of fact, and the inferences that he drew from the contract documentation bore out this interpretation.

Estoppel

83. The respondents make the argument that the appellant is estopped by his conduct in now rejecting the Company as nominee or beneficiary of the trust under which Mr Doherty executed the contract. Because of the view I take that the trial judge was correct that the contract was indivisible, and that, by its terms, Mr Doherty expressly entered into the contract in a representative capacity and thereafter identified the Company as purchaser, I do not propose to consider whether the facts bore out an argument that Mr Gibbons is estopped by his conduct from seeking to treat Mr Doherty as personally liable. Further, there was no finding of fact that might enable an appellate court to consider whether estoppel arises.

Conclusion and summary

84. General Condition 30 permits a person who has expressly signed a memorandum of sale in trust or as agent, or using a similar formula, to nominate his principal or beneficiary. The General Condition does not provide in its express language that the principal or beneficiary must be in existence at the time of the contract but sets in place a structure capable of being availed of by a party who signs in a representative capacity to disclose the name of his principal or such other party, and to nominate that person as purchaser. Commercial reality often requires a degree of flexibility or confidentiality regarding the identity of a principal and might lead to a desire not to disclose the name of a principal until close to or at the date of completion. The General Condition is permissive to that extent, but may be varied by special condition.

85. The trial judge found, as a matter of fact, that the contract was entered into on trust and that the trust was accepted by the vendor. Mr Gibbons must be regarded as having accepted that Mr Doherty's execution of the memorandum of sale in a representative capacity enabled him to avoid personal liability by the nomination of the Company as he duly did. There was no discussion in the correspondence that the sale be closed by a sub-sale, nor did the completion notice served for the failure to close the contract for the third lot suggest that the vendor had in mind that the deed would be a transfer by way of sub-sale.
86. For the reasons I have identified, it seems to me that the trial judge was correct in his conclusions and that the appeal must fail.