THE HIGH COURT

2024 [IEHC] 241

[Record No. 2023/1988P]

BETWEEN

PHOENIX ROCK ENTERPRISES

T/A FRANK PRATT & SONS

PLAINTIFF

AND

GEORGE R. HUGHES

DEFENDANT

JUDGMENT of Mr Justice Liam Kennedy delivered on the 29th day of April 2024

Introduction

1. The Plaintiff seeks an interlocutory injunction pending the resolution of its claim for specific performance to restrain the Defendant from selling or marketing a property which he allegedly agreed to sell to the Plaintiff for €1.2 million in April 2023. The Defendant denies that there was any such agreement. This application only concerns the application for relief pending trial. It does not conclusively determine the issues. Significant challenges could legitimately be expressed in respect of some of the Plaintiff's evidence in support of the application and the Plaintiff would say the same in respect of aspects of the Defendant's evidence. However, I am only considering the merits to the limited extent required for this application. Their final determination must await the trial and oral testimony (and cross

examination). Accordingly, for this application, it is not necessary to summarise all detail raised in the affidavits, especially as to the inconclusive discussions from 2014 to 2022.

The Evidence

Background

2. Uncontroverted evidence confirms that: (a) the Plaintiff is a substantial company with 45 employees and is engaged in the sand and gravel business; (b) the Defendant is a 76 year old farmer; (c) the land in issue is situated at Clondoogan, Summerhill, County Meath ("the Property"); (d) its registered owner (who died on 26 June 1996) bequeathed the Property to the Defendant and his family (him, his wife and their four children) as tenants in common; (e) an application to update the register remains pending; and (f) part of the Property has been leased to another party, Kilsaran Concrete Products ("Kilsaran"), for many years.

3. The Plaintiff criticised the time taken to administer the neighbour's estate and effect the transfer of the Property to the beneficiaries. While the delay does seem extraordinary, I have no reason to believe that it is the responsibility of the beneficiaries (including the Defendant) but the issue is not relevant to the present application, in any event.

The Pre-2023 ("Prior Period") Negotiations

4. In 2014, the Plaintiff expressed an interest in buying or leasing some or all of the Property in order to obtain access to sand and gravel thereon. Intermittent discussions in subsequent years initially concerned on a possible lease, but, after 2017, the focus moved to a possible sale. However, there is no suggestion that the parties ever reached any agreement during the Prior Period. Significantly, when it appeared that a deal was close, both parties were represented by solicitors and, in accordance with good practice in property and commercial transactions, each side's solicitors repeatedly stipulated that, as the Plaintiff's solicitors put it

in a letter dated 4 August 2017 (with similar stipulations appearing in other correspondence such as their letter of 21 September 2017):

> "*PLEASE NOTE that we have no authority either to express or implied [sic] to bind our clients to a Contract and that no Contract shall be deemed to be in existence until such time as Contracts have been exchanged between both parties, deposit paid and one part of the Contract duly exchanged. Please further note that this letter is not intended to be a note or memorandum in writing for the purposes of satisfying the Statute of Frauds as amended by section 51 of the Land and Conveyancing Law Reform Act, 2009*".

5. Although, there were occasional, inconclusive and desultory contacts up to and including 2022, the main discussions seem to have largely concluded (the phrase "*run into the sand*" seems apposite) in 2017 when, in response to an enquiry from the Defendant's solicitors on 13 September 2017 (seeking the Plaintiff's response to the Defendant's 28 July 2017 "*Subject to contract/contract denied*" proposal), the Plaintiff's solicitors reverted by letter dated 21 September 2017 to confirm that there were no further developments. Although the Plaintiff blames the Defendant for the failure of the past negotiations, I have seen no legitimate basis to criticise either party's approach during the Prior Period.

The events of April 2023

6. In 2023, the two principals (Ivan Pratt, the Plaintiff's Managing Director ("the Managing Director") and the Defendant) engaged in further direct discussions about the Property. While there are (not terribly material) disagreements as to the discussions in January/February 2023, it is common ground that there were sporadic contacts. The Plaintiff says that the Defendant committed to negotiate exclusively with the Plaintiff, but the Defendant denies doing so at any time and, to the contrary, maintains that he repeatedly made clear throughout his 2023 engagement with the Plaintiff that he intended to sell by tender. There is no suggestion of any consideration being given in return for the alleged exclusivity or there

being any binding commitment in that regard, as would be the case, for example, with a formal option to purchase.

7. According to the Plaintiff's Managing Director: (a) at a meeting on "24 January 2023" it offered to pay €975,000.00 for the whole property, including €300,000.00 for a house thereon (the parties disagree as to the date of this meeting but nothing turns on it for present purposes, so I will use the earlier date for simplicity's sake); (b) on 25 January 2023, the Defendant sent the Plaintiff a map of the land and confirmed its acreage; and (c) on 21 February 2023, the Defendant telephoned him, seeking €380,000.00 for the house (to which he agreed) and matters were left on the basis that the Defendant would revert in respect of the total price.

8. Although neither party suggests that the January/February 2023 engagements resulted in an agreement at that point, the Defendant has a different recollection of the discussions. He denies discussing his expectations with the Plaintiff other than at the "24 January 2023" meeting. He says that: (a) he telephoned the Plaintiff's Managing Director on 19 January 2023 to tell him that, over the Christmas period, the family had decided to sell by tender; (b) he never agreed at any stage to deal exclusively with the Plaintiff and it would not have made sense for him to have done so; (c) when the parties met on "24 January 2023", he reiterated to the Plaintiff's Managing Director (and to the latter's father who also attended) that the family was selling by tender; (d) the Managing Director confirmed his familiarity with such processes but offered €25,000.00 per acre and queried the acreage; (e) the Defendant confirmed that the Property comprised about 27 acres, whereas the Plaintiff thought there was only 24 acres; (f) the Plaintiff offered €320,000.00 for the house in the course of the "24 January 2023" meeting; (g) the Defendant made no response beyond saying that he would put it to the family (but added that he was "*taken aback*", as he had told the Managing Director that the sale would be by tender and the latter had said that he was familiar with the process; (h) the Plaintiff's Managing Director asked about the Defendant's expectations as to price and, on being told, informed the

Defendant that "*he would not be drawn into a 'Dutch Auction'*", at which point the "24 January 2023" meeting ended; (i) the Defendant agreed to send the Plaintiff a map at the latter's request (and duly did so); and (j) on 21 February 2023, he told the Plaintiff's Managing Director that his family had considered the Plaintiff's offer of "24 January 2023" but they still intended to proceed with sale by tender.

9. There do not appear to have been any significant communications after 21 February 2023 until 11 April 2023. The Plaintiff says that, on that date, the Defendant telephoned, offering to sell the Property for €1.2 million, subject to planning permission, and that the Plaintiff accepted that offer by a registered letter from its solicitor dated 20 April 2023 ("the Registered Letter"). Accordingly, the fundamental issue in the proceedings is whether the Defendant made an unconditional, legally effective, offer in the 11 April telephone call. The Defendant denies doing so. His uncontroverted evidence was that he had instructed the family's solicitor on 4 April 2023 to initiate the sale by tender. He says that, following on from that call to the solicitor, his 11 April 2023 telephone call was intended to confirm that the tender process (which he had previously intimated to the Plaintiff) was actually getting underway. He denies making any offer during the call.

10. The Managing Director says that as a result of the 11 April 2023 "offer":

"*we got a planning consultant and passed on other opportunities*".

He does not identify the missed opportunities between 24 April (when the Defendant received the Registered Letter) and 25 April (when the Defendant made clear that the family still intended to sell by tender).

11. The Registered Letter reflected the Plaintiff's view of the position. It stated:

"*Dear Mr. Hughes,*

We are instructed by our above-named client in respect of the purchase by our client of the lands at Clondoogan, Summerhill, County Meath from you.

Our client wishes to accept your recent offer of 11 April 2023 whereby our client will pay €1.2 million to you for the freehold estate in the lands subject to planning permission and good clear marketable title.

Our clients have accordingly arranged a planning consultant to apply for the requisite planning permission and our client has funds in place and is ready, willing and able to complete the said purchase via this office.

We look forward to receiving the relevant contract documentation with 10 days of the date of this letter."

12. The Defendant received the Registered Letter on 24 April 2023. Also on 24 April 2023, he missed a telephone call from the Managing Director and received a text from him requesting a call. However, he did not see the text or missed call until the following morning, at which point, he telephoned the Managing Director. The Defendant says that, after a protracted discussion of matters extraneous to the proceedings, the Plaintiff's Managing Director asked if the Defendant had received the letter dated 20 April 2023 from the Plaintiff's solicitor and the Defendant:

"*again reiterated that his proposals were not acceptable to us. I also stated that, on 4 April 2023, I had instructed Anthony Murphy of the Defendant's solicitors to begin drafting the requisite documents to effect sale by tender.*"

13. The Plaintiff solicitors wrote to the Defendant on 27 April 2023 protesting the Defendant's 25 April 2023 indication that he intended to sell by tender:

"*This is an entirely unacceptable position for our clients. As Mr Hughes is well aware, our clients had carried out surveys and engaged a planning consultant based on his representations and they choose to pass on other opportunities which they would have availed of if not for his representations.*"

Most, if not all of the acts of detriment or part performance relied upon in this letter appear to predate the Registered Letter which supposedly concluded the contract.

14. The Plaintiff's response to the Defendant's objection that all discussions were on the "*subject to contract*" basis stipulated in correspondence by the Plaintiff's own solicitor, was set out in para. 5 of the Managing Director's replying affidavit dated 6 July 2023;

> "*…whereas my Solicitor did write the letter in the terms cited, at the material time in 2017 Regan McEntee were in correspondence with my solicitor on a contract denied basis. That particular option lapsed in December 2017. The Defendant is trying to rely on this letter to a avoid [sic] being estopped from denying his agreement by binding offer to sell the lands to the Plaintiff on 11th April 2023 but it suffices to say that the letter from my Solicitor at that time in 2017 (which was dealing with a previous possible deal with the Defendant including an optional agreement) which was subject to contract was overtaken by events and nothing was concluded in respect of the 2017 offer. I say that the Defendant renegotiated a new contract with the Plaintiff and made a different binding offer on 11th April 2023 which superseded the 2017 possible deal which is distinct from the 2023 agreement and this offer was accepted by our solicitors on 20th April 2023*".

Issues arising in respect of the Plaintiff's claim

15. Clearly many factual and legal issues can only be finally determined at trial after oral evidence and cross examination, with witnesses presumably including the Plaintiff's directors, their father and their solicitor, and the Defendant, his family and their solicitor. Testimony would also be required at trial from the planning consultants as to when they were retained, on what basis, and as to what expense had actually been incurred by the Plaintiff prior to the Defendant's confirmation that the sale by tender was proceeding.

16. However, some issues require a preliminary assessment for the purposes of the current application. The fundamental question is whether the Defendant did indeed make an offer capable of acceptance on 11 April 2023 and, if so, in what terms, and whether it was intended to be legally binding. The associated factual and legal issues include:

a. What was the Plaintiff's understanding of the position as to the ownership of the Property?

b. Was it understood that the approval of the Defendant's family would be required?

c. Was there an offer of exclusivity and, if so, when, and in what terms, and was it legally binding?

d. Viewed objectively, did the communications between the parties have all the hallmarks of a concluded agreement (including an intention to enter legal relations) other than being in writing?

e. Did the Defendant make an offer to sell the property on 11 April 2023 and, if so, in what terms, and was it an unconditional offer capable of – in the event of acceptance – giving rise to a binding legal commitment?

f. Alternatively, was the 11 April 2023 telephone call on the "*subject to contract*" basis previously confirmed in letters from each side's solicitors?

g. Did the Plaintiff alter its position and act to its detriment in good faith reliance on there being a concluded agreement?

h. Does the principle of "part performance" apply or is the Defendant otherwise estopped from denying the existence of or entering into an agreement?

i. What relief would the Plaintiff be entitled to if it succeeds at trial?

The Plaintiff's Position

17. The Plaintiff says that, after years of negotiation, during which the Defendant had committed to deal exclusively with it and had held himself out as owning the Property and had allowed the Plaintiff to act to its detriment in the expectation of an ultimate deal, the Defendant offered to sell the Property for €1.2 million in the 11 April 2023 telephone call, an unconditional offer which the Plaintiff duly accepted (by the Registered Letter). The Plaintiff claims to have altered its position in reliance on the Defendant's unconditional offer and thus

to be entitled to seek specific performance of the alleged agreement, notwithstanding the absence of the necessary evidence in writing.

The Defendant's Position

18. The Defendant disputes the Plaintiff's version of past engagements, including any suggestion that he ever agreed to deal exclusively with the Plaintiff – pointing out that any such concession would have been illogical from his perspective. He says that the Plaintiff knew that the ownership was shared between six members of the Defendant's family, meaning that their collective agreement to any deal would be required, as had been demonstrated when past proposals (to which the Defendant had apparently been favourably disposed) had been vetoed by the family.

19. The Defendant says that he consistently made clear to the Plaintiff that the family had decided to sell by tender, and he denies making any offer to the Plaintiff in the 11 April telephone call. He says that he would not have done so because: (i) the family had decided to sell by tender; (ii) he would not and could not have done a deal without the approval of the other members of the family who shared the ownership of the Property; (iii) he would not have done so without legal advice; (iv) no deal would have been done until all necessary requirements had been agreed (such as how long should be allowed for planning permission and arrangements for payment of a suitable deposit); and (v) all discussions between the parties, including those in April 2023, were on the basis previously stipulated in the solicitors' correspondence, that there would be no contract until appropriate documentation had been drawn up, agreed, signed and exchanged. On the planning permission point, there was unchallenged evidence from the Defendant of his awareness of the delays and difficulties experienced by Kilsaran seeking planning permission previously - therefore the vendor would

have been unlikely to accept any condition with regard to planning permission and other statutory requirements unless it was strictly defined and limited.

The Law

Requirement for evidence in writing

20. Although the Plaintiff says that an agreement was concluded, it does not suggest that it was evidenced in writing, as required by s. 51 of the Land and Conveyancing Law Act 2009 ("the 2009 Act"), which replaced s. 2 of the Statute of Frauds (Ireland) 1695, and provides:

> "*(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.*
> *(2) Subsection (1) does not affect the law relating to part performance or other equitable doctrines.*
> *(3) For the avoidance of doubt, but subject to an express provision in the contract to the contrary, payment of a deposit in money or money's worth is not necessary for an enforceable contract.*" (emphasis added)

21. The Defendant cited the helpful explanation of the requirement by *McDermott & McDermott on Contract Law* (2nd ed., 2017, Bloomsbury) at para. 5.44:

> "*Many legal systems have formal requirements for the sale of land. For many persons a sale or purchase of land will be the most important financial transaction of their life. It has been said that:*
>
> > *'The significant cost of land, the fact that it is a permanent and limited commodity and the fact that land transactions tend to be carefully planned, are all said to justify a requirement of written evidence. Also the fact that the law allows for a multiplicity of simultaneous interests in a single piece of land creates a need for extra clarity where a particular interest is being disposed of.'*
>
> *Thus there is a need to protect such persons and to ensure that they understand the enormity of what they are undertaking.*"

The Doctrine of Part Performance

22. In *Steadman v Steadman* [1976] AC 536 ("*Steadman*"), at p. 558, Simon L.J. provided the classic exposition of the doctrine of part performance:

> "*[A]lmost from the moment of passing of the Statute of Frauds, it was appreciated that it was being used for a variant of unconscionable dealing, which the statute itself was designed to remedy. A party to an oral contract for the disposition of an interest in land could, despite performance to the reciprocal terms by the other party, by virtue of the statue disclaim liability for his own performance on the ground that the contract had not been in writing, Common Law was helpless. But Equity, with its purpose of vindicating good faith and with its remedies of injunction and specific performance, could deal with a situation. The Statute of Frauds did not make such contracts void but merely unenforceable; and, if the statute was to be relied on as a defence, it had to be specifically pleaded. Where, therefore a party to a contract unenforceable under the Statute of Frauds stood by while the other party acted to his detriment in performance of his own contractual obligations, the first party would be precluded by the Court of Chancery from claiming exoneration, on the ground that the contract was unenforceable, from performance of his reciprocal obligations; and the court would, if required, decree specific performance of the contract. Equity would not, as it was put, allow the Statute of Frauds 'to be used as an engine of fraud'. This has become known as the doctrine of part performance – the 'part' performance being that of the party who had, to the knowledge of the other party, acted to his detriment in carrying out irremediably his own obligations (or some significant part of them) under the otherwise unenforceable contract*".

23. In *Holiday Inns v Broadhead* (1974) 232 EG 951, at p. 1087, Goff J. (as he then was) summarised the position as follows:

> "*The authorities clearly establish that there is a head of equity under which relief will be given where the owner of property seeks to take an unconscionable advantage of another by allowing or encouraging him to spend money, whether or not on the owner's property, in the belief, known to the owner, that the person expending the money will enjoy some right or benefit over the owner's property which the owner then denies him… The authorities also establish…that this relief can be granted although the arrangement or*

understanding between the parties was not sufficiently certain to be enforceable as a contract, and that the court has a wide, albeit of course judicial, discretion to what extent relief should be given and what form it should take."

24. In *Mackie v Wilde* [1998] 2 IR 578 ("*Mackie*"), the Supreme Court cited the above summary of Simons L.J. and noted three considerations in relation to the equitable doctrine of part performance;

"*(1) the acts on the part of the plaintiff said to have been in part performance or of concluded agreement;*
(2) the involvement of the defendant with respect to such acts;
(3) the oral agreement itself."

The Supreme Court concluded that it was essential that:

"*(1) there was a concluded oral contract;*
(2) that the plaintiff acted in such a way that showed an intention to perform that contract;
(3) that the defendant adduced such acts or stood by while they were being performed; and
(4) it would be unconscionable and a breach of good faith to allow the defendant to rely upon the terms of the Statute of Fraud to prevent performance of the contract."

As the Supreme Court observed:

"*The basis for this principle was that the contract by reason of its part performance passed from being a purely executory contract and might create equities which would justify the court enforcing it specifically, something it would have done while it remained purely executory because of the absence of writing to satisfy the statute.*"

The Supreme Court added at p. 586:

"*It must not be forgotten that ultimately the court is seeking to ensure that a defendant is not, in relying upon the Statute, breaking faith with the plaintiff, not solely by refusing to perform the oral contract, but in the matter contemplated from the passage from the judgment of Simon L.J. to which I have referred.*"

25. In *Attorney General of Hong Kong v Humphreys Estate* [1987] AC 114 ("*Humphrey's Estate*"), a claim for specific performance failed. The plaintiff had acted to its detriment, but failed to prove that the defendant had created or encouraged the expectation that it would not withdraw from the ongoing negotiations. Accordingly, no estoppel arose. As the Privy Council observed at pp. 124-125:

> "*... there is no doubt that the government acted in the confident and not unreasonable hope that the agreement in principle would come into effect. ...But at no time did HKL indicate expressly or by implication that they had surrendered their right to change their mind and to withdraw. That right, expressly reserved and conferred by the government, was to withdraw at any time before 'document or documents necessary to give legal effect to this transaction are executed and registered'. HKL did not encourage or allow a belief or expectation on behalf of the government that HKL would not withdraw. HKL proceeded in accordance with the proposal contained in the agreement in principle but at the same time they continued to negotiate the exact provisions of the documents which were necessary to be executed before the parties could become bound.*"

26. *JLT Financial Services Limited v Gerard Gannon* [2017] IESC 70 ("*Gannon*") concerned an agreement that the defendant should take over the plaintiff's lease of a property in return for the plaintiff leasing a different property which the defendant owned. The agreement had been concluded but it had not been evidenced in writing. The correspondence between the parties was headed "*subject to contract/contract denied*" and made clear that no contract would not be executed until the final version of the lease had been agreed. The Supreme Court observed that the agreement was therefore unenforceable unless the plaintiff could rely on part performance or some other equitable principle. It concluded that the doctrine of part performance applied - the plaintiff had fulfilled its side of the bargain by leasing the defendant's property. The Supreme Court observed, at para. 39 (and endorsed at para. 57) the trial judge's conclusion, in the light of *Mackie* and *Steadman*, that:

> "*there was a concluded contract; the plaintiff had performed its contractual obligation; the defendant had not merely induced and acquiesced in but had actively participated in*

the plaintiff's performance by granting the Richview lease; and it would be unconscionable and in breach of good faith to allow the defendant to rely upon the terms of the Statute to avoid having to fulfil what remained of his contractual liability".

Misrepresentation and Estoppel

27. The Plaintiff alleges that the Defendant represented himself as the owner of the Property, relying on authorities such as *Colthurst v La Touche* [2000] IEHC 14 ("*Colthurst*"), *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm) and *Spencer v Irish Bank Resolution Corporation Limited* [2015] IEHC 395. The relevant principles can be briefly summarised; there must be a representation of fact which was untrue, and the plaintiff must have been induced to enter the contract by reason of the misrepresentation.

28. The Plaintiff also relied on estoppel as preventing the Defendant from denying ownership of the property. In *Grundt v Great Bolder Proprietary Goldmines Limited* (1937) 59 CLR 641, Dixon J. outlined the general principles of estoppel, at pp. 674-675;

"*... the law should not permit an unjust departure by a party from an assumption of fact which he has caused another party to adopt or accept for the purpose of their legal relations…. Before anyone can be estopped, he must have played such a part in the adoption of the assumption that it would be unfair or unjust if he were left free to ignore it.*"

The Plaintiff also cited *Canada & Dominion Sugar Company Limited v Canadian National (West Indies) Steamships Limited* [1947] AC 46, at p. 56, *Moorgate Mercantile Company Limited v Twitchings* [1976] QB 225 and *Amalgamated Investment & Property Company Limited (In liquidation) v Texas Commerce Bank International Limited* [1982] QB 84.

Interlocutory Injunctions

29. O'Donnell J. (as he was) summarised the steps to be followed when considering applications for interlocutory injunctions in the Supreme Court's decision in *Merck Sharp & Dohme Corporation v Clonmel Healthcare Ltd* [2020] 2 IR 1 ("*Merck*"), at para. 64:

> "*(1) First, the court should consider whether, if the plaintiff succeeded at the trial, a permanent injunction might be granted. If not, then it is extremely unlikely that an interlocutory injunction seeking the same relief upon ending the trial could be granted;*
> *(2) The court should then consider if it has been established that there is a fair question to be tried, which may also involve a consideration of whether the case will probably go to trial…Even then, if the claim is of a nature that could be tried, the court, in considering the balance of convenience or balance of justice, should do so with an awareness that cases may not go to trial, and that the presence or absence of an injunction may be a significant tactical benefit;*
> *(3) If there is a fair issue to be tried (and it probably will be tried), the court should consider how best the matter should be arranged pending the trial, which involves a consideration of the balance of convenience and the balance of justice;*
> *(4) The most important element in that balance is, in most cases, the question of adequacy of damages;*
> *(5) In commercial cases where breach of contract is claimed, courts should be robustly sceptical of a claim that damages are not an adequate remedy;*
> *(6) Nevertheless, difficulty in assessing damages may be a factor which can be taken account of and lead to the grant of an interlocutory injunction, particularly where the difficulty in calculation and assessment makes it more likely that any damages awarded will not be a precise and perfect remedy...*
> *(7) While the adequacy of damages is the most important component of any assessment of the balance of convenience or balance of justice, a number of other factors may come into play and may properly be considered and weighed in the balance in considering how matters are to be held most fairly pending a trial, and recognising the possibility that there may be no trial;*
> *(8) While a structured approach facilitates analysis and, if necessary, review, any application should be approached with a recognition of the essential flexibility of the*

remedy and the fundamental objective in seeking to minimise injustice, in circumstances where the legal rights of the parties have yet to be determined."

30. In *AIB plc v Diamond* [2012] 3 IR 549 ("*Diamond*") (at pp. 589-590), Clarke J. (as he then was) discussed the approach to interlocutory injunctions when property rights were in play:

"*The courts have always been anxious to guard property rights in the context of interlocutory injunctions: see for example Metro Inter v Independent News [2005] IEHC 309, [2006] 1 ILRM 414. The reason for that is clear. Even though there may be a sense in which it may be possible to measure the value of property lost, declining to enforce property rights on the basis that the party who has lost its property can be compensated in damages would amount to a form of implicit compulsory acquisition. If someone could take over my house and avoid an injunction on the basis that my house can readily be valued and he is in a position to pay compensation to that value (even together with any consequential losses), then it would follow that that person would be entitled, in substance, to compulsory acquire my house. The mere fact that it may, therefore, be possible to put a value on property rights lost does not, of itself, mean that damages are necessarily an adequate remedy for the party concerned is entitled to its property rights instead of their value.*"

31. The Plaintiff cited the observations of Clarke J. in *Metro International SA v Independent News & Media plc* [2005] IEHC 309 ("*Metro*"):

"*Thus in many cases where the plaintiff alleges an infringement of his property rights the court will intervene by injunction where those property rights have been established rather than compensate the plaintiff for the loss of those property rights…Thus the mere fact that a property right (or indeed a diminution in such a right) can be valued in monetary terms does not of itself mean that damages for an infringement of that property right can necessarily be said to be an adequate remedy.*"

32. In *Metro*, Clarke J. also held that, where arguments (on the balance of convenience) were finally balanced, the disproportionate strength of an appellant's case may merit the granting of an injunction in a property case, and he affirmed the test applied by McCracken J. in *B&S Limited v Irish Auto Trader Limited* [1995] 2 IR 142 that in finally balanced cases:

"*the court may consider the relevant strength of each party's case as revealed by the affidavit evidence adduced at the interlocutory stage where the strength of one party's case is disproportionate to the balance of the other.*"

"Subject to Contract" Discussions

33. The Privy Council also observed in *Humphrey's Estate* that, where negotiations had been stipulated to be "subject to contract", it was unlikely that the court would be satisfied that the parties had subsequently agreed to convert their ongoing negotiations into a contract in the absence of such formalities or that an estoppel had arisen to prevent the parties from declining to proceed. The Privy Council also noted at pp. 127-128 that:

"*It is possible but unlikely that in the circumstances at present unforeseeable a party to negotiations set out in a document expressed to be 'subject to contract' would be able to satisfy the court that the parties had subsequently agreed to convert the document into a contract or that some form of estoppel had arisen to prevent both parties from refusing to proceed with the transactions envisaged by the document. But in the present case the government chose to begin and elected to continue on terms that either party might suffer a change of mind and withdraw.*"

34. In *Boyle v Lee* [1992] 1 IR 555, Finlay C.J. found that there was no concluded contract because the amount of the deposit was too important an issue to be omitted from such a concluded agreement. Finlay C.J. also observed:

"*In my view, the very definite statement that a note or memorandum of a contract made orally is not sufficient to satisfy the Statute of Frauds unless or by a very necessary implication recognises, not only the terms to be enforced, but also the existence of a concluded contract between the parties and the corresponding principle that no such note or memorandum which contains any terms or expressions such as 'subject to contract' can be sufficient, even if it can be established by oral evidence that such a term or expression did not form part of the original orally concluded agreement, achieve that certainty.*"

35. *Embourg Limited v Tyler Group Limited* [1996] 3 IR 480 likewise considered the significance of such stipulations (as appeared in the solicitors' correspondence in this case) that

binding commitments would only arise when written agreements were agreed, executed and exchanged. In that particular case, correspondence from the prospective purchaser's solicitor had stipulated that no binding contract would arise until contracts were executed and exchanged. The vendor's solicitor furnished the proposed contract under cover of a letter stipulating that there would be no contract until both sides had executed the contracts and the deposit had been paid. Contracts signed by the purchaser were duly sent to the vendor's solicitor but the latter never reciprocated and instead returned the deposit. The vendor had instructed its solicitor not to return the signed contract. The claim for specific performance failed. The Supreme Court concluded that there was no binding contract because contracts had never been exchanged. It cited Lord Greene MR at 99 in *Eccles v Bryant & Pollack* [1948] Ch 93 ("*Eccles*"):

> "*When parties are proposing to enter into a contract, the manner in which the contract is to be created so as to bind them must be gathered from the intentions of the parties express or implied. In such a contract as this, there is a well-known, common and customary method of dealing; namely, by exchange, and anyone who contemplates that method of dealing cannot contemplate the coming into existence of a binding contract before the exchange takes place.*"

Likewise, in *Greenband Investments v Bruton* [2009] IEHC 67, Clarke J. observed at paras. 5.2-5.4:

> "*5.2 …Parties may enter into discussions for the purposes of identifying the terms on which they might be prepared to contract but may expressly, or by implication, do so on the basis that no contractual relations will be entered into until such time as formal written contracts have been executed by all of the parties. In such circumstances no oral agreement can be said to come into existence which amounts to a binding contract, for the parties do not have in their contemplation that their oral discussions will lead to contractual relations.*
>
> *5.3 In those circumstances it is only if the process leading to the finalisation of a written agreement reaches the stage where it can be said that that written agreement amounts to*

binding contractual arrangements between the parties, that there can be said to be any contract in existence…

5.4 However, 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, to [sic] 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, of course, 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 Statute 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."

Essential terms in a contract for the sale of land

36. Although courts can imply an undertaking of reasonableness to determine outstanding contractual details in appropriate cases, Finlay Geoghegan J. commented in *Globe Entertainment Limited v Pub Pool Limited* [2016] IECA 272 that, where the evidence shows that the parties intended that there should be agreement on a closing date, no concluded contract would come into being unless such a closing date was stipulated. Finlay Geoghegan J. approved the observations from Farrell's *The Irish Law of Specific Performance*:

"*The question what is material or essential must be considered, at any rate primarily, from the point of view of the parties themselves. The test to be applied is a subjective one and the court is required to consider terms as essential to the contract which were so regarded by the parties themselves.*"

37. In *Supermacs Ireland Limited v Katesan (Naas) Limited* [2000] 4 IR 273 Hardiman J. queried whether agreement with regard to a deposit was necessarily essential to the formation of a binding agreement. In the same decision, Geoghegan J observed, at pp. 286-287 that:

"*If the evidence is that there is going to be a deposit but that the amount of it is still to be negotiated, there cannot be a concluded agreement".*

38. Biehler's *Equity & The Law of Trusts in Ireland* (7th ed., 2020) observes (at pp.797-798) that the crucial question is usually whether everything that there is evidence that the parties intended to include in the contract has been addressed.

Solicitors Corresponding with Other Parties directly

39. The Law Society of Ireland's *Solicitor's Guide to Professional Conduct* (4th ed., 2022) states that:

> "*Where a solicitor acting for a client in any matter finds that the other party has opted not to have legal representation, the solicitor is not bound to assist the other party. The solicitor should recommend in writing that the other party obtain legal representation and make clear that the solicitor will only protect the interest of their own client.*
>
> ***Conveyancing matters***
> *In conveyancing matters, where the vendor's solicitor is not aware of the name and address of the solicitor for the purchaser, if there is no estate agent involved in the matter, the vendor's solicitor may write to the purchaser asking the purchaser for the name and address of their solicitor*". (p. 78)
>
> "*A solicitor should not interview or otherwise communicate with a party on the other side of a matter who, to the solicitor's knowledge, has retained another solicitor to act in the matter about which the first solicitor wishes to communicate, except with that solicitor's consent.*" (p. 90)

<u>Discussion</u>

Requirement for a Contract to be Evidenced in Writing

40. There is very little legislation still in force in Ireland with such venerable antecedents as the 2009 Act. It is directly derived from the Statute of Frauds, a remarkable, early legislative recognition of the potential injustice if parties were committed to a contract for the sale of land on the basis of controversial, inconclusive oral discussions. The fact that the Oireachtas

effectively re-enacted the same requirements as recently as 2009 is a testament to the continuing relevance of that ancient public interest concern.

41. The legislation preserves the parties' freedom to contract but imposes safeguards designed to avoid evidential uncertainty which could lead to injustice. However, the authorities also show that equitable doctrines such as that of part performance were developed to prevent the Statute of Frauds itself becoming an instrument of fraud. Classic examples would be cases such as *Gannon*. It seems to me, however, that the facts of the classic part performance cases were very different from the present situation. In such cases, there was generally an unequivocal agreement which would have been enforceable but for the evidential requirement and the plaintiff had clearly been induced to act to its detriment in reliance thereon – fulfilling its side of the bargain in the good faith belief that the defendant would complete the agreed deal. That, in a nutshell, is the essence of the doctrine but it is not the fact pattern in this case.

42. Before considering whether the Plaintiff has established an arguable case, some preliminary issues should be addressed as to concerns about the Plaintiff's evidence and the limited relevance of the pre-April 2023 engagement between the parties.

Concerns about the evidence

43. I was concerned by aspects of the Plaintiff's evidence. As the Defendant's affidavits noted, documents exhibited by the Plaintiff did not always appear to tally with its averments. For example, documentation relied upon by the Plaintiff as evidence of part performance appears to be date stamped "*December 2015*", as the Defendant observed in his first replying affidavit. Although the Plaintiff replied at considerable length to most points made in the Defendant's affidavits, on a paragraph-by-paragraph basis, it did not appear to address this curious feature of the timing of the exhibits on which it relied.

44. The more fundamental issue, however, was that its affidavits appeared unduly concerned with its characterisation of the interaction prior to 2023 (which the Defendant disputes but which are of limited relevance to the application) rather than on the communications in April 2023 on which the application fundamentally relies. In particular, its affidavits tended to confuse and conflate earlier, Prior Period events with those occurring in the relevant period, particularly concerning the basis on which the Plaintiff claims to have acted to its detriment, which is crucial to the claim for specific performance in the absence of evidence in writing.

The Engagement between the Parties prior to 2023 (the Prior Period)

45. The Plaintiff's affidavits, submissions and pleadings focussed heavily on past engagements between the parties (as opposed to the April 2023 period, during which an agreement is alleged to have been concluded), apparently to suggest that the Defendant had behaved or was behaving unconscionably. I did not find such evidence convincing or relevant. In my view, the inconclusive discussions during the Prior Period could only go to context and were double edged in any event. The disproportionate focus on the Prior Period is evidenced in the Statement of Claim, which devotes twelve paragraphs and five pages to the Prior Period, even though it is not alleged that any agreement was concluded in that period, as opposed to the more succinct summary of the 11 April 2023 telephone call which is fundamental to its claim:

> "*Subsequently by telephone call on or about 11th April 2023 the Defendant called Ivan Pratt and offered to sell the Property for €1,200,000.00 subject to planning permission*".

The same dichotomy appears in the Plaintiff's written submissions, which devote nearly three pages to the inconclusive Prior Period interactions, yet summarise the 11 April 2023 call in two lines:

"*On 11 April 2023 the Defendant phoned the Plaintiff and offered to sell the property for a final price of €1,200,000.00 subject to planning permission.*"

46. I was also unconvinced by the Plaintiff's suggestion that it had suffered significant detriment during the Prior Period in the expectation that the Defendant would eventually sell to it. While there was evidence that other land had come on the market from time to time, the Plaintiff's generalised evidence in that regard was underwhelming and the Defendant plausibly argued that he did not acquiesce in any such forgoing of opportunities. In any case, if the Plaintiff had considered alternative opportunities to be attractive, then it is remarkable that it failed to either seize those opportunities or to use them to seek a binding commitment from the Defendant. Its position was implausible.

47. For the same reasons, I was equally unimpressed by the Plaintiff's references to alleged expenditure in the Prior Period. Apart from the limited extent of such evidence, the Plaintiff does not claim to have had a deal at that stage. Its own solicitor's correspondence repeatedly denied any such commitment. Accordingly, if the Plaintiff spent significantly in the hope of an ultimate deal (and I am not convinced that it did), such expenditure does not assist the Plaintiff in its current application. The Plaintiff presents as a substantial, well-resourced business led by shrewd, sophisticated and well-advised directors, who evidently enjoyed ready access to sophisticated legal assistance Even if it did pass on other opportunities and spent money in the Prior Period, those were its own business decisions, at its own risk. It had no guarantee that it would acquire the Property. If it forwent other opportunities or spent money without a binding commitment, it cannot blame the Defendant.

48. The Plaintiff asserted that it behaved "honourably", as if to imply – without, in my view, any reasonable basis to do so – that the Defendant had not done so. However, if there were other opportunities available, there would have been nothing dishonourable about availing of them or at least informing the Defendant that it would do so absent a commitment.

49. In reality, neither party appears to have been anxious to clinch a deal in the intermittent engagement over the years. However, I am not convinced that the Plaintiff's criticisms of the Defendant are reasonable. In any event, as noted above, the relevance of the Prior Period to the claim based on the events of April 2023 is marginal at best.

50. Indeed, the Prior Period is actually unhelpful to the Plaintiff for two reasons:

a. Firstly, the consistent past pattern of inconclusive engagements arguably made it improbable that the Defendant should suddenly adopt a remarkably different approach in the 11 April 2023 telephone call. In view of the Plaintiff's testimony, it would seem out of character that the Defendant should suddenly offer to immediately clinch a binding deal, without first consulting his family or solicitor as he had on all previous occasions. It would seem implausible that he would have suddenly intended to immediately commit to a binding deal by telephone in such a manner, given the importance of the transaction – such behaviour would be inconsistent with the way the Plaintiff has characterised his previous *modus operandi*.

b. Secondly, the parties' earlier engagements were expressly based on the customary stipulation that such negotiations would only give rise to a binding legal agreement once formal documentation was agreed, executed, exchanged etc. Such stipulations make commercial sense and are in keeping with normal professional practice. Both sides had consistently stipulated such terms of engagement over the years. There is no evidence that, in 2023, they intended to engage on an entirely different basis.

Ownership of the Property

51. The Plaintiff says that the Defendant held himself out as the owner of the Property. Its written submissions stated that:

"*At all material times the Defendant held himself out to the Plaintiff to be the vendor of the Property and the Plaintiff is entitled to rely on the Defendant as the principal who is entitled to bind any parties. The Plaintiff was unaware of any interest in the Property by the Defendant's family.*"

52. By contrast, the Defendant says that it repeatedly disclosed the fact that six family members were joint owners. There is oral and documentary evidence for each side's position in this regard. For example, several letters from the Defendant's solicitor to the Plaintiff's solicitor or to the local council inaccurately referenced the Defendant as the owner without identifying the other family members' interest. On the other hand, some documents (a draft lease and other documents prepared for the negotiations during the Prior Period) exhibited by the Defendant clearly referenced the fact that the land was owned by the family rather than by the Defendant alone (although there is some debate as to the extent that such documents were received by the Plaintiff at the time). Paragraph 8 of the Defendant's second affidavit observed that:

"*All of these documents were seen by the Plaintiff and the Plaintiff's servants/agents, and all of these make reference not just to me, but instead to the Hughes family*."

53. Significantly, although repeatedly denying that the Plaintiff knew that the lands were held by the Defendant's family rather than by him alone, the Managing Director did not expressly respond to the Defendant's averments in respect of the documents exchanged and which, the Defendant argues, clearly showed the family's interest. For example, the Managing Director does not deny receiving a draft lease which appear to identify the family members as owners of the land, stating:

"*In respect of the 2015 draft lease, I say that this was not followed through. Mr Hughes simply placed his family members' names on the draft lease without explanation. I say that the draft lease is not applicable herein. The Defendant's Solicitor's letter of July 2017 superseded this draft lease and, in it, the Defendant was described as their client. In subsequent negotiations, no reference was made to Mr Hughes' family.*"

54. The Plaintiff also acknowledged that the Defendant was accompanied by two of his family to a meeting in the Managing Director's father's house in 2016 to discuss the proposed lease of the land, which the Defendant relies on as showing that the Plaintiff was on notice of their interest in the Property. However, the Managing Director claims not to have been made aware of their interest in the land. Paragraph 10 of the Defendant's second affidavit had referenced what was presumably the same meeting, noting that the attendance of two of his children, and relying on remarks made by his daughter as putting the Managing Director on notice of the family's interest:

> "*Indeed, my daughter told Mr Pratt at the said meeting that 'you only have half of us here' or words to a similar effect, it is difficult to understand why that statement wasn't queried by Mr Pratt unless he knew of my wider family's interest in the Inherited Lands*".

55. The Managing Director seems to recollect that comment but to have taken it differently:

> "*At the time I thought his daughter was referring to her husband not being present as representing the other fifty percent. Mr Hughes' daughter did not advise me that any family member had an interest in the lands.*"

However, it is difficult to understand this explanation since, if he believed that the daughter had no interest in the land, then the whereabouts of her husband would scarcely have been of interest to the Plaintiff.

56. The extent of the Plaintiff's awareness of the interests of the other family members can only be resolved at trial. However, although the Plaintiff claims to have believed that the Defendant was the exclusive owner of the land, several points can be made:

a. Firstly, the documentary evidence irrefutably confirms that any such assumption or belief on the Plaintiff's part was misconceived. There is no doubt that, as a result of the bequest, the equity in the land was vested in the Defendant's family jointly.

b. The Plaintiff did not suggest any plausible reason why the Defendant would have wished to misrepresent the position in this regard.

c. In fact, the Defendant's pattern of consulting with family members during the Prior Period appears entirely consistent with his, quite rightly, recognising their interest and proceeding accordingly.

d. A more plausible explanation for the lack of precision in some of the correspondence (similar to occasional loose terminology on the part of the Defendant's solicitor when referring to his own client) is that the position as to title was academic while negotiations were a very preliminary stage and that all such important issues would be resolved later, before any deal was formalised. If this was the case, then it is difficult to see how it could give rise to an estoppel or misrepresentation and such an analysis would also tend to undermine the Plaintiff's suggestion of a concluded deal.

57. Whether or not the Defendant incorrectly presented himself to the Plaintiff as the exclusive owner of the Property can only be conclusively resolved at trial. However, even on the basis of the Plaintiff's evidence in that respect, it is clear that, objectively speaking, the Defendant shares ownership with his wife and children. The interest of the other family members creates a significant issue for the Plaintiff to the extent that it seeks relief which would restrict those parties' ability to deal with their interest in the Property, despite the fact that the Plaintiff alleges no contract with those parties. Despite threatening to join such parties to the proceedings and being given leave to do so, it has not sought to add them to the proceedings. Nor has it articulated credible legal grounds to do so. In the circumstances, the fact that the relief sought would impact on the property rights of individuals who are not parties to the proceedings (and who would not be protected by the undertaking as to damages) must surely be a valid consideration in terms of the balance of convenience and the exercise of the judicial discretion.

Were the April 2023 discussions "subject to contract"?

58. There is no doubt that discussions during the Prior Period were conducted on the basis that they were *"subject to contract*" – the 2017 correspondence stipulated that the ongoing negotiations would only give rise to a binding legal agreement once all issues were agreed and legal documents were prepared, settled, agreed, signed and exchanged, a typical way to conduct real estate and other major commercial negotiations. The question is whether, when engagement resumed in early 2023, it was on the same basis or whether the parties envisaged that the agreed ground rules should be dispensed with. In the extensive but fruitless engagement between the principals and their representatives during the Prior Period, both sides repeatedly stipulated that there would be no binding agreement unless and until formal legal documents were negotiated, executed and exchanged.

59. The Plaintiff contends that these established negotiating parameters no longer applied when negotiations resumed in 2023. However, I have seen no objective evidence to suggest that the Plaintiff and the 76-year-old farmer wished or agreed to change the basis for their engagement. Accordingly, the evidence currently available suggests that the April 2023 discussions were also "subject to contract". If that is so, then the 11 April telephone call could not have been intended to give rise to a concluded legal agreement because that was not the basis on which the parties were engaging.

Had all material terms been agreed?

60. Even leaving aside the need for evidence in writing, for a binding agreement to be reached, there must be agreement as to all material terms (or agreement as to how any unresolved issues will be determined). The engagement during the Prior Period may cast light on the sort of matters which the parties would have considered material. Based on normal conveyancing practice, it is doubtful whether, even on the Plaintiff's view of the April 2023

exchanges, the parties had agreed all material issues which would need to be settled before they entered into a binding contract for the sale and purchase of the Property:

a. The Defendant's solicitor would have been concerned to ensure that the Defendant was assured of an appropriate completion date and of the prompt payment of the purchase price.

b. The parties would have had to agree the period for securing planning permission – there was no doubt on the evidence that the Defendant would have been unlikely to offer an indefinite period of grace in that regard. If such a transaction was conditional on planning permission, then normal practice and commercial logic would suggest that an agreed period for obtaining such permission would have been stipulated, with the arrangement to lapse if the condition was not fulfilled.

c. An appropriate deposit would have had to be agreed and paid (as contemplated during previous engagements during the Prior Period).

d. As noted above, the Plaintiff's solicitor would have been concerned to ensure, for example, that the Plaintiff would secure good title (since the Defendant was not the registered owner and there were other equitable interests). The solicitor would presumably have required evidence of the other family members' agreement to the transaction coupled with express warranties of the Defendant's authority to negotiate on their behalf.

These and other issues would need to have been resolved before any prudent businessperson would have been likely to commit to a binding agreement (and before any competent solicitor would have been likely to advise their client to do so).

61. It is notable that, in his affidavit in support of the unsuccessful application for entry to the commercial list, the Plaintiff's solicitor essentially repeated the assertions in the Plaintiff's grounding affidavit as to the circumstances of the contract formation, without sharing his own

perspective as to whether all material terms had been agreed in April 2023, an issue considered further below. His evidence could be particularly relevant since he was the author of the Registered Letter which purported to conclude the contract.

Concerns about the manner of "acceptance" of the alleged "agreement"

62. The "hybrid" formation of the contract asserted by the Plaintiff is a peculiar feature of its case, with a Registered Letter being sent by a lawyer in response to oral discussions between principals nine days earlier.

63. The Plaintiff claims that the discussions between the principals culminated in the 11 April telephone offer by the Defendant to the Managing Director. The Registered Letter differed from the pattern of correspondence between the parties' solicitors in the course of the previous discussions in at least three fundamental respects:

a. It was sent directly to the Defendant, purely by registered post;

b. It was not copied to his solicitors, either by post or email;

c. It was not marked "*subject to contract/contract denied*", nor was it expressed to be subject to the usual caveats about only being bound when and until contracts were agreed, signed and exchanged.

64. The Registered Letter also seems a strange way to conclude such discussions between principals. In commercial negotiations involving significant property transactions, it is natural that negotiations may be conducted at different levels. Commercial issues, such as price, are typically determined by the clients directly, for obvious reasons. By contrast, lawyers are more likely to be instructed to agree the technical legal documentation and steps required to implement their respective clients' commercial instructions with a view to concluding the deal in accordance with the principals' instructions. Accordingly, it is unsurprising that the two principals should have engaged directly. There would have been little point in the solicitors

discussing price, because they would have needed instructions. It was simpler and more natural for the principals to negotiate those issues directly.

65. However, even where principals resolve such commercial issues that does not of itself mean that a binding agreement is concluded. Whether that was the case will depend on the objective evidence as to whether the principals both intended to finally conclude a binding agreement on all material issues or whether they were initially focussing on the commercial issues in the full knowledge that other important issues would also need to be reviewed and resolved before the documentation could be finally agreed and executed.

66. If two parties meet and unequivocally demonstrate an intention to immediately conclude a binding agreement (perhaps by the particular language used or by shaking and/or, in more traditional contexts, perhaps even by "spitting" on it) then, subject to the lack of evidence in writing, such objective evidence of intention to enter binding legal relations might satisfy a court that the parties had concluded an agreement. In this scenario, the lawyers' subsequent role would be that of an amanuensis, merely documenting the deal which had been concluded in all material respects.

67. In my view, the evidence, particularly in relation to the engagement during the Prior Period, suggests that the only plausible interpretation is that the principal-to-principal engagement was not intended to clinch a deal on the spot. The pattern was for the parties to try to agree the price and thus pave the way for subsequent engagement between the solicitors on other issues which would also need to be resolved before either side committed to a deal. There would have been little point in the lawyers engaging in such discussions, drafting or other work at their respective clients' expense unless price could be agreed. However, in this (more plausible) scenario, it would still be understood that formal documentation should be prepared, agreed, executed and exchanged before either side could be bound. There is no convincing evidence that the parties agreed to proceed on any other basis in April 2023.

68. The plausibility of the Plaintiff's position is not enhanced by the curious way the arrangements were supposedly concluded. If the principals were engaging in direct one-on-one discussions with a view to reaching a legally binding agreement, then it is remarkable, to say the least, that the Plaintiff failed to complete the contract by accepting the offer in the same way it says that the offer had been communicated, by a telephone call. In the context of such oral negotiations, the natural thing to do would have been for the Plaintiff's Managing Director to have telephoned the Defendant to confirm the good news that the Plaintiff was accepting the Defendant's terms and they had a deal. The Plaintiff's evidence would be more compelling if it had made such a telephone call, thus evidencing a mutual understanding that all that was left was for the solicitors to document the agreed arrangements. In the course of such a call, the Plaintiff could have confirmed that its solicitor would be writing to the Defendant's solicitor (or to the Defendant directly if he was unrepresented, but clearly it would have been necessary for both parties to retain solicitors to complete the transaction).

69. If, for any reason, it was not possible for the Plaintiff to visit or telephone the Defendant with the message along these lines, then I would have expected to see an email or text message to the Defendant to similar effect. Such an approach would seem the natural way to accept if the Plaintiff genuinely believed that the parties were on the same page.

70. Of course, if the parties were not in fact agreed, then any such "acceptance" telephone call, email or text would have been likely to prompt an immediate rebuff from the Defendant, confirming that there was no deal. Sending the Registered Letter, rather than taking the simpler, faster and more natural expedient of calling the Defendant, could thus be seen as an artificial attempt to create a paper trail suggesting a binding agreement and avoiding the risk that a telephone call would have immediately exposed the lack of consensus.

71. The Plaintiff has not satisfactorily explained why it did not immediately telephone the Defendant to confirm acceptance of the latter's telephone offer. Nor did it instruct its solicitor

to contact the Defendant's solicitor (by letter, telephone call, email or otherwise) to confirm the deal. It submitted that the Defendant had not emphasised this issue in his replying affidavits and endeavoured to explain its approach in submissions. This was unsatisfactory, not only because the submissions went beyond what can be tolerated in terms of evidence from the bar, but also because the proffered explanations were unsatisfactory in any event.

72. The despatch of the Registered Letter by the Plaintiff's solicitor to the Defendant directly (rather than *via* his solicitors in accordance with normal professional practice) was explained on the basis that it was believed that the Defendant may have been contemplating a change of solicitors. However, there was no affidavit evidence to that effect. Even if that had been the case, the Plaintiff's solicitor should have emphasised the need for the Defendant to obtain his own legal advice and in the absence of legal representation and, in view of the context, it would have been prudent to check that the Defendant actually did intend to make an offer capable of acceptance.

73. Indeed, even if such evidence was admissible, the suggestion that the Plaintiff thought that the Defendant might no longer be represented by his previous solicitor would have two consequences. Firstly, it would be important for the Plaintiff and its lawyers not to take advantage of an unrepresented Defendant in a major property transaction, particularly when there were the interests of other beneficiaries to consider. Secondly, it would make it even more implausible that the Defendant would have intended to enter into an unconditional agreement without professional advice (particularly in the light of past dealings).

74. The Plaintiff's representatives, including its solicitor, may be able to shed further light on these matters at trial. However as matters stand, it is difficult to avoid the suspicion that the Registered Letter was intended to create a paper trail. The Plaintiff would not be entitled to seek specific performance if, knowing that it was doubtful whether the 11 April call had been intended to be an unconditional offer, it nevertheless purported to characterise it as such and to

accept it proceeded to act in purported reliance, all with a view to locking the Defendant in. If that course was adopted because the Plaintiff suspected that a telephone call might well have elicited immediate clarification that there was no deal, then there would be no basis for specific performance. I make no finding either way on that issue, but it is clear that, at trial, the Defendant will be taking issue with such aspects of the Plaintiff's account of the conclusion of the "deal".

75. The circumstances in which the agreement was concluded by Registered Letter would also give rise to concerns in terms of the equity of the case. The Plaintiff is a sophisticated, well-resourced company acting with the benefit of independent legal advice. The Defendant is a 76-year-old farmer. Concerns would arise about concluding such a major transaction in circumstances in which he was not legally advised, particularly to the extent that there were interests of other parties to be considered (although the Plaintiff claims that it did not appreciate this at the time).

76. The Plaintiff notes that there is no suggestion of lack of mental acuity on the Defendant's part, legitimising its conclusion of the agreement by Registered Letter. That is not the issue. As the Plaintiff has acknowledged, in the previous engagements, the Defendant deferred to his family before deciding how to proceed on the proposed lease and the Defendant says that the need for such consultation was one of the reasons the discussions were protracted, because two children lived outside Ireland. The Plaintiff does not deny that such delays for consultation took place but says that it did not appreciate that this was because they also had an interest in the land (it says that it assumed that the Defendant was consulting his family "*for moral support*"). In my view it was entirely appropriate that the Defendant should have consulted his family for either reason. I do not think it greatly matters whether, as the Defendant says, he needed his family's consent because they all had an equity interest, or simply because he valued their advice, as the Plaintiff claims to have believed. The point is that he had deferred

to his family before committing. It is unlikely that he would have deliberately departed from that approach in April 2023 and any attempt to preclude or pre-empt his doing so could itself be unconscionable.

77. Also, in the previous engagements the Defendant had (very prudently) sought advice from his solicitor before finally deciding how to proceed. However, the Plaintiff seems to have sought to accept the 11 April "offer" in circumstances in which there was no suggestion that the 76-year-old farmer had had the opportunity to consult his solicitor, as was his wont.

78. The foregoing facts have two consequences. Firstly, they make it implausible to suggest that the Defendant could have intended to commit to a deal (or that the Plaintiff could reasonably have expected him to do so) without consulting his family and without obtaining legal advice. Secondly, to the extent that the Plaintiff seeks equitable relief either now or at trial, it must be considered whether it was unconscionable for the Plaintiff to have sought to "clinch" a deal with a 76-year-old man without ensuring that he had consulted with his family and his solicitor or at least explicitly confirming that he was willing to commit to a legally enforceable deal without doing so. The observations cited from the Law Society of Ireland's *Guide to Professional Conduct* appear pertinent.

79. During the hearing, I queried the fact that the Registered Letter was directed to the Defendant rather than to his solicitor, contrary to good practice. The Plaintiff's explanation for the despatch of the Registered Letter was that there may have been a perceived need to "*copper fasten*" the agreement and was no doubt that solicitors would have been required in due course to prepare the necessary documentation, *et cetera*. I have two concerns with this submission. Firstly, any such future role for solicitors might itself be inconsistent with there being an immediately binding agreement. Secondly, and even more importantly, the acknowledgment that the letter was designed to "*copper fasten*" the issue may imply a concern that the

Defendant's position could change. Any such concern could itself undermine any suggestion of a mutual intention to enter into a binding legal commitment as of April 2023.

Part Performance

80. The Plaintiff seeks to invoke the doctrine of part performance to compel the Defendant to "honour" an alleged oral agreement which would otherwise be unenforceable because it was insufficiently evidenced in writing. However, I do not consider that it has adduced meaningful evidence of such part performance. It has not performed its side of the contract, as was, for example, the case in cases such as *Gannon*, nor has it been induced to act to its detriment by the Defendant. It has not signed a contract or paid a deposit, much less the purchase price. As noted above, I do not believe that any of the pre-2023 examples of allegedly forgone opportunities or acts of expenditure have any great relevance. The only act which the Plaintiff can claim to have taken in reliance after the supposed oral agreement was to appoint a planning consultant. There was no evidence of any material effort or expense in that regard. No letter of engagement or invoice was exhibited.

81. For the avoidance of doubt, while there was no suggestion of a tactical approach by the Plaintiff and his solicitor – deliberately incurring expense to "lock in" the Defendant and to ground a claim for part performance – if any such evidence were to emerge at trial, then it could further undermine any basis for equitable relief. The equitable doctrine of part performance is intended to protect parties who have been "led up the garden path" and have genuinely incurred expenditure because they had been led to believe that a deal was imminent. Equity is not intended as a device to circumvent long standing statutory safeguards which otherwise apply to the enforceability of any contract for the sale of land. Accordingly, if it were ever the case that the true motivation for any expenditure was to ground a part performance plea, then equitable relief might not be available to the Plaintiff under the "clean hands" maxim. I make

no determination in respect of that issue. For present purposes, what matters is that there is no concrete evidence of any meaningful act of part performance after the contract was supposedly concluded by the Registered Letter (which the Defendant received on 24 April 2023 and rejected on 25 April 2023) other than the reference to the retention of a planning consultant. There is no suggestion that the Plaintiff incurred material expenditure in the *bona fide* belief that the Defendant had committed to a deal. Accordingly, putting the Plaintiff's case at its height, I see no basis on which the doctrine of part performance could be invoked.

82. Although the Plaintiff's solicitor did not swear an affidavit for this application, he did do so for the Plaintiff's (unsuccessful) application for admission to the Commercial List. However, that affidavit largely repeated the Plaintiff's affidavit. It did not provide the solicitor's own perspective on whether the issues had been agreed necessary for there to be a concluded deal. It is disconcerting that, rather than offering his own perspective, his reference to the agreement appears to entirely rely on the Plaintiff's grounding affidavit as revealed by the fact that paragraph 14 of his affidavit virtually mirrors para. 12 of the Plaintiff's grounding affidavit even to the extent of repeating a sentence to the effect that:

"*The offer was accepted by the Plaintiff's Solicitor on our behalf on 20th April 2023*".

Unless the solicitor was wont to refer himself in the third person, language seems to have been copied from the grounding affidavit without the basic modification required to reflect the change in deponent. Such lack of attention by an officer of the Court to a crucial averment is surprising.

83. Furthermore, it is concerning that, while reiterating his client's position, the Plaintiff's solicitor offered no insight as to his own understanding nor did he explain the context of the "acceptance" letter from his own perspective. He cast no light as to the instructions which triggered his letter. He did not explain why it was appropriate to correspond directly with the Defendant without including the Defendant's solicitors, or, at the very least, recommending to

the Defendant that he retains solicitors and asking him who he would be using for the transaction (in accordance with the *Guide to Professional Conduct*). He did not confirm his understanding of the position with regard to legal title or equitable ownership (which would be important in terms of understanding whether a €1.2 million transaction could be agreed). Nor does he explain what enquiries the Plaintiff's solicitors had undertaken as to title or as to the steps which the Plaintiff's solicitor regarded as required in order to complete the proposed transaction. If the Plaintiff believed that the parties were *ad idem* as of 11 – 20 April, then there would be no question of litigation privilege and there would be no basis to object to the disclosure of the position in respect of legal assistance in respect of the implementation of an agreed deal (as opposed to confidential legal advice). The Court does not require expert evidence to conclude that it would be remarkable if an experienced businessman and an experienced solicitor were to agree to commit to an unconditional offer to pay €1.2 million for real estate without undertaking checks to confirm title to the property in question. However, there is no evidence from the Plaintiff or its solicitor in respect of this process. If they had undertaken title searches before purporting to accept the Defendant's alleged offer – and it would have been utterly remarkable if they had failed to do so – then it would have been evident that the testator rather than the Defendant was the registered owner. It would seem extraordinary if the Plaintiff and its solicitor were prepared to conclude a binding contract to pay such a substantial sum without resolving the central issue as to the title which the Defendant could offer, yet that issue is not addressed in the evidence before the Court.

Findings

84. I need to determine for interlocutory purposes whether: (a) the Plaintiff has established an arguable case which would entitle him to such relief if it were to succeed at trial; (b) damages

would be an adequate remedy; and (c) the balance of convenience favours the granting of such interlocutory relief.

85. As the courts have made clear (see, for example, *Diamond*), once both parties have put sufficient evidence before the court on an application for an interlocutory injunction to allow the court to conclude that each had a case on the facts, there is nothing to be gained by the filing of further evidence of the merits in respect of such issues because a court will not resolve disputed questions of fact at an interlocutory stage. Accordingly, nothing is gained in such circumstances by engaging in an exhaustive examination of the evidence and the inferences which such evidence might bear out at trial.

86. There is a conflict of evidence as to whether the Defendant offered to deal exclusively with the Plaintiff at any stage, but particularly during the April 2023 negotiations, and also as to whether, in the course of the 11 April 2023 call, the Defendant offered to sell the Property for €1.2 million or held himself out as the sole owner of the land. Accordingly, in view of the low threshold (fair issue to be tried) applicable to the current application, I would consider that the Plaintiff has made out an arguable case on those factual issues (but I am not convinced that anything turns on the exclusivity point in the absence of any consideration). However, there is also strong countervailing evidence and therefore, I would not consider that this was the sort of situation identified in *Metro* where the strength of a Plaintiff's case on the merits might help tip an otherwise even balance of convenience in favour of injunctive relief. An assessment of the relative strengths of each side's *prima facie* evidence would make me more reluctant to grant the current application.

87. Furthermore, even though I am assuming for present purposes that the Defendant agreed to deal exclusively with the Plaintiff, that he represented himself as the sole owner of the Property and that he expressed a willingness to sell it for €1.2 million in the 11 April 2023 telephone call, I do not consider that that is sufficient to suggest an intention to enter contractual

relations, particularly since, firstly, the parties had both had recourse to legal advice before concluding previous discussions and, even more significantly, in their previous interactions the parties had clearly stipulated that (as the Plaintiff's solicitor had put it):

> "*no Contract shall be deemed to be in existence until such time as Contracts have been exchanged by both parties, deposit paid and one part of the Contract duly exchanged.*"

In the absence of any evidence that the parties wished to proceed to any other basis, the inescapable inference is that those terms of engagement continued to apply.

88. Just as in *Eccles*, the evidence overwhelmingly suggests that - consistent with normal conveyancing practice – the parties were proceeding on the basis outlined in the previous solicitors' correspondence, that they would be bound in the event of an exchange of executed contracts. If they had intended to proceed on a different basis, then – in view of the previous stipulation by the solicitors – this would have been made clear in the communications between the parties. There is no evidence that any such discussion took place or that the parties ever agreed to change the rules of engagement from those laid down by their solicitors on their behalf.

89. Nor, in the light of the previous interactions, is it plausible that the parties intended to reach a €1.2 million deal on 11 April without determining what deposit should be paid, how long the Plaintiff would have to secure planning permission and confirmation as to the Defendant's ability to furnish good title. The doctrine of part performance cannot be invoked unless a concluded agreement between the parties has been reached. As Clarke J. observed in *Price v Keenaghan Developments Limited* [2007] IEHC 190 (at para. 9) part performance "*was never intended to aid an incomplete oral agreement.*"

90. There was no suggestion that the contract was evidenced in writing, so the Plaintiff cannot enforce any agreement, unless it can invoke the doctrine of part performance or otherwise show that it would be unconscionable if the Defendant were to withdraw the alleged

11 April 2023 offer. There is insufficient evidence of any meaningful act of part performance – the instruction to the planning consultant is plainly not sufficient. The Plaintiff has not performed its side of the supposed bargain, as was the case in *Gannon*. Events during the Prior Period cannot rectify the lacuna (and any such actions were clearly in the hope of securing a deal rather than on the basis that there was any commitment in that regard and are thus insufficient for the same reasons as in *Humphrey's Estate*). The current case is similar to *Haughan v Rutledge* [1988] IR 295, in which Blaney J. refused to order specific performance of an alleged agreement to grant a lease because the plaintiffs had failed to show that they had acted to their detriment in the belief that they had or would have a sufficient interest in the land to justify a belief encouraged by the property owner and that there was no bar to the equity. Nor is there evidence of improvement to the Defendant's property at the Plaintiff's expense, which is the sort of consideration which might, in certain circumstances, render it unconscionable for a defendant to decline to proceed as mutually envisaged. In my view, none of the ingredients identified by the Supreme Court in *Wilde* (and cited in paragraph 24 above) are established. In the circumstances, I see no reason why it would be unconscionable for the Defendant to proceed to sell by tender.

91. Even if there had been a binding contract, the balance of convenience would rest firmly with the Defendant. He and his family have a definite property interest, whereas the Plaintiff would, at most, have a contractual right to acquire it. Furthermore, there was no evidence from the Plaintiff to suggest that damages would not be an adequate remedy. By contrast, I doubt that damages would be an adequate remedy for the Defendant because of the difficulty in determining what price might have been secured if the sale by tender is frustrated. Damages could be more readily assessed in respect of any loss sustained by the Plaintiff because of the difficulty in determining the outcome of a hypothetical sale by tender.

92. Although I would have reached the same decision in any event, my concerns about the manner in which the "agreement" was supposedly concluded, in circumstances in which the Defendant had not had his customary recourse to his family and his solicitor, would also militate against the exercise of the judicial discretion. The fact that one party's solicitor was corresponding directly with the other party is also a concern for the reasons outlined above.

93. Also relevant to the judicial discretion is the fact that, in most part performance cases, there is no doubt that a deal was concluded, and that the Plaintiff acted to its detriment in reliance on the concluded deal, with the issue being the failure to evidence the transaction in writing. In this case, there is doubt, not only about the detriment supposedly suffered by the Plaintiff, but also about the conclusion of any deal, the intention to enter into a contract. It seems to me that this case is precisely the sort of situation the Statute of Frauds was intended to guard against – a conflict of oral evidence as to whether a party had agreed to part with land. I believe that the circumstances must clearly be unconscionable before it would be appropriate to grant an order which could, in practice, deprive a defendant of his statutory protection, an ancient safeguard which he is fully entitled to invoke.

94. It would also be inappropriate to grant relief in the terms sought in circumstances in which such orders would also impact the other family members who jointly own the Property and who the Plaintiff has chosen not to join to these proceedings.

95. Applying the very helpful structure suggested by O'Donnell J. in *Merck to* the facts of this case, to the extent such considerations are applicable, my conclusions are as follows:

a. I am not convinced that, even if the Plaintiff were to succeed at trial, a permanent injunction could be granted. Since the Defendant is not in fact the sole owner of the Property, then an injunction could not restrain the actions of non-parties. In those circumstances, the Plaintiff would have a claim in damages against the Defendant, if it could substantiate its contention that he misrepresented himself to be the owner and

agreed to sell the Property, but I do not consider that an injunction could be granted in the proceedings as presently constituted. Such a conclusion makes it extremely unlikely that an interlocutory injunction could be granted;

b. In any event, I am not satisfied that the Plaintiff has established a fair question to be tried, in that, even if the Defendant expressed a willingness to accept €1.2 million for the Property, the objective evidence does not establish an intention to conclude a deal, given the important issues left outstanding and the failure to formalise and exchange legal documentation in accordance with the previously stipulated procedures;

c. The exhortation of O'Donnell J. for the Court to be aware of the risk that cases may not go to trial, and that the presence or absence of an injunction may be a significant tactical benefit, seems a particularly pertinent in the circumstances of this case. The Defendant argued that the litigation was an attempt by the Plaintiff to intimidate him, but I do not need to reach a determination in that respect for present purposes;

d. I am satisfied that damages would be an entirely adequate remedy for the Plaintiff, less so for the Defendant, and not at all for his family;

e. For the multiple reasons outlined above, the balance of convenience and the balance of justice would overwhelmingly favour the refusal of the application in any event.

96. In the circumstances, the application will be refused. The matter is to be listed before me on Friday 3 May 2024 to deal with discovery. At the outset of that hearing, I will invite submissions as to whether there are any special circumstances which suggest that costs should not follow the event.