**THE SUPREME COURT**

**[RECORD NO.: S:AP:IE:2019:000217]**

**Clarke C.J.**
**O'Donnell J.**
**MacMenamin J.**
**Dunne J.**
**Charleton J.**

**BETWEEN:**

**JOHN GIBBONS**

**PLAINTIFF/APPELLANT**

**AND**

**DANIEL DOHERTY AND ADT INVESTMENTS LIMITED**

**DEFENDANTS/RESPONDENTS**

**Judgment of Mr. Justice John MacMenamin dated the 11th day of December, 2020**

**Introduction**

1. On the 21st December, 2006, the appellant, John Gibbons, signed a contract to sell three lots of land which he owned at Woodlands, near the town of Letterkenny in County Donegal. The contract for sale in question incorporated the then current Law Society General Conditions of Sale, promulgated in 2001. The lands in question, comprising in total 7.93 hectares or thereabouts, were part of Folios 1984 and 17310F, Register of Freeholders, County Donegal.

2. This apparently simple transaction has given rise to litigation which has moved through the High Court, the Court of Appeal, and now this Court, rendering it necessary to address points of law which arise from this contract, including the true interpretation of Condition 30 of the General Conditions, the capacity of parties to a contract, the common law principles of agency, the law concerning pre-incorporation contracts, novation, ratification, and the discretionary nature of the remedy of specific performance.

**The Parties**

3. John Gibbons is a farmer. Daniel Doherty, the first-named respondent, is a property developer who controlled a number of companies engaged in property development. Mr. Doherty was described in the contract for sale as the purchaser of the lands "in trust".

The second-named respondent, ADT Investments Limited ("ADT"), was formed at Mr. Doherty's behest for the purpose of acquiring the lands. The contract was to be performed by the sale of three lots, in three stages, over a three-year timespan. ADT was unable to complete the purchase of the third lot through lack of funding in late 2008.

**The Proceedings**

4. Later, the appellant sued both respondents for specific performance of that third and final element of the contract. The High Court granted the appellant a decree for that relief, but only against ADT, the second respondent. However, the company did not have the funds to complete the sale of the third lot, and, therefore, could not comply with the High Court order. The High Court decision was upheld by the Court of Appeal. The appellant was granted leave to appeal to this Court. While a myriad of issues must be considered, the ultimate issue in this appeal is whether the appellant is entitled to specific performance against the first-named respondent in relation to completion of the sale of the third lot. The appellant submits that the earlier courts erred in holding him entitled to a decree only against ADT, and not against Mr. Doherty personally. He submits the Court of Appeal erred in its interpretation of Condition 30.

**Context**

5. A further outline of the background is necessary. In the year 2006, the property boom was at its height. Property developers were often extremely anxious to acquire land with significant development potential. These lands were no exception. There was keen competition, amongst other bidders. Following quite complex negotiations, where there was some lack of clarity as to planning permission for the lands, Mr. Gibbons and Mr. Doherty arrived at a deal, later reduced to writing.

**The Contract**

6. The contract was unusual in form. It envisaged the purchase of the lands for a total consideration of €4 million. On a rough calculation, therefore, the appellant was to receive the remarkable sum of approximately €504,413 per hectare, or slightly over €204,000 per acre. There was evidence that neighbours of Mr. Gibbons had received even higher figures for their lands around that time.

**Lot 1**

7. Under the contract, the sale of Lot 1 (of 4.98 hectares) for the sum of €2 million was to be completed 14 days after the purchaser received a facility-letter from an entity, referred to in correspondence from the purchaser's solicitor, as "his" lenders. It was agreed that the vendor might rescind the agreement in its entirety should the facility-letter not have been issued by the 16th March, 2007 (some three-and-a-half months after the date of the contract). In such an eventuality, the contract contained the unusual provision that the purchaser's deposit was to be refunded. As described later, the sale of Lot 1 was completed, but in the deed of transfer, the purchaser was named as ADT, the second-named respondent, and not Mr. Doherty.

**Lot 2**

8. The consideration for Lot 2, comprising 1.62 hectares, was €1 million. In this instance, the contract provided for a completion date of 12 months from the date on which the

completion of Lot 1 took place. This sale was completed on the 26th April, 2008. The transfer deed again only named ADT as the purchaser.

**Lot 3**

9. The consideration for Lot 3, comprising 1.4 hectares, was €1 million. The contract provided that completion of the sale of this final lot was to take place within 24 calendar months of the completion of the purchase of Lot 1. As matters turned out, this would have been on 29th March 2009. The sale of this land did not proceed, giving rise to these specific performance proceedings.

10. By late 2008, the property market had weakened. In a telephone conversation, and in later meetings in October 2008, Mr. Doherty told Mr. Gibbons that, due to lack of funding, ADT would not be in a position to complete the purchase of Lot 3. Importantly, in the context of the relationship between an agent and principal, it emerged later that ADT had been registered as a limited company only on the 23rd February, 2007. This was two months after Mr. Doherty signed the contract of sale, but in sufficient time to be named as the purchaser in the transfer deed of Lot 1, which was dated six days later on the 29th March, 2007. The deed of transfer of Lot 2, again naming ADT as purchaser, was completed on the 26th April, 2008. The intended completion date of Lot 3 was, as already stated, 29th March, 2009. What took place in the course of the negotiations is described in more detail later. But these events must be viewed within the framework of the pleadings, and the court proceedings which followed.

**Pleadings**

11. The fact that specific performance is a discretionary remedy is well settled. The legal authorities also establish that a decree may be refused even on the grounds of delay alone (*Lark Developments Limited v. Dublin Corporation* (Unreported, High Court, 10th February, 1993). The appellant's plenary summons, seeking specific performance of the purchase of Lot 3, was issued against the respondents on the 21st May, 2009. Later, there were amendments to the pleadings. The original pleadings on behalf of the appellant, drafted by different counsel, and the later amendments thereto, reveal some of the underlying issues which emerge for consideration in what, at first sight, might be thought of as a relatively simple scenario. How the case evolved requires close analysis, therefore.

12. When there was a failure to complete the sale of Lot 3, the appellant's solicitor served two completion notices, one addressed to the first respondent, and the other addressed to both respondents, also described as purchasers. In the subsequent plenary summons, the appellant sought specific performance of what was described there as a single contract, entered into between himself, as vendor, and the first respondent as "purchaser in trust" for the second respondent. The statement of claim, delivered on the 17th July, 2009, contained the same description of the capacity in which both the first and second respondents acted. The appellant pleaded, at the outset, that both the first- and second-named respondents had agreed to purchase the three lots in question for a total purchase price of €4 million, but that the respondents had failed to complete the purchase of Lot 3 for the sum of €1 million.

13. The original defence, delivered on the 10th March, 2010, accepted that ADT had completed the purchase of the first two lots, but pleaded that the appellant was incorrect in serving a completion notice on Mr. Doherty, the first respondent, because the second respondent, ADT, had been clearly identified as the purchaser in respect of Lot 3. The respondents pleaded that the first respondent had no obligation to complete the contract, and would rely upon General Condition 30 of the Law Society General Conditions of Sale, 2001, which they contended, provided that a purchaser, although he or she signed in trust, should not be personally liable to complete the sale, once the name of the principal had been identified to the vendor.

**Amendments**

14. Having by then received advice from senior counsel, the appellant's solicitor served an amended plenary summons on the 17th November, 2011, two-and-a-half years after these proceedings had been initiated, and five years after the date of the contract of the 21st December, 2006. In the amended summons, the appellant abandoned the plea that the first respondent, Mr. Doherty, had purchased in trust for ADT. Instead, on foot of information which had by then emerged as a result of senior counsel's advices, the appellant made the case that, on the date of the contract, the second respondent had not existed as a legal entity, and that the contract had been entered into personally by the first respondent, Mr. Doherty, who had been the actual purchaser of the lands, and remained the beneficial owner of the interest therein. Arising from the fact that ADT had not been incorporated at the time of the contract, the appellant alleged that, at no time, had Mr. Doherty been a trustee for ADT, either when the lands were purchased or thereafter.

**The Amended Defence**

15. In an amended defence which followed on the 16th April, 2012, the respondents responded to these new pleas by stating it had been made clear at all times that the first respondent was executing the contract in trust. The first respondent, Mr. Doherty, denied any personal liability to complete the purchase of Lot 3. He claimed that, having entered into the contract in trust, he had, in due course, disclosed his principal, namely ADT, with which party the appellant had continued in a course of dealings without raising objection. The respondents pleaded estoppel. They stated it had been clear that Mr. Doherty had dealt with the property on behalf of ADT, a fact which had been acknowledged by the appellant in the subsequent transactions, and that, since March 2007, the appellant had represented to the respondents that he had accepted ADT, rather than Mr. Doherty, as the purchaser on foot of the contract. The respondents further contended that these representations had induced both respondents to alter their positions to their detriment, by not having the issue of ownership resolved before the purchase of Lots 1 and 2 by ADT at inflated values, and by later having to defend the proceedings. The respondents contended that, having transferred Lots 1 and 2, and received €3 million from ADT for those two lots, it was unconscionable for the appellant to thereafter assert that, under the same contract, Mr. Doherty should be regarded as the purchaser of Lot 3 for €1 million, at a time when the value of all the lots had drastically fallen, and when, by then, ADT was unable to complete.

**The Proceedings**

16. The proceedings came on for hearing in the High Court (Roderick Murphy J.) and judgment was delivered on the 14th March, 2013 ([2013] IEHC 109). As recorded earlier, the judgment granted a decree of specific performance, but only against ADT, and not against Mr. Doherty personally.

17. Mr. Gibbons appealed to the Court of Appeal (McGovern, Baker and Costello JJ.) which affirmed the High Court decision ([2019] IECA 275). That judgment, delivered by Baker J., and now appealed, held that the first respondent was entitled to rely on General Condition 30 in order to avoid liability on a decree of specific performance. In doing so, the judgment made a number of observations about the effect of Condition 30.

**Application for Leave to Appeal**

18. The appellant applied for leave to appeal to this Court. In the application for leave, it was submitted that the case raised issues regarding the interpretation of General Condition 30 relating to the capacity and powers of a signatory to a contract for the sale of land, either to assign to a third party or to call on the vendor to convey to that third party. I mention here that "Condition 30", as referred to there, is now contained in the same form as Condition 26 in the present Law Society General Conditions of Sale, 2019 (see, J.C.W. Wylie and Una Woods, *Irish Conveyancing Law* (4th edn, *Bloomsbury Professional* 2019), at para. 13.47). I add that in *Irish Conveyancing Law*, the authors discuss a question which, tangentially, and in a slightly different form, touches on issues in this appeal. The authors express the view that, now, for the purposes of s.51 of the Land and Conveyancing Law Reform Act, 2009 ("the 2009 Act"), a description of a purchaser "in trust", without more, would result in a situation whereby the full name of one of the parties would be missing, in circumstances where this later provision required the names of both parties should be specified. The contract in question in this case, of course, pre-dates the coming into effect of the 2009 Act. It was governed by s.2 of the Statute of Frauds (Ireland) Act, 1695 which, insofar as material, provided that no action should be brought concerning a contract for the sale of land unless there is a note or memorandum in writing "*signed by the party to be charged therewith, or some other person there-unto by him lawfully authorized.*"

19. It is trite law that a memorandum or note must contain the names of the parties and a description which enables them to be identified with certainty (*Law and Anor. v. Roberts and Co.* [1964] I.R. 292, at p. 297; *Irvine v. Deane* (1849) 2 Ir. Jur O.S. 209; and *Guardian Builders Ltd. v. Kelly* [1981] I.L.R.M. 127)); if a party is not named, the description must be sufficiently precise to enable a court to identify him or her by reference to other documents. But one critical question in this appeal is as to the legal *effect* of the *description* and, in particular, the significance of the identification of the first respondent as signing "in trust" for the second respondent, ADT, at a time when that company did not exist.

20. I mention also that the authors of *Irish Conveyancing Law* separately make the observation that what is now Condition 26, previously Condition 30, may "save" a contract by providing that the person who signs is to be personally liable to complete the

purchase, unless and until he or she discloses to the vendor the name of his or her principal. The authors go on to warn that the Condition may also act as a deterrent to solicitors or to other persons from signing contracts as agents or trustees without specifying: (1) the agency or trusteeship, and (2) even if the agency or trusteeship is specified, the name of the principal or beneficiary. The authors express the view that care should be taken to ensure that the principal or beneficiary is able to complete, and will, if necessary, indemnify the agent or trustee (para. 13.47). I endorse these rather prescient observations.

**Determination to Grant Leave**

21. In granting leave to appeal ([2020] IESCDET 17), the panel of this Court observed that two main issues arose for consideration. The first was whether the views expressed by the Court of Appeal as to the powers of an agent or trustee contained in Condition 30 were correct? The second was whether, having accepted the company as a purchaser in relation to the first two lots, and having received a total of €3 million paid by ADT for those two lots, it was open to the appellant to thereafter seek specific performance against the first respondent rather than the company, in relation to specific performance of Lot 3?

22. At para. 9 of its determination, the panel of this Court observed that the analysis of Condition 30 by the Court of Appeal was said to be a standard legal interpretation. The panel explained that what was involved in the appeal, therefore, was a matter of importance to every solicitor in the jurisdiction, and to developers and purchasers of property, and that the case might impact on others where a contract is signed as agent for a principal, but where such principal is not yet "in on" the deal, or what is involved is a company that has not yet come into existence. The panel commented that the same questions might arise in the case of an individual who had not yet been identified as taking on the burdens and benefits of the contract, but added that the nature of the remedy, being sought in equity, was arguably subject to the principles of equity. The determining panel also raised questions as to whether the issues in the case might give rise to *quasi* estoppel, or estoppel, or whether it was subject to any other principle of equity whereby, even if the contract was interpreted in favour of the appellant-purchaser, he should nonetheless not obtain relief? These various questions were more easily raised than resolved. It can be said there are aspects of this appeal reminiscent of a Rubik's cube, where the challenge is to align all the facts and legal principles in order to arrive at a just resolution.

**The High Court Judgment**

23. It is necessary now to analyse both of the earlier judgments in more detail. As regards the High Court judgment, I start with the simple obvious observation that the very fact that litigation is adversarial means that, to a greater or lesser degree, one party will succeed and the other will not. Parties to litigation are entitled to a reasoned decision which sets out clearly relevant issues and the judge's reasoning thereon. This case was heard in the High Court by a highly experienced and respected judge. The judgment carefully records what was submitted by both sides. But, on this occasion, the High Court judgment, unfortunately, did not fully set out the basis why an order for specific

performance was made against the second-named respondent, that is the company, but not against Mr. Doherty personally.

24. The High Court judge did, however, accept a submission made on behalf of the first respondent, that the terms of Condition 30 required the purchaser, as named in the contract, 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 name of his principal, or other such person" (para. 48). The judge went on to hold that the first respondent had disclosed to the appellant that the situation was one of agency at the time the contract was entered into, and that the first respondent had confirmed this in the incorporation and identity of the company on the 28th February, 2007, the date the transfer in the name of ADT Investments Ltd. was sent on to the appellant's solicitor (para. 48). I think these observations, as they stand, present some difficulty.

25. The judge accepted the respondent's submission that, to be applicable, the words of Condition 30 did not require that the company to be in existence at the time of signature, and that the first respondent could avail of that Condition to avoid liability. He observed that the sale of the first two lots had been completed in the name of ADT, and that no objection had been raised either by the vendor, or his advisors (para. 48). The judgment expressed the view that a decision of Costello J. in the High Court case of *Dublin Laundry Company Limited v. Clarke* [1989] I.L.R.M. 29 was distinguishable on a number of factual grounds which were identified. Toward the conclusion of the judgment, having considered the case law, the judge moved to considering whether there had been ratification of the contract, observing:

*"114. The issue of pre-incorporation contracts being ratified by a company under s. 37 of the Companies Act [1963], is considered in the third edition of Courtney, The Law of Companies (3rd Ed) (Butterworths 2012) at 17.037-17.044.*

*115. Section 37(1) provides as follows:-*

> *'Any contract or other transaction purporting to be entered into by a company prior to its formation or by any person on behalf of the company prior to its formation may be ratified by the company after its formation and thereupon the company shall become bound by it and* ***entitled to the benefit thereof as if it had been in existence at the date of such contract or other transaction and had been a party thereto.****'* (Emphasis added by the judge).

*116. Such ratification may be informal (Costello J.) in* HKN Invest OY v. Incotrade PVT Limited et al *[1993] 3 I.R. 152."*

26. But, having quoted s.37(2) earlier in the judgment, the judge did not again refer to that provision of the Act, which read as follows:

*"Prior to ratification by the company the person or persons who purported to act in the name or on behalf of the company shall in the absence of express agreement to the contrary be personally bound by the contract or other transaction and entitled to the benefit thereof."*

If the High Court judgment held that there had been ratification by virtue of s.37(1), it might have been more helpful to explain why this was so, and also to consider the materiality, if any, of s.37(2) to the case at hand. Even though the issue does not directly arise, his observations on this point must also be considered later.

27. Referring later to Mr. Gibbons, as "plaintiff" and ADT as "the second named defendant", the judge then went on to hold:

*"117. 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."* (Emphasis added).

He continued:

*"118. 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." (*Emphasis added)

He concluded:

*"119. The court will, accordingly make an order for specific performance in respect of lot 3 as against the second named defendant."*

It is clear that the High Court judgment held that the appellant had accepted ADT as being the purchaser on foot of what was held to be one single contract. The fact that the judgment did not clearly set out precisely why specific performance against the first respondent had been refused, unfortunately, rendered an appeal more likely, as an order against the company which could not meet the order was of little use to the appellant. By 2012, the value of Lot 3, and indeed the other lots, was a fraction of their value in 2006.

**The Court of Appeal Judgment**

28. The Court of Appeal judgment, delivered by Baker J., is carefully reasoned and addresses each issue, clearly setting out the reasons for each conclusion.

29. The primary focus of this appeal concerns Condition 30, which provides:

*"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 name of his principal or other such party."*

30. The way in which the court approached the question of interpretation deserves to be set out in some detail. Baker J. held:

> *"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."*

31. This passage provides the background for what must now be considered. It is necessary, of course, to remember that the Condition is but one element of the contract in a series of transactions which not only comprise that contract, but also later the transfer deeds. This was in circumstances where the contract was signed by Mr. Doherty but where ADT later advanced the consideration and was named as purchaser in the transfer deeds of Lot 1 and 2.

32. Later, this judgment must consider whether Condition 30 had the effect of transferring the burden, as well as the benefit of the contract, to the company. But, next, it is necessary to describe the conduct of the parties in the performance of the contract as reflected in the correspondence, the transfer deeds, as well as at the non-completion of the Lot 3 sale. In any process of interpretation, both the contract itself and the transfer deeds are formal documents which must have real weight. But, in this case, the conduct of the parties, as it emerges from the correspondence and evidence, has a critical bearing on the ultimate outcome of the appeal.

**The Conduct of the Parties**

33. At the very outset, it can be said that the solicitors on both sides acted *bona fide*. It is not suggested they deviated from their clients' instructions. This case primarily concerns what the parties actually discussed, agreed and accepted in writing, through their solicitors. There was little conflict on the evidence. The conduct of the parties as reflected in the correspondence is now recorded in some detail, not as an aid to interpreting the contract, but rather because, ultimately, this Court is asked to apply a discretionary remedy. For this reason, and even at the risk of an accusation of covering ground already briefly explored, it is necessary to set out what happened in greater detail than would be customary in an appeal to this Court on points of law. This is not because of any omission on the part of the Court of Appeal: that judgment is admirably comprehensive. It is, rather, because, as well as considering the law of agency and the interpretation of the conditions of sale, it will be necessary to consider matters through the different prism of specific performance as an equitable remedy.

34. As described earlier, on the 20th December, 2006, Michael D. White & Co., Mr. Doherty's solicitors, wrote to Mr. Gibbons' solicitors, Mulrine & Co., after the negotiations had taken place. White & Co. stated that Mr. Doherty had executed the contract for the purchase of the lands "in trust for the present". The memorandum of agreement recited that it had been entered into on the 21st December, 2006, between the vendor and "Daniel Doherty of Kilderry, Muff, County Donegal, (In Trust) (Purchaser)". The memorandum identified the purchase price as €4 million, less a deposit of €20,000, which had actually been paid by another company under Mr. Doherty's control, but later returned to that company by ADT. The equivocal nature of the first respondent's position at that time is shown by the fact that White & Co. wrote that Mr. Doherty might himself acquire the property, or in the name of a company to be determined. He was, therefore, keeping his options open.

35. On the following day, Mulrine & Co. responded in terms which, at minimum, acknowledged the possibility that the first respondent would not be acquiring in his own name. The letter from that firm referred in its heading to the purchaser of the property as "Your client GDC (Irl) Limited". This was a reference to another company controlled by the first respondent. Mr. Doherty was not described as the purchaser of the lands either in that letter, or in any of the extensive correspondence which followed after the contract was signed. There are numerous later references by both solicitors' firms to a corporate client "purchaser", which was variously described as "GDC Woodlands", or on other occasions, "GDC (Irl) Ltd.". It would be otiose to go through the letters one by one.

36. It may be that one possible explanation for the confusion was that Mr. Doherty was receiving tax advice that he should use a new corporate vehicle through which he should acquire the lands, while at the same time he was seeking to provide the lenders with a company which had secure enough assets to be a recipient of a loan to acquire the lands. But there can be no doubt that, by the 21st December, 2006, he, personally, was named in the contract which identified *him* as purchaser, albeit described as purchaser "in trust". Against this, it must be said that Mr. Doherty's evidence was that, if in February, or early March, 2007, Mr. Gibbons had insisted that Mr. Doherty proceed with the contract in his personal capacity, the deal would not have gone further, as he, (Mr. Doherty), would not have been prepared to do that.

37. By the 28th February, 2007, White & Co. had informed Mulrine & Co. that a new company, ADT Investments Ltd., had been incorporated as a vehicle for the purchase and that finance had by then been obtained. White & Co. enclosed requisitions on title and a draft transfer deed of Lot 1 for approval.

38. This transfer deed was a formal contractual document. But neither the requisitions, nor the transfer deed for Lot 1, mentioned Mr. Doherty in any capacity. Instead, both named only ADT as the purchaser. The vendor raised no objection to this description. In fact, before White & Co. sent on the transfer deed, Mulrine & Co. wrote two letters, on the 20th and 23rd March, 2007, which also referred to the purchaser as "ADT Investments Limited". The company was, by then, also White & Co.'s client.

39. The transfer deed of Lot 1 was dated the 29th March, 2007. Just before the deed of transfer, there was yet more correspondence. There, again, there were multifarious references to the purchaser, as in letters headed "GDC Woodlands Letterkenny", or under other descriptions. Perhaps, also, the confusion was attributable simply to the user of a word processor using the same heading as in a previous letter. But it continued even after the deed of transfer. But none of the correspondence from either firm referred to Mr. Doherty as purchaser. There is no letter which said that, although ADT was the transferee, Mr. Gibbons still considered Mr. Doherty liable to perform the contract.

**The 29th March, 2007, and afterwards**

40. There is no confusion, however, on one essential point. On the 29th March, 2007, the appellant, Mr. Gibbons, having previously indicated acceptance of ADT as purchaser through his solicitor, also accepted the consideration for the purchase of Lot 1 in the sum of €1,980,000, less the deposit of €20,000 which had been already paid by another company of Mr. Doherty, GDC Ireland. The deposit was later returned to that company by ADT. It was ADT which paid the sum of €1,980,000. Mr. Gibbons accepted that sum of €2 million as payment for Lot 1 from ADT. That Lot was transferred to ADT on foot of that payment.

**The Appellant's Conduct in or about the 24th April, 2008, and thereafter**

41. After the transfer of Lot 1 was complete, further correspondence ensued regarding the completion of Lot 2. Again, the letters from both sides variously identified the purchaser as "GDC Woodlands", or "GDC (Ireland) Limited". But, as in the case of Lot 1, the subsequent formal deed of transfer of Lot 2, dated the 24th April, 2008, described ADT as the purchaser. Mr. Gibbons, the vendor-appellant, accepted payment on foot of this document, this time in the sum of €1 million, without any objection. That payment was also made by ADT.

42. But, amongst the somewhat unusual nature of all these transactions, there is no indication that, at any stage, Mr. Doherty engaged in any formal assignment or sub-sale of his interest in the lands to that company.

**A Duty to Accept ADT as Purchaser**

43. To a greater degree than might be thought, the appellant's case hinges upon the proposition that the appellant not only became liable to convey the property to Mr. Doherty's or his nominee, but could have been called on to specifically perform a contract to that effect. The appellant's case is that, on signing the contract, he became legally liable to convey the property, not merely to Daniel Doherty, but to any other person *nominated* by him. The Court was referred to a passage from Wylie's *Irish Conveyancing Law* (2nd edn, Butterworths 1996) at para. 18.18, to the effect that:

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

44. But, then, after the words "sub-sale", the paragraph goes on:

> *"If, however, this would prejudice the vendor, e.g. where the purchaser has **entered into personal obligations and his personality is fundamental** to the transaction, the vendor may compel the purchaser to join in the conveyance to guarantee performance of those obligations."* (Emphasis added)

The decision of Maughan J. in the High Court of England and Wales in *Curtis Moffat Limited v. Wheeler* [1929] 2 Ch 224 is cited. The later editions of Wylie do not differ from the 2nd edition on this point.

45. It is true that Mr. Doherty had the power to nominate a purchaser, but the fact is that Mr. Gibbons actually *accepted* ADT as purchaser without objection. Mr. Gibbons could not in law have refused to accept ADT as transferee, even if Mr. Doherty had continuing obligations under the first two parcels. Mr. Doherty was still under a continuing obligation to perform the third part of the contract; therefore, that fact alone could not be a good ground for refusing to accept ADT as a purchaser. But the fact is, that Mr. Gibbons did not say at the time - nor can his conduct then be interpreted as maintaining - that he still considered Mr. Doherty to be the contracting party, and ADT as a mere nominee subject to a sub-sale. Instead, without any issue as to pre-incorporation being raised, Mr. Gibbons must be taken as accepting that ADT was the *principal* with the burden of performance, and on behalf of whom Mr. Doherty had contracted in trust, with the critical consequence that Mr. Gibbons not only must be seen as having accepted ADT as the contracting party, but more crucially, as permitting Mr. Doherty to conclude that although he, as purchaser, was named in the contract, he no longer had any obligations under that contract. Put more simply, Mr. Gibbons accepted ADT as a "principal" under Condition 30 and did not raise any objection that ADT had not existed at the time the contract was executed.

46. If, hypothetically, Mr. Doherty had signed the contract in his own name, without the addition of the words "in trust", he would not only have continued to be bound by it, but would still also have been entitled to assign to ADT as transferee. Mr. Gibbons would not have been in a position to object. But by acquiescence, Mr. Gibbons actually accepted ADT as principal. As this judgment ultimately holds, therefore, as a consequence of what actually occurred, Mr. Doherty must be viewed as having been discharged from his obligations. But the question whether Mr. Doherty could nonetheless still be fixed with personal liability must still be resolved. If Mr. Gibbons had continued to maintain, and could have shown, that Mr. Doherty remained a party to the contract, and that ADT was a mere transferee nominated by him, then he would have been entitled to succeed against Mr. Doherty. But he did not make any such assertion either in pre-trial correspondence or pleadings. The judge made no finding to that effect.

47. By October 2008, the property market had turned, and Mr. Doherty had inconclusive meetings and discussions with Mr. Gibbons. It is said that he offered Mr. Gibbons an *ex gratia* payment of €10,000, which was refused. Judging from the evidence, Mr. Doherty had very substantial assets at his disposal at that time.

48. On the 20th November, 2008, White & Co. wrote a "without prejudice" letter, saying that, while ADT had acted in good faith, the company would not be in a position to proceed with the purchase of Lot 3 due to circumstances beyond its control. The letter, accepted in evidence without objection, made the point that not only had the lands already acquired diminished in value, but so, too, had the value of the third lot. Had there been some issue regarding the description of the purchaser at that point, one might have expected an immediate response from Mr. Gibbons' solicitor seeking to put his side of the matter on the record, whether with or without prejudice. Instead, this letter was met with a silence which, in hindsight, is telling. It requires no feat of imagination to envisage that, had the appellant's understanding been otherwise, he would have immediately instructed his lawyer to respond to the effect that Mr. Doherty was, and remained, a party to the contract and that he, as well as ADT, continued to bear the burden of performance and completion of the purchase of Lot 3.

**The Completion Notices**

49. The response eventually came on the 3rd April, 2009, when Mulrine & Co. served two completion notices on White & Co. It is difficult to discern any difference in the text of the two notices, both seeking completion against "Daniel Doherty in trust for ADT Investments Limited, and ADT Investments Limited". The difference was only that one notice was addressed to Mr. Doherty personally, the other to both respondents.

50. In reply, White & Co. wrote two letters. The first, on behalf of ADT, did not deny that the company had been the purchaser, and repeated that, by then, it was not in a position to complete. The second letter, written on behalf of Daniel Doherty, denied any liability to complete on his part, and made a number of problematic assertions. It bluntly denied that Mr. Doherty had been a purchaser, or a party to the contract at all, and contended that his function had merely been to sign the contract *on behalf* of ADT, which had been acknowledged in the deed of transfer between John Gibbons and ADT. The contention that Mr. Doherty had, on the 21st December, 2006, signed the contract on behalf of a then non-existent company must be seen as something requiring some consideration. Could he have been an agent for ADT, or acting in trust for that company, at the time he signed the contract? It is necessary then to consider whether it can be said Mr. Doherty could have come within what is called "agency exception"?

**The "Agency Exception"**

51. The case law on the so-called agency exception is replete with fine distinctions and decisions on their own facts. For courts, the difficulties are sometimes aggravated by the fact they may have to conclude whether a contract binds parties outside the original bargain. It is described as one of the most controversial areas in agency law (see, *Irish Conveyancing Law* (cited at para. 19 above), at para. 9.34). It is clear that agency authority does not have to be given in writing and may be given orally (*Callaghan v. Pepper* (1840) 2 I.R. Eq. Rep. 399, at p. 401). But where an individual signs as an agent, he or she must describe themselves as such, by signing expressly as agent, or for a principal; otherwise, he or she risks being held personally liable.

52. Here, the first respondent is a property developer. There are instances - such as in the case of solicitors - where exceptions are made when a party signed in the course of his or her profession (*Lavan v. Walsh* [1964] I.R. 87). Budd J.'s judgment in *Lavan* is good authority for the principle that the intention of the parties is to be discerned from the written agreement as a whole. In fact, in *Lavan*, even though the solicitor had signed "in trust", the High Court, having considered all the facts, was in a position to hold that the solicitor in question had, in fact, contracted personally. By contrast, in *United Yeast Co. v. Cameo Investments Ltd.* [1977] 111 I.L.T.R. 13, Butler J., again in the High Court, held on the facts before him that by "common usage", a solicitor who signs a contract in trust was thereby recognised as merely acting as an agent.

53. But this is not a case where it can be said that "common usage" or "customary" considerations arise. The first respondent was not a solicitor, but a property developer. Here there was no other hidden purchaser or principal, or, in the words of Condition 30, any "other party". It is not submitted that any clause or description of the parties contained in the contract was "subsumed" into the deed of transfer, with the effect that the appellant might have lost his remedy under the contract or be compelled to rely only on rights under the transfer deed (See *Adair v. Carden* (1892) 29 L.R. Ir 469, at p. 481; *Re Otway's Estate* (1862) 13 IR CH R 222, at p. 235; *Vandeleur and Anor. v. Dargan* [1981] I.L.R.M. 75, at pp. 76–77; and Farrell, *Irish Law of Specific Performance* (Bloomsbury Professional 1994), at para. 11.17). The description of the purchaser in the contract remained in force, therefore. In truth, the issue which requires resolution is not whether the first respondent had been *a* purchaser - he was; but, rather, whether he should continue to be regarded by a court as such, having regard to the events described? The Court of Appeal held that he could absolve himself from liability under Condition 30.

**The Respondent's Case**

54. Counsel for the respondent, who did not appear in the High Court, stands over the judgment of the Court of Appeal, which held that Mr. Doherty was entitled to be absolved from liability under the terms of Condition 30. Counsel contends that, regardless as to whether or not ADT was in existence at the time of signing the contract, his client was entitled, under the terms of the Condition, to nominate ADT as the purchaser, thereby shifting liability under the contract to the company. But the premise of this submission should not be ignored. It could only be that Mr. Doherty *remained* a party to the contract, and that he sought to contend that he was entitled to avoid liability by reliance on the Condition.

55. The question is whether the Court of Appeal adopted too expansive an approach to interpreting Condition 30? The task, then, is to interpret what the words of the Condition mean, and the underlying assumptions of those words. This must be done in the context of the contract entered into on the 21st December, 2006 (see, para. 6 of the judgment of O'Donnell J. in *Law Society of Ireland v. Motor Insurers' Bureau of Ireland* [2017] IESC 31). Due weight must be given to what was contained in the formal documents, especially the contract itself. Where, as here, the parties committed themselves to their duties in

writing, it must be assumed that they intended to give effect to their obligations in that way (see, *Marlan Homes Limited v. Walsh and Anor.* [2012] IESC 23, at para. 51). Neither side contends there is any ambiguity.

56. The task of interpretation here will be approached in two ways: first, by looking at the plain meaning of the words, especially the key words of the Condition; and second, by a consideration of the legal authorities in order to discern the extent to which these common law authorities support the interpretation which the Court of Appeal arrived at, in concluding that the Condition permitted a "contracting out" from the developed common law position when there is purported agency for a principal who does not exist at the time an agent signs a contract "on behalf of" such person or entity. The Court of Appeal judgment accepted, however, that in *Bowstead and Reynolds on Agency* (Watts and Reynolds (eds), (20th edn, Sweet & Maxwell, 2014)), at para. 2-060, the authors explained that a judgment considered below, *Kelner v. Baxter* (1866–67) L.R. 2 C.P. 174, was 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."* (See Bowstead and Reynolds on Agency, 21st edn. Para. 2-062).

*But Baker J. responded:*

*"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."*

Thus, it can be fairly said that the Court of Appeal's reasoning squarely depends on Condition 30 providing an exception to the common law position.

57. For reasons I now seek to explain, I do not agree that the terms of the Condition could have the effect proposed in the judgment now under appeal. In my view, the wording of the Condition is actually *consistent* with the long-established common law position, and does not provide an exception to it. I think both the words of the Condition, and the common law authorities, negative any other conclusion. As pointed out in *Bowstead and Reynolds*, in order for any question of ratification to arise, the company in question must be in existence at the time of the "act"; that is, the signing of the contract. But, as outlined earlier, this judgment concludes that, while on the face of the contract, Mr. Doherty remained bound by it, in fact, Mr. Gibbons must be regarded as having decided to deal with ADT as principal, despite any issue which might theoretically have arisen as to the date of ADT's incorporation. But, in order to reach that conclusion, it is necessary

to proceed by stages and start with why Mr. Doherty would not have been entitled to escape liability by virtue of Condition 30.

**The Key Words in the Condition**

58. For ease of reference, I now repeat the words of the Condition, now emphasising key words to which weight must be given in interpretation:

> *"The 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 name of his principal or other such party."*** (Emphasis added)

**Timing and Nomination**

59. For further context, I emphasise one paragraph in the judgment of the Court of Appeal where it was held that the Condition:

> *"[made] 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"* (para. 57). (Emphasis added)

60. As quoted earlier, the Court of Appeal held that a person who signs a contract in a representative capacity had, what was termed there, "*an agreed right, at some future time, to **nominate** the person who, upon **nomination**, assumes contractual liability"* (para. 55). (Emphasis added). On this basis, the judgment held that the condition permitted a person identified in a contract as "trustee" or "agent" to be relieved from personal liability under the contract when, and if, such identification took place.

61. In considering the Condition, the issues of "timing" and "nomination" go in tandem. One must consider those words in the context of the entirety of the words of the Condition. I address, also, the "*time of the contract*", referred to in paragraph 57 of the Court of Appeal judgment, as opposed to the "*time of identification*". I think these words not only have meaning in themselves, but also assume, or imply, a temporal context to the act of signing.

**"Signs"**

62. What is undeniable is that the first line of the Condition refers to *"[t]he purchaser who **signs the memorandum "in trust".*** (Emphasis added). I think both the plain meaning, and the context of these words can only be read as referring to the situation which obtains *at the time the purchaser signs the memorandum*. The words are premised on a factual situation which obtains at the time of *signature*. They do not allow for any

interpretation other than one based on "contemporaneity"; that is, the state of affairs extant at the time the contract is signed.

63. The Court of Appeal's finding that there is a power to nominate at any time thereafter must be contrasted with the words in the Condition: "*without therein specifying the identity of the principal or* ***other party for whom he so signs****".* (Emphasis added). These words, in particular the two words "*so signs*", are, again, phrased in the present tense, and refer back to the purchaser who signs "in trust" without specifying the identity of the "*other party*" for whom he or she *signs*. At the time of signature, therefore, there must *be* an "other party".

64. The plain meaning of the words in the Condition, and, if necessary, the Shorter Oxford English Dictionary, tell us that the term "*specify*" means to identify clearly and definitively. The word "*identify*" means to establish the identity of some one or thing. The term "*identity*", in turn, means "*the fact of being who or what a person or thing* ***is****".* (Emphasis added). Taken together with the words "*other party*", it is clear that the "*other party"* to which reference is made must be in existence at the time that the contract is signed.

65. Moving down then to the next critical phrase, "*unless and until he shall have disclosed to the vendor the name of his principal or other party", the term "disclose" means "make known".* The words "*unless and until he shall have* ***disclosed*** *to the vendor the name of the other party"*, are, too, only consistent with that "*other party*" being in existence at the time the contract is signed. The term "*disclosed*" means, or, at minimum, implies, that the identity of the other person is actually *capable* of being made known at the time of signature.

66. But, at the time the contract was signed, ADT was not in existence. That company was not capable of being "*identified*". It was not capable of having its identity "*disclosed*". By contrast, Mr. Doherty *was* capable of identification. At the time of the contract, he, and he alone, was the only true purchaser when he was signing; he can only have been signing for himself.

**Plain Meaning**

67. Thus, I conclude that a plain meaning interpretation of the words of Condition 30 does not allow Mr. Doherty to escape liability. In my view, by its wording and context, the Condition is phrased in the present tense. Its "timing" must be taken as being at the time of the signature, and not at some later time.

**Alternative Interpretation**

68. I go no further than to observe that a different interpretation might tend to facilitate a potential injustice, which is simply that, *post*-signature of the contract, a hypothetical dishonourable contracting party, detecting a potential downturn in the market, and apprehensive about completing, might seek to use the words of the Condition to escape liability and assign a new straw man as "principal" or beneficiary of a "trust", or "other party", after the contract was signed. Perhaps a cautious, and well advised, vendor might seek to address such a situation by objecting to such a "new" purchaser or by insisting on

strict special conditions. I do not say this can always be prevented. But, in my view, such preclusion would require a high degree of foresight. Moreover, it is questionable whether the mere existence of such special conditions would always be of real assistance in the event of the new "nominated" purchaser ultimately transpiring to be insolvent, or a true "straw man", by the time it came to enforcing the contract. I move next to the way in which the Court of Appeal approached the judgment in *Dublin Laundry* delivered by Costello J. in the High Court (cited at para. 27 above).

***Dublin Laundry Company Limited v. Clarke* [1989] I.L.R.M. 29**

69. In order to interpret the Condition as it did, the Court of Appeal had unavoidably to address the High Court judgment in *Dublin Laundry*. It held that the judgment in *Dublin Laundry* could be readily distinguished from the facts in the present appeal, as in that High Court judgment the 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 (para. 38). The Court of Appeal went on to hold that Costello J. had not determined 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 Court of Appeal held that the judgment in *Dublin Laundry* is not authority for the proposition that a contract signed in trust, or as agent, could not relieve a transferee 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. had determined otherwise, his conclusion was *obiter* (para. 38).

70. *Dublin Laundry* addressed a situation in many ways similar to that here; it involved a property developer who signed a contract with an intention to ultimately complete in the name of an as-yet unformed company. The judgment dealt with a series of truly byzantine transactions relating to the purchase of development lands.

***Ratio***

71. Amongst the many issues considered in *Dublin Laundry* was whether, in that action for specific performance, the defendant, Mr. Clarke, had entered into a contract in a representative capacity as an agent for a principal, in circumstances where he had intended that a party or entity other than he himself would actually carry out the development. There is, it is true, a *factual* distinction: the defendant in *Dublin Laundry* did not, as here, purport to sign "in trust". But as a matter of precedent, the question is not whether there is a factual distinction - there will always be those - but whether there is a *material* factual distinction which has the effect that the principle expressed in the judgment may not have precedential value in another case. Additionally, a court must ask whether a statement in a case is part of the *ratio* or whether it is *obiter*. It cannot be both. It is true, of course, that a judgment can also be overruled by a Superior Court as not being good law. But this did not happen here.

72. To my mind, there is no *material* distinguishing factor to the long-established principle re-identified in *Dublin Laundry*, which is that an existent principal is a *sine qua non* to agency. In the judgment, Costello J. had to consider what was then Condition 5 of the

applicable Law Society General Conditions, which was in the same terms as those of General Condition 30 presently under examination.

73. Costello J. had no hesitation in rejecting the proposition that the defendant signatory could escape liability by reliance on what was then Condition 5, even though, there, the defendant, Mr. Clarke, had not signed as "agent" or "in trust". That judge pointed out that what was before him was a situation where the defendant, Mr. Clarke, had ***no*** *principal* at the time of the contract and that, as a result, he could not have entered into the contract in a representative capacity (para. 38). In so holding, Costello J. was not simply determining this as a matter of fact in that case, but expressing a long-established legal principle. He reached this conclusion as part of his ratio. In the judgment, he introduced the issue in this way:

> *"37. The first issue which I have to consider is whether, in fact, the Defendant entered into the contract in a representative capacity, that is to say, as the agent for a principal. The Defendant's evidence, as I have pointed out, is that he intended that a company would carry out the development, that is, obtain finance, take a conveyance of the lands and build. When Mr. Clarke, the defendant, signed the contract he did not know what company would carry out the development. Mr. Clarke indicated that he would take his accountants advice; that it might be a new company. It was necessary, he stated in evidence, to obtain what he called a 'clean' company, one which had not already traded. Arven Homes Limited was a possibility but his brother was a director of this company and that might not do. Devonwood Developments Limited was another possibility but Mr. Anglin was a shareholder and director of that company and Mr. Clarke was neither."*

He then continued:

> *"38. 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…".*

There is no doubt in my mind that what Costello J. said, in the second paragraph just quoted, was part of the *ratio* of the judgment. It was, after all, one of the issues "he had to consider". I do not agree that the observation was *obiter*.

74. Costello J. concluded, therefore, that what was before him was the case of a person with the *intention* that the obligations and benefits would be taken over by a third party limited company which might not yet be in existence. He held that, in such circumstances, Condition 5 could have no application and that, even if the defendant had signed as an agent, he could not in such circumstances claim to escape personal liability by relying on the contention that he was an agent when, in fact, there was no principal (para. 38).

**Distinguishable?**

75. Even at risk of repetition, therefore, the Court of Appeal held that Costello J.'s judgment in *Dublin Laundry* could be distinguished from the present case as the defendant purchaser in that decision had not signed the contract, either in trust or as agent, and as a matter of contract law, the General Condition had no application (para. 38). While this is undoubtedly a factual difference, I do not agree it is a *material* factual distinction. The principle upheld in *Dublin Laundry*, equally applicable here, is that, absent an identified or identifiable principal at the time of the contract, there cannot be an agent.

76. Persuasively written as the judgment of the Court of Appeal is, I regret I am not convinced by the reasoning. The passage cited from *Dublin Laundry* is part of the *ratio* and is not *obiter*; the material facts are not distinguishable from those in the instant case, nor do I think the judgment in *Dublin Laundry* could, or should, be overruled.

**Common Law Authorities**

77. In *Dublin Laundry*, Costello J. was, in fact, reiterating what has been a long-established common law principle. In *Kelner v. Baxter* (cited at para. 58 above), the Court of Common Pleas (Erle C.J.; Byles and Willes JJ.) had no doubt that, where a principal did not exist at the time that the contract was signed, a contract would actually be inoperative unless it was binding upon the signatory him- or herself. (per Erle C.J. at p. 183). The Court held that a stranger could not, by subsequent ratification, relieve the signatory from liability, concluding that even subsequent ratification by a company could not relieve the signatory from liability without the assent of the plaintiff, and that parol evidence would not be admissible to show that personal liability was not intended (p. 183). In the course of a robust concurrence, Willis J. observed that a signature on behalf of an intended, but non-existent company, would be no more operative than if a person contracted for a quantity of corn "*on behalf of my horses*" (at p. 185).

78. Under the common law, the requirement that a principal must exist at the time of an alleged contract most commonly arose in relation to contracts made on behalf of unregistered companies. Subsequent to *Kelner*, there developed a line of case law further considering the issue, footnoted in *Bowstead and Reynolds* (cited at para. 57 above) and other texts on the law of agency, which includes the judgments of *In re Empress Engineering Company* (1880–81) L.R. 16 Ch. Div. 125; *re Northumberland Ave. Hotel Co.* (1886) 33 Ch. Div. 16; *Melhado v. Porto Alegre, New Hamburgh and Brazilian Railway Company* (1873–74) L.R. 9 C.P. 503; *Natal Land and Colonization Co. Ltd. v. Pauline Colliery and Development Syndicate Ltd.* [1904] AC 120 (see, *Bowstead and Reynolds*, at para. 2-064).

79. In the 21st edition of *Bowstead and Reynolds*, the authors comment that, under the law of agency as classically understood, the authorities showed that a company may make a new contract in the same terms as the old, and this may be proved by part performance; but it cannot ratify the contract with retrospective effect. (*Howard v. Patent Ivory Co.* (1888) 38 Ch. Div. 156; *Touche v. Metropolitan Railway Warehousing Co.* (1870–71) L.R. 6 Ch. App. 671, para. 2-064). This is novation.

80. Other remedies were sometimes found in respect of pre-incorporation contracts. Many of these older decisions are best described as being highly fact-specific, where it is hard to discern a bright line principle. They include *Phonogram Ltd. v. Lane* [1982] Q.B. 938, a case where Mr. Lane, the defendant, was the manager of a rock group which was to be called "Cheap Mean and Nasty". The company intended to be created to run the group was called Fragile Management Ltd. Mr. Lane purported to contract on behalf of that company, which was never formed. Unsurprisingly, Mr. Lane was held to be bound by the contract.

81. In the United Kingdom, ultimately, the legislature intervened in the case of pre-incorporation contracts in 1972 (see, s.9(2) of the U.K. European Communities Act, 1972, as later re-enacted in subsequent U.K. legislation). In Ireland, the problem had been addressed by s.37 of the Companies Act, 1963 ("the 1963 Act"), and, now, its successor in s.45 of the Companies Act, 2014 ("the 2014 Act").

82. But there is no basis for this Court now to conclude that *Dublin Laundry* should be overruled. In fact, all the indications are that what was held by Costello J. on this issue is, and remains, good law.

83. I add one further indicator to the fact that *Dublin Laundry* was on point. There is also long-established authority that a signatory could not either rely on the unexpressed intention to assign where a person intended to act as another (*Keighley, Maxted and Co. v. Durant* [1901] AC 240). As in *Keighley*, Mr. Doherty may have had an intention. He may have had the intention to follow tax advice. But that intention did not manifest itself in action until *after* he had signed the contract, when ADT was formed and its name was placed on the transfer deed. While the deed showed an intention that ADT be *joined* as a purchaser, there is no evidence to show that Mr. Doherty was, *with the explicit consent of the vendor*, to be discharged, nor that the contract was entirely subsumed in the deed.

84. As a *coda* to this consideration, and at risk of stating the entirely obvious, one might simply observe that the very concept of agency itself is *predicated* on the factual existence of a principal; without a principal, on whose behalf can such a person be an agent?

**Novation**

85. Bearing in mind the absence of explicit consent by Mr. Gibbons, it is now necessary to explore a by-way, briefly touched on in argument in this appeal. While the observations which immediately follow are *obiter*, they nonetheless have bearing on the issues if only by way of contrast with the position under consideration.

86. The common law does not recognise a form of "conversion process" permitting the transfer of a contractual liability without the consent of the creditor. This can only be achieved by novation (*Treitel: The Law of Contract* (14th edn, Sweet & Maxwell Ltd. 2015, (Peel ed.), at paras. 15-077 and 15-078). Under the common law, the only manner in which a direct contractual relationship could have come into being between the appellant and ADT in this case would have been by way of novation. For this to be

established, it would have been necessary to demonstrate, to a high degree of clarity, that ADT had actually assumed complete liability to the knowledge of the vendor; that Mr. Gibbons, the vendor, had explicitly accepted ADT as a principal to the contract; and that Mr. Gibbons, as creditor, and an existing party to the original contract, had accepted the new contract in full satisfaction of, *and as substitution for*, the old contract.

87. In the Court of Appeal of England and Wales, Collins M.R. held in *Tolhurst v. Associated Portland Cement Manufacturers* (1900) Ltd. [1902] 2 K.B. 660, that:

> *"It is, I think, quite clear that neither at law nor in equity could the burden of a contract be shifted of the shoulders of a contractor onto those of another without the consent of the contractee. A debtor cannot relieve himself of his liability to his creditor by assigning the burden of the obligation to some one else; this can only be brought about by the consent of all three, and involves the release of the original debtor" (p. 668).*

Thus, the assignment of a liability does not take place, for what ought to take place is the extinguishing of the original liability and replacement of it by a new liability.

***National Trust Co. v. Mead* [1990] 2 S.C.R. 410**

88. In the absence of an express new agreement, a court will be unlikely to find novation, unless the circumstances are especially compelling. In *National Trust Co. v. Mead and Anor.* [1990] 2 S.C.R. 410, Wilson J., speaking for the Supreme Court of Canada, made very clear that, in an assignment, the *burden* under the original contract remains with the assignor, and that this principle results from the fusion of two fundamental principles of contract law: first, that parties are able to make bargains with parties of their own choice (freedom of contract); and, second, that parties do not have to discharge contractual obligations they had no part in creating (privity of contract). Novation may not be forced upon an unwilling creditor (p. 426).

89. In Buckley, O'Neill and Conroy, *Specific Performance in Ireland* (Bloomsbury Professional 2012), under the heading of "Burden of Contract/Novation", the authors point out that the authorities make clear that the burden of a contract cannot be transferred by way of simple assignment, such that the assignor is discharged from his or her future liabilities and the original contract becomes enforceable against the assignee. A contractor cannot shift the burden from his or her shoulders to those of another in this way without the consent of the other original contracting party (*Tolhurst* (cited at para. 89 above), at p. 668). Such substitutions of obligations can only be achieved by novation, a tripartite agreement in which the original counterparty to the contract agrees to release the other party from its obligations in consideration of a promise by a third party to assume the principal liability under the contract (see, *National Trust Company v. Mead* (cited at para. 90 above), at pp. 426–428; and *O & E Telephones Limited v. Alcatel Business Systems Limited* (Unreported, High Court, 17th May, 1995). Strictly speaking, this does not entail the substitution of a new contract (p. 26 of *Specific Performance in Ireland*).

90. But novation was not pleaded in this case. There was no assignment or sub-sale. The issue of novation arose only in argument in this Court. The respondents cannot now seek to rely on that defence. The acceptance of ADT as a transferee was a performance of the contract of the 21st December, 2006, which allowed Mr. Doherty to nominate a transferee. But such nomination was not a novation between Mr. Gibbons and ADT with the effect of removing Mr. Doherty as a *party* to the contract.

**Ratification**

91. On much the same basis as novation, I must also mention here ratification, first dealt with by s.37 of the Companies Act, 1963, and now contained in s.45 of the Companies Act, 2014. I do so acknowledging the fact that the parties to the appeal were *ad idem* that s.37(1) of that 1963 Act, which deals with ratification (and which was enacted a considerable length of time before legislation to the same effect in the U.K.) was inapplicable. As is pointed out at para. 7.097 in Courtney, *The Law of Companies* (4th edn, Bloomsbury Professional 2016), it is a basic principle of ratification that a principal can only ratify an agent's actions where the principal itself could have entered into the contract at that time. The principles governing the ratification of contracts were stated by Wright J in *Firth v. Staines* [1897] 2 Q.B. 70, at p. 75 to be as follows:

> *"To constitute a valid ratification three conditions must be satisfied: first, the agent whose act is sought to be ratified must have purported to act for the principal; secondly, at the time the act was done the agent must have had a competent principal; and, thirdly, at the time of ratification the principal must be legally capable of doing the act himself"* (see, para. 7.097 of The Law of Companies).

92. The author goes on to point out that, although now modified in the context of pre-incorporation contracts, the principles of ratification set out in *Firth* continue to apply to the ratification of contracts generally in Ireland. He makes clear that the "problematic" second condition for ratification of pre-incorporation contracts in *Firth* was reversed by s.45(1) of the 2014 Act. Thus, as far as pre-incorporation contracts are concerned, only the first and third conditions in *Firth* now remain (para. 7.098). In *HKN Invest OY and Anor. v. Incotrade PVT Limited (in Liquidation) and Ors.* [1993] 3 I.R. 152, Costello J. observed that a pre-incorporation contract might be effected informally. As is clear, in general once a contract or other transaction has been "validly ratified", the company will become bound by its terms and the agents will normally drop out of the picture. However, s.37(2) of the 1963 Act provided that:

> *"the person or persons who purported to act in the name or on behalf of the company shall in the absence of express agreement to the contrary be personally bound by the contract or other transaction and entitled to the benefit thereof."*

93. I agree with Dr. Courtney's view that s.37, and now its successor, s.45 of the 2014 Act, should be strictly construed. I add, in passing, that the issue of pre-incorporation ratification was recently discussed by Murray J., speaking for the Court of Appeal (Whelan, Power and Murray JJ.) in *PPF Capital Source Ltd.* [2020] IECA 63, at para. 21. But, here, the parties were correct in excluding the question of ratification: while the High

Court judgment did quote s.37(1), ratification could not have application here as it cannot be said that the first respondent was acting, or purporting to act, "*in the name or on behalf of* ***the*** *company".* (Emphasis added to the word "*the*", a definite article). There was no such company at any material time. Because there cannot *then* have been a lawful ratification by ADT, the first respondent was not enabled to "drop out of the picture" by that route.

94. This begs the question: if the company did not become a party to the conveyance - by contrast with the contract - how did this arise? It could not be by ratification. But there can be no doubt that the vendor *acquiesced* in the company becoming the principal in the contract. The judgment concludes he cannot now assert otherwise. His conduct bars him for doing so.

**Discretion**

95. As a starting point to this part of the judgment, it is clear that there is a difference between *acquiescence* or *assent*, on the one hand, and *consent* on the other. Here, even if Mr. Gibbons did not explicitly consent or join in a new contract, as in novation, the evidence shows he acquiesced at the time ADT was named in the transfer deeds. By contrast to actual consent, which would require clear evidence that the vendor had joined in the arrangement; acquiescence would merely necessitate that the appellant simply did not stand in the way of what occurred.

96. In this case, there was no new contract. But the question is whether, in intended performance of the contract, ADT was permitted to become the named purchaser in the transfer deed on behalf, and in place, of Mr. Doherty, and to take on his duties of performance without objection from the appellant; and, if so, what is the consequence where the company paid out a total of €3 million to the appellant? Condition 30 did not allow the first respondent to absolve himself from liability. Mr. Doherty was bound by the contract. But I would hold that Mr. Gibbons must be deemed to have accepted ADT as a transferee not just in name, but as the principal and, in the circumstances, must be taken as having accepted, and led Mr. Doherty to proceed on that basis, that Mr. Doherty had no continuing obligations under this single contract in three parts, selling three interlocking parcels of land.

97. The High Court judge made the important finding of fact to the effect that the appellant had "accepted" the company. This carries consequences in equity. While the defence pleaded estoppel by representation, the respondents now in their written submissions, more accurately submit, that the appellant is, by his conduct, "barred" from specific performance. As specific performance is discretionary, a court may withhold the remedy in cases of a type where, having regard to the conduct of the parties and all the circumstances, it considers that the remedy ought not to be granted. The discretion is not an arbitrary one, but must be exercised in accordance with the principles which have been worked out in a multitude of decided cases.

98. This is not a case where it can be said that there was an unconscionable bargain, or where a decree would be manifestly disadvantageous to the first respondent at the time

the contract was made. Mr. Gibbons did not act unlawfully. However, what is clear from the correspondence and evidence is that, from the time of the first transfer deed onwards to the date of non-completion of the third lot sale, Mr. Gibbons elected to treat ADT as the purchaser in the place of Mr. Doherty, and acquiesced in the position where the company took on Mr. Doherty's obligations to the extent that neither party treated Mr. Doherty as a principal. Even before the contract was signed, the appellant had accepted the contingency that Mr. Doherty might acquire through a corporate vehicle. The correspondence from both sides contains no mention of Mr. Doherty as purchaser subsequent to the contract, although he clearly remained a party as signatory to a contract.

99. The appellant acquiesced in this by his conduct. The transfer deeds and correspondence are only consistent with Mr. Gibbons accepting ADT as principal. None of the subsequent correspondence until October 2008 is consistent with *either* party being of the view that Mr. Doherty was to continue to be treated as a principal. No objection was made when White & Co. indicated that the purchaser would be ADT Investments Ltd.; in fact, the appellant's solicitors accepted this. The requisitions on title were raised in the name of that company. The deeds of transfer of 2007 and 2008 for Lots 1 and 2 were effected in the name of the company. The vendor, Mr. Gibbons, was content to act upon that basis, and was content to receive the consideration of some €3 million, out of the €4 million total, from ADT, not Mr. Doherty. By any standards this was a huge windfall. Even if the position which evolved in this case might, in another case, raise questions as to privity of contract, the appellant here must be taken as having acquiesced, in circumstances where ADT became not only *a* purchaser but *the* principal, even if Mr. Doherty's name remained on the contract and even though ADT had not been in existence at the time of the contract.

100. For completeness, I reiterate that the appellant's argument, to the effect that a potential hypothetical specific performance action might have been launched against him in March 2007, and his assertion that he could have been compelled to perform if he had objected to the company being treated as purchaser, loses traction in the reality of what happened. The appellant actually accepted ADT at a time when he was about to receive €2 million.

101. In estoppel by convention, where one party, A, conducts him- or herself toward the other party, B, so as to lead B to believe that a particular state of affairs exists as to a legal relationship between them, even if erroneous as to law or fact, A will not be permitted to thereafter resile from the position he or she adopted, or the conduct in which he or she engaged, so as to go back on the assumption which A created in B's mind. It matters not whether the parties reached that understanding due to misrepresentation, inadvertence or mistake. I would apply the principle by analogy in this case, where the equitable relief of specific performance is sought by the appellant.

102. To allow the appellant to go back on what was accepted by both parties as the situation by both parties would now be unjust. There was a "common understanding" or an

underlying shared set of assumptions, which, whether erroneous in law or not, led the first respondent to conclude that the appellant had elected to treat the company as the purchaser. If seen in the converse, and if, hypothetically, one treated ADT as a plaintiff in a specific performance action, it might almost be said that there were "acts pursuant to the contract" and, especially, the transfer deeds, which could be portrayed as being acts of part performance. In the light of the conclusions reached, it is unnecessary to give any consideration to the elapse of time which has occurred.

103. The appellant has been ably represented. His case in the High Court and the Court of Appeal was advanced squarely on the basis of the appellant's election to seek specific performance, and not any alternative remedy under Lord Cairns' Act or in common law. The evidence showed the appellant had substantial financial commitments which he himself had entered into in the years 2006 and 2007, and before and after the contract in question. For that reason, any question of alternative remedies simply did not come into the case. But the appellant did receive €3 million, and still retains Lot 3 which will acquire significant market value in the future. In submissions, the respondents raised an additional issue on the question of easements, relating to wayleaves over Lots 1 and 2 for the beneficial use of Lot 3, but there is no need to consider that issue further.

**Conclusion**

104. In conclusion, I would propose that the Court would uphold the order of the Court of Appeal, but for the reasons set out in this judgment. For clarity, I reiterate that despite Condition 30, the first respondent remained a party to the contract. He could not rely on the Condition in order to avoid his liability under the contract. The fact that the words "in trust" were used did not protect him. The plain meaning of the words of the Condition required that the principal or, in the words of the Condition, the "other party", be in existence at the time that the contract was made. There was no such party. The Condition did not permit Mr. Doherty to escape liability in the circumstances.

105. The principle expressed by Costello J. in *Dublin Laundry* is *ad rem* and applicable in this case. Not only did the words of Condition 30 not permit the first respondent to escape liability but, as in *Dublin Laundry*, this was a contract where there was no other party or principal at the time the contract was signed, purportedly "in trust". The judgment in *Dublin Laundry* reiterates a long-established principle which remains good law, albeit now mitigated by statute. The quotation from *Bowstead and Reynolds*, found earlier in this judgment at para. 58, is also on point: the only "person" who could have ratified this contract was a hypothetical person or entity in existence at the time the contract was signed. There was no such person or entity. The company did not, and could not, ratify the contract under the terms of s.37(1) and (2) of the 1963 Act. But, as and from the 29th March, 2007, the appellant treated ADT as the principal, and continued to acquiesce in this situation up to the time of non-performance of the third part of the contract. Applying, by analogy, principles drawn from estoppel by convention in this, also an area of equitable discretion, the appellant is debarred by his conduct from obtaining relief against the first respondent.

106. I confess to some sympathy for the appellant, although this is mitigated by the fact that he had already received what, by any standards, was a very substantial sum of money for the first two lots. I fully accept that the appellant is entitled to succeed on the first issue identified in the determination of this Court regarding the interpretation of Condition 30 ([2020] IESCDET 17, at para. 10). This may have a bearing on costs. Unfortunately, from the appellant's viewpoint, this is only one feature of a larger picture whereby he is debarred from obtaining a decree of specific performance. For the reasons outlined, I must, therefore, dismiss the appeal.