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Judgment: approved by the Court for handing down | *Delivered:* **26/10/09**
(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM
THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

BETWEEN:

BONNER PROPERTIES LIMITED

Plaintiff/Appellant

and

McGURRAN CONSTRUCTION LIMITED

Defendant/Respondent.

Before: MORGAN LCJ, GIRVAN LJ and WEIR J

GIRVAN LJ

[1] This is the judgment of the court.

Introduction

[2] This matter comes before the court by way of an appeal by the plaintiff/appellant ("Bonner") from an order of Deeny J ("the trial judge") who on 26 November 2007 dismissed a specific performance suit brought by Bonner against the defendant/respondent ("McGurran"). Bonner which is a property development company asserts that McGurran, a building contract company, agreed to purchase lands belonging to Bonner consisting of some 4.78 acres of land comprised in Folio FE 85889 and FE 86244 County

Fermanagh situated at Derrygonnelly, County Fermanagh ("the relevant land"). McGurran contends that while it did at one time offer to purchase the relevant land Bonner rejected that offer and accordingly no contract was ever concluded notwithstanding a later purported acceptance of the offer by Bonner.

The pre-contract negotiations and correspondence

[3] The relevant land was the subject of an application for planning permission in 2007 to build some 40 houses on the land. The firm of Eadie, McFarland & Co acted as estate agents on behalf of the owners of the land, then Mayne Developments Limited, in relation to the sale of the relevant land. It was not in dispute in the proceedings that Bonner took over the interest of Mayne Developments Ltd at some point in the course of the negotiations. By April 2007 the agents had agreed, subject to contract, on a sale of the lands to McGurran for the sum of £3.2 million. Carson and McDowell, solicitors, were instructed to act for the proposed vendor on 5 April 2007. Murnaghan Fee, solicitors, were instructed on behalf of McGurran. On 18 April 2007 they asked Carson and McDowell to forward the proposed contract, title and replies to standard pre contract enquiries. This documentation was provided and, following some correspondence in relation to a third party easement, by letter of 14 June 2007 marked "Subject to Contract" Carson and McDowell enclosed a revised form of contract. This consisted of a memorandum of sale incorporating the Law Society's General Conditions of Sale (Third edition, Second version). It incorporated special condition in the following terms:-

> "This contract is subject to and conditional upon the Vendor's application for planning permission for the residential development in respect of the property and sale being granted on or prior to 1 October 2007 ("the Longstop Date"). Completion shall be 14 days after the grant of such planning permission. In the event that such permission is not granted by such time the Purchaser can either elect to rescind this agreement by written notice to the Vendor which must be served within 5 days of the Longstop Date whereupon the deposit paid hereunder shall be returned to the Purchaser or alternatively must complete the purchase of the Property within 14 days of the Longstop Date."

[4] Under cover of letter of 26 July 2007 also marked "Subject to Contract" Murnaghan Fee enclosed the contract document duly signed but with amendments. The letter stated:-

> "Subject to receipt of the (Company) Search, we enclose contract signed by our client, as amended, for acceptance by your Client. We would refer you to the amendment of Special Condition 4 and the addition of special condition 5. With regard to Special Condition 5, we wrote to you on 8 June querying the position regarding the visibility splays but to date the query has not been dealt with. We look forward to hearing from you as soon as possible with a copy of the accepted contract."

The amended special condition 4 and the new special condition 5 were in the following terms:-

> "4. This contract is subject to and conditional upon the Vendor's application for planning permission for the residential development in respect of the property in sale being granted on or prior to 1 October 2007 ("the Longstop date"). Completion shall be 14 days after the grant of such planning permission. In the event that such permission is not granted by such time the Purchaser can either –
>
> *(a)* elect to rescind this agreement by written notice to the vendor which must be served within 5 days of the Longstop date whereupon the deposit paid hereunder shall be returned to the Purchaser; or
> *(b)* alternatively must complete the purchase of the Property within 14 days of the long stop date; *or*
> *(c)* *extend the Longstop Date until 1 November 2007.*
>
> *5. The Vendor shall procure (at its own expense) and transfer to the Purchaser all easements including site lines necessary to satisfy Road Service requirements attached to the planning permission referred to at 4 above."*
> (italics added to show the amendments)

It is common case that the signed memorandum with the additional conditions represented an offer to purchase the relevant land on those terms. Until it was accepted no contract could have come into existence.

[5] Following receipt of the letter of 26 July 2007 enclosing McGurran's offer document Carson and McDowell replied on 8 August 2007 in a letter which was again marked "Subject to Contract". Since much turned on the contents of

that letter in the course of the hearing it is necessary to set out its contents in full:-

> **"<u>Subject to Contract</u>**
> **Your client: McGurran Construction**
> **Our client: Bonner Properties Limited**
> **Re: Land at Derrygonnelly**
>
> Thank you for your letter of 26th July 2007. While we appreciate receiving a Contractual Offer it does not take into account the request made by our client in our letter of 20 July 2007. We would be obliged if you would confirm that your client accepts that the planning condition will be satisfied once the matter has been passed by the local council in which case special condition 4 would read as follows:
>
> > "This contract is subject to and conditional upon the Vendor's application for planning permission for the residential development in respect of the property in sale being approved by the Local Council or on prior to 1st October 2007 ("the Longstop date"). Completion shall be 14 days after such approval is given and in the event that such approval is not so given by such time the purchaser can either (a) elect to rescind the agreement by written notice to the vendor which must be served within 5 days of the Longstop date whereupon the deposit paid hereunder shall be returned to the purchaser; or (b) alternatively must complete the purchase of the property with 14 days of the Long Stop date; or
> > (c) extend the Longstop date until 1st November 2007. In the event that the purchaser opts to extend the Long Stop date to 1st November 2007 and such approval is not obtained by such time the Purchaser must either rescind this agreement by written notice to the vendor to be served within 5 days of the extended long stop date whereupon the deposit paid hereunder shall be returned to the purchaser or alternatively complete the

> purchase of the property within 14 days of the extended Longstop date. Please confirm that this is acceptable."
>
> You have added a Special Condition 5 about sight lines, etc. This is not acceptable to our client. Without prejudice to this it believes that the development as per the planning application can be fully accommodated within the confines of its title. It will not procure anything further. If it was to assuage your client's concerns our client would be happy for a new Special Condition 5 to read as follows:-
>
> > "For the avoidance of doubt the permission referred to in 4 above shall only be applicable if it can be fully implemented within the confines of the Vendor's title."
>
> We have requisitioned a Companies Office search and will let you have same shortly. We look forward to hearing from you as soon as possible."

[6] On 10 August 2007 Carson and McDowell sent a Companies Office search, receipt of which was acknowledge on 13 August 2007. On 23 August 2007 Carson and McDowell referred to the letter of 8 August 2007 and asked for a response as soon as possible as they were going to meet their clients at the end of the week. By letter of 24 August 2007 Murnaghan and Fee stated:-

> "We are not yet in a position to confirm whether the amendments to the special conditions set out in the letter of 8 August are acceptable. We shall revert to you as soon as we have firm instructions."

On 7 September 2007 Carson and McDowell replied on the following terms:-

> "We refer to previous correspondence in this matter. Our client has now spoken further to its roads engineer and planning consultants and had been advised that the development can be fully implemented within the confines of the site and that the planning application is likely to be passed for approval by the local council towards the end of this month with the green form issuing shortly thereafter. It is therefore prepared to live with our original special conditions as opposed to altering same and we

> are pleased to enclose copy accepted contract. We look forward to receiving cheque for deposit as soon as possible."

In a reply of 26 September 2007 Murnaghan and Fee responded stating that:-

> "Your client has now purported to "accept" the Contract without hearing any further from us. Your client has effectively made a counter offer which our client may either accept or reject. We shall confirm our client's position in due course but in the meantime the position remains that there is no binding Contract between the parties."

Thereafter McGurran maintained the position that there was no binding contract.

The judgment below

[7] Deeny J considered that there were three issues for determination in the case:-

(a) whether the letter of 8 August constituted a rejection of the purchaser's officer to purchase.

(b) whether the writer of the letter had expressed or implied authority to write it on behalf of Bonner.

(c) whether the fact that the letter was signed subject to contract prevented it constituting a rejection of the offer.

[8] The trial judge concluded that the wording of the letter was clear and emphatic. To say that one does not accept something is merely a less stark way of saying one rejects it. The judge inclined to the view that a solicitor engaged in a conveyancing transaction writing on behalf of his client did have ostensible authority to reject an offer on behalf of his client. A solicitor on the other side should be entitled to assume that the solicitor writing such a letter had his client's authority. Having heard the evidence of the solicitor who wrote the letter of 8 August the trial judge concluded that she would not have written the letter without clear instructions and he considered that the clients had conveyed to the solicitor that special condition 4 would have to be changed and that paragraph 5 as drafted by Murnaghan and Fee was not acceptable. The judge was thus satisfied the solicitor had in this instance actual authority to write the letter. The judge rejected the argument put forward that the letter of 8 August 2009 constituted a counter offer. The judge then turned to consider the argument that because the letter was written "Subject to Contract" it should not

be construed as a rejection. The argument as presented to the judge was that because the letter was marked subject to contract the content of the letter was protected and deprived of any contractual force. Deeny J concluded that this argument was fallacious. The fact that the words "Subject to Contract" denies an intention to make a binding contract so that the document could not be a sufficient note or memorandum for the purposes of the Statute of Frauds does not prevent an offer being rejected. Such an argument would in the judge's view produce an illogical outcome. The letter did not state its contents were without prejudice to the continuance of the purchaser's offer of 26 July. He thus concluded that "subject to contract" meant that no agreement would be legally binding until a formal legal contract was entered into. It did not mean that despite what was said in the letter Bonner was not rejecting the offer to purchase. In the result the judge concluded that the letter of 8 August 2007 constitute a rejection of McGurran's offer as contained in the contractual offer sent with the letter of 26 July. That rejection terminated the offer and thus there was no offer for Bonner to accept on 7 September.

The parties' respective contentions

[9] Mr Horner QC who appeared with Miss Simpson on behalf of Bonner renewed before this court the arguments that had been raised before Deeny J. He argued that a letter marked "Subject to Contract" cannot amount to a rejection. There was no intention to affect legal relations between the parties. The phrase provided the parties with the means to negotiate terms and thus, in effect, to keep the offer in suspense until all the terms were agreed. Even if the letter had accepted the addition of more special conditions the contract would not have been concluded until the memorandum itself was signed by Bonner with a copy of accepted offer being sent to McGurran. The words "Subject to Contract" kept the agreement (sic) in suspense. Mr Horner QC argued that the solicitor had neither ostensible nor express authority to reject the offer. The judge had conflated the notions of a solicitor taking instructions from a client and having authority. The solicitor had given evidence that she did not have authority to bind Bonner or reject any offer made. While a solicitor will normally have authority to negotiate a contract he does not have authority to complete one or, therefore, to reject a contractual officer.

[10] Mr Fee QC who appeared with Mr Donal Lunney maintained the correctness of the judge's conclusion that the letter constituted a rejection of the offer made by McGurran. The letter of 8 August clearly and unambiguously rejected the McGurran's version of the Special Conditions 4 and 5. In respect of condition 4 Bonner's solicitor did more than make a speculative or exploratory enquiry. He put forward a new and materially different special condition. Condition 5 was rejected as unacceptable. Bonner had said bluntly that they would not procure anything further. A new and different term was being put forward. Counsel also argued that the judge was fully entitled to conclude that the solicitor had actual authority to write the letter of 8 August 2007. At no

stage was it denied by the solicitor herself or appellant's counsel that she had authority to write the letter in the terms in which it was written. The legal effect of the letter is not a matter for the solicitor or for her client. It is a question of law for the court. On the "Subject to Contract" point counsel argued that the appellant was confusing the effect which the phrase can have with the meaning of the phrase. The phrase subject to contract only has a particular effect when applied to an offer or acceptance because it makes sense when so applied. It makes no sense when applied to a rejection – "I reject your offer but this rejection is subject to a subsequent formal contract" is a legal nonsense.

Conclusions

[11] Although the appellant's argument before the trial judge and to this court to a lesser extent was elaborately constructed and led to a lengthy and complex judgment at first instance the questions raised in the appeal can be answered with relative ease by reference to first principles of contract law.

[12] The memorandum which was signed by McGurran and sent to Bonner's solicitor under cover of letter of 26 July 2007 constituted a contractual offer. No binding contract would come into effect until all the terms of that contractual offer were accepted. Since the correspondence was clearly marked "Subject to Contract" no binding contract enforceable under the Statute of Frauds would come into existence until the memorandum was signed by Bonner in terms accepting all the terms put forward in the memorandum signed by McGurran. The memorandum signed by McGurran was returned under cover of letter of 7 September 2007 from Carson & McDowell apparently duly signed by Bonner. If the offer contained in the memorandum signed by McGurran had remained extant a binding contract would indeed have come into existence on receipt of the letter of 7 September 2007. The document signed by both parties would constitute a note or memorandum satisfying the Statute. Bonner's solicitor's letter of 8 August 2007 on its true construction would clearly constitute a rejection of the offer unless in some way the addition of the words "subject to contract" in that letter deprived the letter of the effect which on its normal construction it would otherwise have had. The reformulation of condition 4 might conceivably be argued to be a request to explore the possibility of a redraft of condition 4 without in the meantime a rejection of the existing condition 4. What was said, however, in relation to condition 5 was a clear rejection. The words "this is not acceptable to our client" permit of no other interpretation. By proceeding to say "without prejudice to this" Bonner believed that the development could be accommodated within the confines of the title merely confirmed the rejection. Bonner made clear that it would not procure anything further. The wording was thus clear and blunt.

[13] On the question whether the words "Subject to Contract" in some way deprived the letter of the effect of being a rejection (the normal consequence of

the wording of the letter) it is necessary to understand the effect of the words "Subject to Contract" when inserted in pre-contract correspondence. The words are accepted shorthand for "subject to a formal contract being prepared". They are inserted as a protection against the unintended creation of a note or memorandum that would otherwise satisfy the requirements of the Statute of Frauds. The use of the words is intended to make clear that the parties intend those negotiations to lead to an enforceable agreement only at the point when a formal contract is prepared and executed. See for example Winn v. Bull [1877-8] LR 29. The words have nothing to say to the question whether in correspondence one party has or has not manifested an intention to reject an offer, to make a counter offer or to seek clarification or information. In any of those situations the parties have simply not reached a consensus. The need for either party to protect himself against the correspondence having the unintended consequence of creating a binding agreement short of a formal contract does not arise. If practitioners are in practice operating under the assumption that by inserting the words "Subject to Contract" into such correspondence in which they purport to reject an offer in the course of the negotiations but later maintain that the offer remains open for acceptance if they cannot obtain better terms, that assumption is a false one. It is difficult to understand how such an assumption has developed (if it has) having regard to logic and the application of the first principles of contract law.

[14] On the question whether Bonner's solicitor had authority to write the letter rejecting the offer the trial judge concluded on the evidence that the solicitor had express authority. The trial judge had ample evidence to reach that conclusion. While Mr Horner did initially challenge the conclusion of the trial judge in respect of the question of the solicitor's authority to write the letter he did not press the issue. Although we would not share the judge's censorious view of the manner in which the solicitor gave her evidence we conclude that the judge was correct in his findings in relation to the solicitor's authority to write the letter. In view of the judge's conclusion on the question of express authority it is not necessary to come to a conclusion on the question whether she had, in any event, ostensible authority to bind her client by the terms of the letter which on its true construction was a rejection of the offer. We, like the judge, incline to the view that a solicitor engaged in a conveyancing transaction writing on behalf of the client does have ostensible authority to reject an offer on behalf of the client. As the trial judge pointed out, it would be unsatisfactory if another solicitor in such circumstances had to write and ask whether the letter was written with the authority of the client before he could know whether or not his client's offer had or had not been rejected. Where a solicitor is held out as having authority to negotiate the terms of a contract we incline to the view that he or she has ostensible authority to bind his or her client by statements made in the course of those negotiations in the correspondence.

[15] In the result we conclude that the trial judge was correct in his conclusion that the plaintiff had failed to prove that there was a binding and enforceable contract. We agree with his conclusion that there was a rejection which terminated the offer and that there was thus no offer in law for the vendor to accept on 7 September. The appeal accordingly is dismissed.