

THE LAW REFORM COMMISSION
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

(LRC 59 - 1999)

REPORT
ON
GAZUMPING

IRELAND
The Law Reform Commission
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THE LAW REFORM COMMISSION

Background

The Law Reform Commission is an independent statutory body whose main aim is to keep the law under review and to make practical proposals for its reform. It was established on 20th October, 1975, pursuant to section 3 of the *Law Reform Commission Act, 1975*.

The Commission's Programme for Law Reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas in January, 1977. The Commission also works on matters which are referred to it on occasion by the Office of the Attorney General under the terms of the Act.

To date the Commission has published fifty-eight Reports containing proposals for reform of the law; eleven Working Papers; fifteen Consultation Papers; a number of specialised Papers for limited circulation; and twenty Reports in accordance with Section 6 of the 1975 Act. A full list of its publications is contained in an Annex to this Consultation Paper.

Membership

The Law Reform Commission consists of a President, one full-time Commissioner and three part-time Commissioners. The Commissioners at present are:

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NOTE

This Report was submitted on 26 August 1999 to the Attorney General, Mr Michael McDowell, S.C., under section 4(2)(c) of the *Law Reform Commission Act, 1975*. It embodies a review, carried out at the request of the former Attorney General, Mr David Byrne, S.C., of the practice of vendors of residential property requiring the payment from prospective purchasers of booking deposits. After extensive research, and consultation with interested parties, the Commission puts forward proposals for reform as requested by the Attorney General.

While these proposals are being considered in the relevant Government Departments the Attorney General has requested the Commission to make them available to the public, in the form of this Report, at this stage so as to enable informed comments or suggestions to be made to the relevant Government Departments by persons or bodies with special knowledge of the subject.

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INTRODUCTION

The Reference of the Attorney General

1. On the 7 December 1998, the Attorney General pursuant to the provisions of section 4(2)(c) of the *Law Reform Commission Act, 1975*, requested the Commission to review the practice of vendors of residential property requiring the payment from prospective purchasers of a booking deposit and in particular:-

- (a) to review the present position by which the payment of such a deposit confers no interest in the property on the prospective purchasers;
- (b) to consider what protection if any could be afforded to such prospective purchasers;
- (c) without prejudice to the generality of (b) to consider whether it is feasible to equate the payment of a booking deposit with an option to purchase the property;
- (d) if it is not feasible to confer any form of protection on the prospective purchasers, to review the desirability of permitting such deposits to be required and the feasibility of making such a requirement unlawful.

2. The reference followed some public disquiet as a result of a few highly-publicised cases of "gazumping." For the purposes of this report, gazumping is taken to occur where, there has been an informal agreement (that is, either without any concurrent intention to be bound or alternatively, without observing the formalities required by law for an enforceable contract) for the sale of property at a particular price. However, subsequently,

- (i) either the vendor refuses to execute a formal contract, and sells to someone else for a higher price; or,
- (ii) the vendor refuses to execute a formal contract of sale to the purchaser unless the purchaser agrees to pay a higher price.

3. The cases reported in the media were instances of the latter form of gazumping. The parties agreed informally for the sale of property, at a particular price, and a booking deposit was paid and accepted. This is normal practice in sales of all residential properties. However, in these cases, the vendor later approached the purchaser and sought a higher price. The particular features of these sales were that they involved the sale of either just completed or soon to be completed houses and secondly, the sales were by builders to first time buyers. One consequence of the fact that new houses are involved is that there is often a delay of several months rather than (as in the case of second-hand houses) weeks between the

commencement of negotiations and the payment of a booking deposit and, the making of the formal contract. While these factors do not affect the basic law, they should be borne in mind, as part of the background to this Report.

4. There is another practice which cannot be called gazumping, but which has also led to concern. That is the practice of opening a show house or apartment and allowing anyone interested to queue. Where the number of people interested exceeds expectation, the vendor/developer increases the prices at which he is willing to accept booking deposits, either prior to taking any deposits or after accepting a limited number of bookings.

5. Finally, purchasers' solicitors have reported difficulties in their dealings with some vendors.¹¹ On occasion, they are put under pressure in relation to matters other than price. For example, they may be asked to accept title without being afforded time to properly read it, or they may be asked to accept variations in maps, specifications or contracts which are unfavourable to their clients. Despite voicing their concerns to their clients, they are often instructed to proceed, because the purchaser is aware of the market conditions and may be anxious to sign a contract, without proper consideration of the disadvantages to him.

6. These practices typically occur in a market where house prices are rising rapidly. In particular, vendors, knowing that purchasers are extremely anxious to secure a house before prices rise further, can put pressure on purchasers to increase their offer above the agreed amount. These practices are perfectly legal. The law is set out in chapter 2, in an effort to explain why this is so. In essence such practices arise from the fact that legally binding obligations are not undertaken immediately by the parties at the time the price is agreed. During this pre-contract period, the vendor may try to exploit the purchaser by threatening to withdraw from the negotiations unless an increased price is paid.

The Law Reform Options

7. The present law in this area is well-established. The Commission recognises that a desirable reform of the law would be to simplify conveyancing procedure, so that the time period between informal agreement and the making of a binding contract would be reduced in length, so reducing the opportunity for the gazumping. The Working Group on Land and Conveyancing Law continues to review conveyancing practice in order to identify appropriate reforms.

8. In examining the options for reform, it is important to bear in mind the necessity of certainty in the law, and to avoid introducing further complications into transactions which are already thought to be in need of simplification. Moreover, the Commission is not in favour of any reform which might appear to benefit purchasers by fixing the price, but which might leave them vulnerable in other respects. It is a cardinal feature of the present law that the pre-contract stage of a

¹¹ This was indicated in the submission made by the Incorporated Law Society of Ireland in response to a questionnaire circulated by the Commission in order to investigate the extent and nature of the problem. See chapter 1.

conveyancing transaction is used by the purchaser's solicitor to make enquiries which will protect the purchaser's interests.

9. Furthermore, the Commission is conscious that gazumping is a market-driven phenomenon, and of its nature temporary. If the housing market "cools down," it might be open to purchasers to reduce their offer in the pre-contract stage. Any reform which might be introduced to combat gazumping should not be open to abuse by purchasers in a slow market.

10. Given the benefits of the existing laws on contracts for the sale of land and the difficulty of introducing reform, the Commission has concluded that reforms should not be effected unless this could be done without sacrificing the benefits of the current laws.

Layout of this Report

11. Since reliable statistics on the extent to which gazumping occurs were not available, the Commission took steps to inform itself of the frequency with which the problem arises, and of the practice followed in paying and accepting booking deposits. The results of this inquiry are set out in chapter 1. In chapter 2, the law on contracts for the sale of land is discussed with a view to explaining why gazumping is possible. In chapters 3, 4 and 5, various proposals for changes of the law, which it has been suggested would protect purchasers, are discussed.

CHAPTER 1 THE FACTUAL BACKGROUND

The Extent of the Problem

1.01 In order to inform itself of the extent of the problems associated with booking deposits, the Commission formulated a questionnaire which was sent to all relevant professional bodies, including consumer associations. The text of the questionnaire is to be found at Appendix 1. A list of the persons and bodies to whom it was sent is included at Appendix 2. It is worth emphasising here that many of the questions were not directed at discovering the level of understanding of the professionals who filled in the form, but rather at the understanding, which they took their clients to have, of the rather technical legal issues which are the subject of this Report. For the most part, it is from the responses to these questions, that we draw our assumptions as to the level of understanding of the average purchaser.

1.02 The first section of the questionnaire asked respondents to give information on the circumstances in which gazumping occurs and on its frequency. Many of these questions either remained unanswered or the answers were very vague or simply informed us that the respondent had no direct experience of gazumping. Some of the respondents declined to answer any question in this section, and it seems fair to assume that they did so because they had no direct experience of gazumping.

1.03 The comments offered in response to the questionnaire suggest that gazumping, where it does occur, occurs in the second-hand and new housing markets, though it is more prevalent in the latter because the time period between informal and formal agreement is usually longer. We should emphasise, however, that the Report applies equally to both categories, save where it is expressly stated that we are confining a statement to say 'vendors acting in the course of business'. Where the vendor is a builder, the instances arise equally as between large and small builders. Where builders gazump, they are more likely to do so in respect of housing estates. Gazumping generally occurs within three months of the payment of a deposit, and at the point at which the depositor approaches the vendor seeking to advance progress with the sale, such as by asking for a formal contract. The problem (such as it is) appears to be an urban one, i.e. it is more likely to occur in Dublin or other large urban centres. Responses indicated that depositors rarely backed out of transactions, and that gazumping is not a problem where the purchaser is an investor. However, in a depressed market, it is more likely that the depositor, rather than the vendor, would back out and the Law Society stated in its response that this has been a problem in the past.

1.04 The crucial question posed was Question 6 which asked for an estimation of the percentage of all cases involving booking deposits in which gazumping occurs. Responses indicated that gazumping occurred in less than 5% of such cases, with

some respondents stating that it occurred in less than 2% or less than 1% of cases. Question 10 asked respondents to furnish examples of as many types of cases of gazumping as possible. Only one example from direct experience was offered, and this did not relate to a case where a booking deposit was taken. Members of the Conveyancing Committee of the Law Society between them had experience of only two cases of gazumping.

1.05 The questionnaire does not, of course, provide us with reliable statistics on the incidence of gazumping, but responses strongly suggest that it is an infrequent occurrence, even in current market conditions. Thus, the primary conclusion which we have drawn from the responses is that the incidence of gazumping is extremely small. This conclusion can be restated in the following way: the laws and practices surrounding house purchase do not give rise to concern in the vast majority of transactions.

1.06 Nevertheless, because there is some scope for abuse in the present system, even if the vast majority of vendors do not exploit it, we also posed questions on the practice of taking booking deposits and of the interests served by the current system.

Booking Deposits

Conditions on which Booking Deposits are Accepted.

1.07 The responses to Question 11 of the questionnaire confirmed the following statements:

- Booking deposits are made against a stipulated price and accepted on the basis, expressed in writing by the vendor at the time that it is "subject to contract". This phrase, or similar terms indicating that the making and acceptance of the deposit does not create a contract, is included in the written receipt for the deposit.
- Either party is legally free to back out at any time before a formal written contract is entered into by both parties.
- If either the vendor or the depositor backs out, the deposit is repaid to the depositor.
- Every response to the questionnaire indicated agreement with this account of the normal practice of taking deposits, though the Law Society indicated that the last two aspects are usually implicit.

1.08 We also asked if a booking deposit would ever be accepted without any stipulation that it is "subject to contract". Most of the responses declined to comment at all on this question, since they had indicated assent to the statements in Question 11, considered above. However, some responses stated that this would happen on a rare or occasional basis, and where an explanation was given, the suggestion was that it would only arise where a vendor/developer had not retained

an auctioneer and had no experience of these transactions. (Only one response thought that this was a common occurrence.) The Irish Auctioneers and Valuers Institute (I.A.V.I.) stated that it recommends that all of its members use their form of receipt. A copy of the receipt is included in this Report at Appendix 3.

1.09 Since the effect of the stipulation 'subject to contract' might not always be obvious to the lay person, we also posed questions which were designed to explore the extent to which a purchaser understands that neither party is legally bound, and in particular that the vendor is not obliged in law to sell at the agreed price. If these answers showed confusion, there might be a need for changes in law or practice which would inform the purchaser of his position in law.

1.10 Question 13 asked if depositors in general understood that either party was completely free to renege before a formal contract was entered into. Responses were evenly divided. The next question asked if depositors nonetheless sometimes believed that they had legally binding contracts entitling them to purchase at the stated price. Interestingly on this question the majority of responses indicated that purchasers believed this to be so. This suggests that purchasers believe either (a) that they can renege, but the vendor cannot, or (b) that either party can renege, but if the sale goes ahead the price has been fixed. Question 15 asked if depositors nonetheless believed that they had a concluded oral agreement. Again, responses were evenly divided.

1.11 Where the responses expanded on the factors influencing the understanding of a depositor, they indicated that depositors were less likely to understand the position prior to the taking of legal advice.

1.12 These questions were posed so as to elicit information regarding the understanding which house-purchasers and the general public have of the legal significance of booking deposits. Where there is confusion, laws which would increase the public understanding of the nature of booking deposits might go some way to ameliorate the current problem of gazumping, a suggestion to which we return in chapter 5.

Interests Served by the Payment of Booking Deposits.

1.13 Question 16 asked whether the interests of the vendor or of the depositor were best served by a system of booking deposits not involving the creation of binding contracts. Question 17 asked those who felt that the system benefited vendors, if there was nonetheless a benefit for depositors. Most of the responses indicated that the interests of both were served, or that even if the system favoured one party over the other, that other party also benefited from the system. The view of our Land and Conveyancing Law Working Group was that the interests of both the vendor and the depositor are served, but at different times. In a buyer's market, the system tends to protect builders by discouraging a purchaser from purporting to agree to buy several different properties. In a seller's market, the purchaser is protected, though imperfectly, where a deposit is taken "subject to contract" in that the property is usually withdrawn from the market. It was stressed that the system was not abused by builders in general, and only a few engage in gazumping.

1.14 Question 18 asked if depositors considered that they obtained an advantage in that booking deposits do not legally bind them to purchase the dwelling. Most of the responses felt that they did, although some responses stated quite strongly that the system of taking booking deposits did not benefit depositors in any way and served only the interests of vendors or their auctioneers.

1.15 It is significant that the response of the I.A.V.I. was very clear that without a system of booking deposits, an estate agent would be obliged to market the property actively up to the execution of a formal contract. With a system of booking deposits, the property is effectively taken off the market, so that while gazumping might still occur, it is less likely.

1.16 We also note that booking deposits were originally introduced by auctioneers in order to secure their fees. In relation to a green-field site, the taking of booking deposits may, alternatively, assist the developer by providing him with some capital with which to commence development. Neither of these interests would dissuade us from recommending changes in the practice of taking booking deposits, if we considered them otherwise desirable. However, the effect of booking deposits in allowing a property to be taken off the market has convinced us that, whatever their other consequences, booking deposits usually operate so as to prevent vendors or their agents playing prospective purchasers off against each other. In this respect, they may play a crucial part in preventing gazumping.

Summary

1.17 The clear implication of these findings is that gazumping is a relatively rare phenomenon, and that the booking deposit system works well in the vast majority of cases. While there is opportunity, depending on the state of the housing market, for either the vendor or the purchaser to abuse the system, this opportunity is only taken by a small number of vendors at present, despite the steady rise in house prices in recent years. The Commission therefore concludes that gazumping is both a temporary and an infrequent phenomenon. As a necessary consequence, no proposal for a change in the present laws will be recommended if it puts in jeopardy the benefits of the current system.

CHAPTER 2 THE EXISTING LAW ON CONTRACTS FOR THE SALE OF LAND

2.001 The Commission has been asked to "review the present position by which the payment of such a [booking] deposit confers no interest in the property on the prospective purchasers." This requires a review of why the payment of a booking deposit does not create an enforceable contract for the sale of land, and a consideration of whether it would be desirable to change this position. In this chapter, the existing law on contracts for the sale of land is discussed, and in chapters 3, 4 and 5, possible reforms of the law are considered.

1. Enforcing an Agreement for the Sale of Land

2.002 In order to enforce an agreement for the sale of land, a plaintiff must first show that there is an agreement. He must then show that the necessary formalities, as required by s. 2 of the *Statute of Frauds (Ireland), 1695*,¹ have been complied with. Alternatively, an oral agreement may be enforced by reliance on the equitable doctrine of part performance. The pregnant phrase "subject to contract" will usually prevent a binding contract from coming into existence. The law on these matters is, for the most part, well-established, and is set out here so as to place the problems associated with booking deposits in context.

Is there a Concluded Agreement?

2.003 This first enquiry is crucial. Without an agreement, there is nothing to enforce. In order to have an agreement, there must be consensus on all essential terms. As a matter of law, the essential terms will always include the parties, the property to be sold and the purchase price. In addition, there must be agreement on any terms regarded by the parties as being essential.² Any non-essential terms which have not been settled by the parties will be implied into the agreement by general law.³

2.004 Whether the parties have actually agreed on the necessary issues is an evidential matter. The courts are usually quite willing to find that the parties have come to a concluded agreement. The cases reveal that even where the parties have discussed an issue, thereby demonstrating that it has some importance for them, the

¹ Section 2 provides that contracts for the sale of land (which in law includes buildings) cannot be enforced unless they are made, or evidenced, in writing.

² *Lynch v. O'Meara*, Unreported, Supreme Court, 8 May 1975

³ See *Law v. Roberts* [1964] I.R. 292.

courts may still find as a fact that they did not regard it as essential.⁴ In this way, the courts lean towards enforcement. However, once the court finds that the parties regarded a term as essential, agreement must have been reached on the issue.⁵

2.005 There is some uncertainty as to whether a deposit has now been added to the list of terms which is considered to be essential. It had been understood that this was a matter which was not essential unless it was so regarded by the parties.⁶ However, Finlay C.J. in *Boyle v. Lee*⁷ referred to this as an important issue and took lack of agreement on the amount of the deposit as evidence that there was no concluded oral agreement. It is not clear if this was a statement of principle or whether agreement on the deposit was regarded as fundamental by the parties in that case. Furthermore, O'Flaherty J., in his judgment,⁸ did not deal directly with the issue although it was a factor in his decision that no agreement had been reached. While it is probably still a correct statement of the law to say that agreement in relation to a deposit is not always necessary, *Boyle v. Lee* suggests that once it figures in negotiations, a court will be easily convinced that it was regarded as essential by the parties.

2.006 If the contract is one for a lease, agreement must be reached on other terms, such as the date of commencement,⁹ the term¹⁰ and the rent.¹¹

2.007 The parties must also have intended to enter into a legally binding contract for there to be a concluded oral agreement. If the parties agree that they will not be bound in the absence of a written contract, there is no concluded agreement even if all of the terms regarded as essential at law have been settled. In the recent case of *Embourg Ltd. v. Tyler Group Ltd.*,¹² a booking deposit had been paid and was accepted subject to the exchange of formal contracts. The Supreme Court held that the parties had not intended to be bound until these formalities had been completed. Since this had not been done, there was no binding agreement.¹³

⁴ See, for example, *Kelly v. Park Hall School Ltd.* [1979] I.R. 340, *Mulhall v. Haren* [1981] I.R. 364, *Guardian Builders Ltd. v. Kelly* [1981] I.L.R.M. 127, and *Boyle v. Lee* [1992] 1 I.R. 555.

⁵ See *Carthy v. O'Neill* [1981] I.L.R.M. 443 where it was held that the date of completion was yet to be fixed, the title was to be approved by the plaintiff's solicitor and the price of the stock and other matters relevant to the sale of a licensed premises as a going concern were not agreed.

⁶ See *Black v. Kavanagh* (1973) 108 I.L.T.R. 91.

⁷ *Op. cit.*, fn.4.

⁸ Hederman J. concurred with the judgment of the Chief Justice. McCarthy and Egan JJ. dissented on this point.

⁹ *O'Flaherty v. Arvan Properties Ltd.* Unreported, Supreme Court, 21 July 1977

¹⁰ *Crane v. Naughton* [1912] 2 I.R. 318; *Kerns v. Manning* [1935] I.R. 869.

¹¹ *Shannon v. Bradstreet* (1803) 1 Schoales & Lefroy 52.

¹² [1996] 3 I.R. 480.

¹³ The case did not involve an oral contract. The plaintiffs were seeking to prove that there was a written agreement.

Formalities: the Statute of Frauds (Ireland), 1695

2.008 Even if there is a concluded oral agreement, it will not be enforceable unless the provisions of the *Statute of Frauds* are satisfied. Section 2, which is the section governing contracts for the sale of land, provides, *inter alia*:-

"No action shall be brought whereby...to charge any person...upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

Therefore, no formal contract is necessary. However, some written evidence is required before an action on foot of the contract, such as an action for specific performance, will succeed.¹⁴

2.009 There is a considerable volume of case law on the requirements of section 2 and each phrase of it has been examined judicially. Not all of this case law is relevant to the problem of gazumping,¹⁵ and we are confining the discussion to those aspects which are directly relevant to the circumstances in which booking deposits are taken.

2.010 The phrase "unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing" means that there are two ways in which an enforceable contract for the sale of land can come into being: either the agreement itself is in writing, or there is an oral agreement of which there is a written memorandum or note. An oral contract for the sale of land can, therefore, be enforced provided the person seeking to enforce it can produce appropriate evidence in the form of a memorandum or note.

2.011 At the stage where booking deposits are taken, no contracts are signed by either party. In fact, it is the delay in drawing up contracts and having them signed which facilitates gazumping.¹⁶ However, some written record of the agreement (if there is one) usually exists, for example, a receipt for the booking deposit. We return to deal with the character of the document or documents, at paras 2.016-019. Here we consider the requirements as to its content, if it is to satisfy the Statute. The requirements are twofold: the memorandum must recognise the existence of a concluded agreement, and it must contain evidence of all of the essential terms.

¹⁴ The contract will be enforceable in ways other than those involving legal proceedings, since there is a valid contract. Therefore, if the purchaser pays money as a deposit on the purchase price, the vendor may forfeit the deposit if the purchaser fails to complete.

¹⁵ For example, the case law on the interpretation of the phrase "upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them" and the difficulties in relation to certain contracts as to whether they fall within this definition, is not a concern here, since what is at issue is the sale of a house, which is clearly the sale of land.

¹⁶ This feature is discussed further in chapter 4.

(i) *Recognising the Existence of a Contract*

2.012 It is now clear that a written note which denies the existence of a contract cannot constitute a memorandum for the purposes of the *Statute of Frauds*.¹⁷ The usual way of incorporating such a denial in any written note is to head it with the phrase "subject to contract." This phrase means that no agreement has been concluded since the parties have agreed that they will not be bound in the absence of a formal contract, and, as a result, any note which is headed with the phrase cannot constitute a memorandum. We return to elaborate on this significant phrase in paragraphs 2.020-2.040.

(ii) *Essential Terms*

2.013 All of the essential terms must be evidenced by the memorandum. We have already noted that the authorities clearly state that identification of the parties, the property, and a statement of the purchase price are essential terms in all contracts for the sale of land. These are matters that the law can never imply on behalf of the parties, and they must therefore be evidenced in the memorandum. However, the courts lean in favour of enforcement and as long as these matters are ascertainable from the memorandum, that will suffice. They do not have to be identified with precision.¹⁸ Oral evidence will be admissible to show that the words in the memorandum are sufficiently clear.¹⁹ The price must be clearly stated, or the method of ascertaining it must be clear from the memorandum.

2.014 As long as these bare essentials are included, the courts may order specific performance of the contract. All of the other relevant terms necessary in a contract for the sale of land will be implied by law.²⁰ For example, the memorandum need not state the estate or interest of the vendor in the premises if the purchaser is prepared to take the interest which the vendor has.²¹ Where there is no stipulation as to the quality of title, the contract will be regarded as an "open" contract. This means, significantly, that the vendor is required to show forty year's title beginning with a good root of title, which is an unusually high standard.²²

¹⁷ *Boyle v. Lee*, [1992] 1 IR 555.

¹⁸ See for example *Law v. Roberts*, [1964] IR 292, and *Guardian Builders Ltd. v. Kelly*, [1981] ILRM 127, where technical misstatements of the names of companies were disregarded, and *Godley v. Power* (1957) 95 I.L.T.R. 135 where a minimal description of the property was held to be sufficient. However, in *Carthy v. O'Neill*, [1981] ILRM 443 where the memorandum did not mention one of the vendors, who were joint tenants, it was held to be insufficient.

¹⁹ See *Guardian Builders Ltd. v. Kelly*, *ibid.* where the memorandum referred to "half of the above site" and oral evidence showed that the parties had agreed the land to be sold by outlining it with pen on a map.

²⁰ See the judgment of Kingsmill-Moore J. in *Godley v. Power*, *op. cit.*, fn.18 (O'Daly and Maguire JJ. concurring) at p.147.

²¹ *Per* Kenny J. in *Law v. Roberts*, *op. cit.*, fn.18 at pp.304-5. See also the judgment of Kingsmill-Moore J. in *Godley v. Power*, *ibid.*

²² The forty year period is provided for in s.1 of the *Vendor and Purchaser Act, 1874*. The Land and Conveyancing Law Working Group has recommended that this period be reduced to twenty years. See LRC 30-1989 *Land Law and Conveyancing Law, General Proposals* at paras. 8-9.

2.015 In addition to those matters, any other term which was regarded by the parties as being essential must also be evidenced in the memorandum.

Creation of a Memorandum

2.016 A memorandum need not be formally drawn up as a record of the agreement.²³ The most informal scraps of paper may constitute a memorandum provided they record the essential terms and are authenticated by the defendant or his agent. A receipt will suffice, including a receipt for a booking deposit.²⁴

2.017 Frequently, letters written or notes made by a solicitor or estate agent have been held to be memoranda and where the document is created and signed by the defendant's agent it is sufficient that the agent acted within his authority. A straightforward example of this is *Keller v Crowe*²⁵ in which there was an agreement to sell, evidenced by a letter signed by the vendor's agent. At no stage was the phrase "subject to contract" used and the High Court ordered specific performance. While the onus of proof is on the plaintiff, it is not difficult to establish that an agent had authority.²⁶ It is important to note that while it might be quite clear that an agent has no authority to negotiate or enter into a contract for sale on behalf of his client, he may have authority to create the informal documents which may later be relied on as a memorandum.²⁷

2.018 Several documents may be joined together to constitute a memorandum, such as a series of correspondence. On this question of joinder of documents, the courts have adopted a "progressively liberal"²⁸ approach.

2.019 The inevitable conclusion from all of this is that a very informal document, which was not intended to have any legal effect, may constitute evidence of an oral agreement and render it enforceable. The accidental creation of a memorandum is a matter of concern for professionals who may inadvertently provide the evidence which will be used to bind their client, despite instructions not to do so, or despite their own knowledge that it is not wise to become legally bound until a formal

²³ Per Kenny J. in *McQuaid v. Lynam*. [1965] IR 564, at p.569

²⁴ In *McQuaid v. Lynam*, *ibid.*, the defendants issued a receipt to the plaintiff on the payment of a deposit which stated "Received from Mr. Michael McQuaid the sum of £800 being deposit on No. 1 Kinvara Road" and which had the name of the defendants' building firm stamped on it. Kenny J. said *obiter* at p.573 that this receipt together with the details on a loan application form would constitute a good memorandum. Similarly, the possibility that a receipt along with other documents would satisfy the Statute was recognized in *Mulhall v. Haren*, [1981] IR 364. Should a receipt contain sufficient detail, it could constitute a memorandum on its own.

²⁵ Kelly J., High Court, 6 August 1999. See *The Irish Times*, 16 August 1999.

²⁶ According to Murnaghan J. in *Kerns v. Manning*, [1935] IR 869 at p.881.

"Comparatively slight evidence would, in accordance with ordinary experience, be required to prove that a solicitor had authority to make a memorandum as the legal evidence of a concluded contract..."

²⁷ See the judgment of O'Connor L.J. in *Cloncurry v. Laffan* [1924] 1 I.R. 78 at p.84.

²⁸ Per Kenny J. in *McQuaid v. Lynam*, *op. cit.*, fn.23.

contract has been negotiated and various pre-contract enquiries made. In order to avoid this, a denial that any contract exists is invariably inserted into any written document or note. That is usually done by heading the document "subject to contract," or "subject to contract/contract denied" and we now turn to examine the effect of these phrases in more detail.

The Importance of "Subject to Contract"

2.020 There are dangers associated with committing to a sale without a formal contract, particularly for the purchaser. The purchaser runs the risk of finding himself bound to purchase a property which has problems that were not apparent at the time the bargain was struck. For example, it may be prudent to conduct a planning search in order to ensure that there is planning permission for any works done to the property or that permission is likely to be forthcoming for developments which he wishes to make. Again, there may be structural defects, discoverable only by way of a professional survey of the property. The purchaser will also need to ensure that he has the necessary finance or to investigate the neighbourhood and its likely future development.

2.021 For these reasons, a purchaser's solicitor will usually take care to avoid binding his client until a formal contract is executed. The purchaser himself may be aware of the risks associated with entering into a binding contract without undertaking preliminary searches and enquiries and may want to protect himself. A vendor will have less concern, though he will no doubt wish to avoid the creation of an "open" contract which is more onerous from his point of view than one drawn up by the parties, and in general, both parties will want to avoid the uncertainty associated with an oral contract, and will prefer a written record of everything that has been agreed.²⁹

2.022 Furthermore, where the contract is for a lease, it may be necessary to provide for other matters, such as the establishment of a management company, the payment of service charges, and the exact provisions of any user clause. These issues will be of concern to both parties.

2.023 There are two ways to avoid binding legal obligations. Firstly, either party may state orally that they do not wish to be bound. Without a mutual intention to create legal relations, there is no concluded oral contract. Secondly, the much more usual way is to avoid creating a memorandum which would satisfy the *Statute of Frauds*. This means that even where there is already a concluded oral agreement, without a memorandum that oral agreement is not enforceable.³⁰ While no particular set phrase is required, the best known of the phrases used by both parties to achieve this result is "subject to contract."

²⁹ See the comments of Keane J. in *Mulhall v. Haren*, [1981] IR 364 p.375, as to the reasons why parties might wish to delay the creation of binding legal obligations.

³⁰ There is an alternative in that if the party alleging the contract can show acts of part performance, the contract will be enforced. However, it is rare that parties to a typical house purchase can show part performance prior to entry into possession by the purchaser. See the discussion on part performance, *infra.*, at paras.2.049-2.083.

2.024 That this phrase can effectively delay binding legal obligations was assumed by virtue of a long series of authorities,³¹ beginning with *Winn v. Bull*,³² in which Jessel M.R. stated:

"Where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says, it is subject to and is dependent upon a formal contract being prepared. When it is not expressly stated to be subject to a formal contract, it becomes a question of construction whether the parties intended that the terms agreed should merely be put into correct form, or whether they should be subject to a new agreement, the terms of which are not expressed in detail."³³

There was a similar statement in *Thompson v. The King*³⁴:

"Where an offer and acceptance are made subject to a subsequent formal contract, if such contract is a condition or term which until performed keeps the agreement in suspense, the offer and acceptance have no contractual force. On the other hand, if all the terms are agreed on, and a formal contract is only contemplated as putting the terms in legal shape, the agreement is effectual before and irrespective of such formal contract."³⁵

2.025 What these authorities recognise is that theoretically the phrase "subject to contract," can have either of two possible meanings. First, it can mean that there is no concluded agreement because the parties do not yet intend to be bound. In other words there is no binding agreement until formal contracts have been executed. Second, it may mean that there is a concluded oral agreement, which the parties envisage will be implemented by way of the standard formal contract. Where the parties intend it to have this meaning, the court may order specific performance if there is an adequate memorandum or where there are acts of part performance.

2.026 The former meaning was usually attributed to the phrase i.e. there was no evidence that agreement had been concluded. Thus the insertion of the phrase in all written notes and letters was seen as an unimpeachable defence against a claim for specific performance, since the potential memorandum denied the existence of a concluded agreement. In this way, professionals protected their clients from becoming bound in the absence of a formal contract.

2.027 This certainty was disturbed as a result of cases in the late 1970s where it was submitted that, despite the use of the phrase in the document(s) offered as a memorandum, there was in fact evidence of a concluded agreement. The question then squarely arose as to whether writing which contained the phrase "subject to contract" could satisfy the *Statute of Frauds*. The reluctance of the courts to refuse

³¹ Per Keane J. in *Mulhall v. Haren*, *op. cit.* fn.29 at p.375.

³² (1877) 7 Ch D 29.

³³ *Ibid.*, at p.32. In *Boyle v. Lee*, [1992] 1 IR 555 at p.586. O'Flaherty J cited *Winn v Bull* in his examination of cases expounding the phrase "subject to contract".

³⁴ [1920] 2 I.R. 365.

³⁵ *Ibid* at p.386 per Gibson J.

to enforce a contract which had in fact been concluded led, in cases now regarded as exceptional, to the enforcement of contracts despite the fact that the document put forward as a memorandum contained the phrase "subject to contract. " In other words, despite the fact that the memorandum denied that there was any concluded agreement, it was taken as evidence of such an agreement, sufficient to satisfy s. 2 of the *Statute of Frauds*.

2.028 The aberrant cases begin with *Kelly v. Park Hall School Limited*³⁶ where the relevant letter stated: "I confirm that we have agreed terms, subject to contract." This was held not to prevent the creation of a memorandum. The finding of the High Court was that all terms of the contract had been agreed, and that it was not a term that the agreement be reduced to writing. These findings were endorsed by the Supreme Court. In effect, the case fell into the second category mentioned in *Thompson v. The King*.³⁷

2.029 In *Casey v. Irish Intercontinental Bank*³⁸ the court held that there was a concluded oral agreement, and the phrase "subject to contract and title"³⁹ was introduced only at the time, when the memorandum was created. The court took the view that it was therefore not a term of the contract and could not be introduced unilaterally at a later stage. Thus a memorandum which satisfied the *Statute of Frauds* existed, despite the fact that it denied the existence of a contract. This was a "gazumping" case: agreement on all essential matters had been reached and the purchaser had been given the keys, but the vendor sought to renege on the contract when he received a substantially higher offer.

2.030 While *Kelly* could be regarded as a legitimate exception in the terms envisaged by *Thompson v. The King*, *Casey* was more difficult to reconcile with usual practice. From time immemorial, professionals involved in the sale of land had always inserted the phrase into their correspondence in order to prevent the creation of a memorandum. Were this case to be followed, the effect of the phrase "subject to contract" would be completely undermined.

2.031 However, *Casey* has not been followed, and since the decision in *Mulhall v. Haren*,⁴⁰ the traditional view has reasserted itself. In that case, a booking deposit was paid. There was a concluded agreement, and there was no evidence that the phrase "subject to contract" had been used in the negotiations, although it was subsequently used in correspondence between the solicitors.⁴¹ Keane J., after an exhaustive review of the authorities held that there was no valid memorandum:

"Section 2 of the *Statute of 1695* plainly envisages a writing which is evidence of a contract entered into by the party sought to be charged, and that this is not

³⁶ [1979] IR 340.

³⁷ [1920] 2 IR 365

³⁸ [1979] IR 364.

³⁹ Nothing turned on the reference to "title".

⁴⁰ [1981] IR 364

⁴¹ The phrase was introduced by the plaintiff-purchaser's solicitors.

met by a writing which uses language inconsistent with the existence of a concluded contract. *It also appears to me that a long line of authorities has clearly established that the use of the words subject to contract is inconsistent with the existence of a concluded agreement, save in the most exceptional cases.*"⁴² [Emphasis added]

2.032 *Kelly v. Park Hall School Limited* was, Keane J. felt, an exceptional case; *Casey* he confessed to having difficulty with. While the phrase "subject to contract" had not been used in oral negotiations here, he felt that this was because the parties were relying on the good sense of their solicitors to protect them. The plaintiffs would have been appalled if they had been bound before their finance had been organised. While this was only a High Court decision, it already cast doubt on the correctness of *Casey*.

2.033 The next case is *Carthy v. O'Neill*.⁴³ In this case, the Supreme Court found that there was no concluded agreement. However, they stated *obiter* that *Kelly v. Park Hall School* was an exceptional case and that the phrase "subject to contract," used in the alleged memorandum, had its usual meaning, i.e. what had been agreed was subject to a full contract being agreed.⁴⁴

2.034 The Supreme Court examined the effect of "subject to contract" again in *Boyle v. Lee*,⁴⁵ where the High Court had granted specific performance in an *ex tempore* judgment. While the Court were not all of the same view on whether there was a concluded written agreement - a majority found that there was not - all of its members felt that the memorandum would be bad because it failed to recognise the existence of a binding agreement.

2.035 The letter in question was in the following terms:

"We have received instructions from the Vendors to accept an offer of IR£90,000 subject to contract. I would be obliged if you would prepare, and forward the contract which should incorporate the following agreed terms... [The letter then went on to set out the terms]...This letter is for information purposes only, and does not by itself, constitute part of a binding contract."

2.036 Finlay C.J. rejected the approach taken in *Casey v. Irish Intercontinental Bank*. The plaintiff had argued that a party to a concluded oral agreement should not be permitted to escape enforceability by unilaterally inserting "subject to contract" in the contract. This, said the Chief Justice, involved the precise mischief which the *Statute of Frauds* intended to avoid, i.e. the court amending a written

⁴² *Ibid.*, at p.386.

⁴³ [1981] ILRM 443

⁴⁴ It is notable that Henchy J. gave judgment for the Supreme Court in both *Kelly v. Park Hall Schools Limited*, *op. cit.*, fn.35 and *Carthy v. O'Neill*, *ibid.* His treatment in *Carthy* of the *Kelly* case as "exceptional" supports the view expressed in FARRELL, IRISH LAW OF SPECIFIC PERFORMANCE (1994, Butterworths) at p.94 that the *Kelly* case was intended to be exceptional.

⁴⁵ [1992] 1 IR 555

memorandum on oral evidence as to the agreement, thereby allowing oral evidence to supersede the only written evidence:

"In broad terms, it is the clearest possible purpose of the *Statute of Frauds, 1695*, to put the written evidence as dominant and superseding any oral evidence."⁴⁶

He was of the view that those cases where the phrase had not been given its traditional meaning were ones where the fact that an agreement had been concluded was not in dispute, and the courts were dissatisfied with the defence of non-enforceability due to the want of a sufficient memorandum. The courts could not introduce provisos into section 2 which were not consistent with its plain meaning.

2.037 The dominant theme of Finlay C.J.'s judgment is that justice required that the law should be as certain as possible. That certainty was achieved by the principle that a note or memorandum of an agreement made orally is insufficient "unless it directly or by very necessary implication recognises, not only the terms to be enforced, but also the existence of a concluded contract between the parties".⁴⁷ He continued that certainty was also achieved by,

"the corresponding principle that no such note or memorandum which contains any term or expression such as 'subject to contract' can be sufficient, even if it can be established by oral evidence that such a term or expression did not form part of the originally orally concluded agreement."⁴⁸

2.038 Each of the four judgments in *Boyle* regarded the inclusion of the phrase "subject to contract" as being fatal to the plaintiff's claim. As to whether there are very limited exceptions to this interpretation of the phrase, it appears that the majority view in *Boyle* is that neither *Kelly v. Park Hall Schools* nor *Casey v. Irish Intercontinental Bank* should be followed.⁴⁹ That would leave the possibility of any exception as a very remote one.

2.039 There is a further point arising from the fact that it usually happens that the phrase 'subject to contract' appears not at the initial oral stage, but at the subsequent stage when professionals write to confirm the agreement using the phrase 'subject to contract' in their correspondence. The question is, does the use of the phrase at this stage, have the effect of (as it were) retrospectively undermining what would otherwise have been a concluded oral agreement? Since there seems no authority on the point, we must reason from first principles. However it seems plain that there is no reason for permitting a subsequent act of a party to disturb an agreement. Now the point could well be made that this conclusion is of no practical

⁴⁶ *Ibid.*, at p.573.

⁴⁷ *Ibid.*, at p.574.

⁴⁸ *Ibid.*

⁴⁹ McCarthy J. said that neither case should be followed. O'Flaherty and Egan JJ. felt that the cases could stand, but were purely exceptional, although Egan J.'s judgment is slightly contradictory: he expressly approves the judgment of Keane J. in *Mulhall v. Haren* which doubted the correctness of the *Casey* decision, though of course Keane J. could not overrule the judgment of a superior court. Finlay C.J. (Hederman J. concurring) seems to say that neither case should be followed.

significance since if the contract cannot be enforced for lack of writing, then it is immaterial whether there was a concluded oral agreement or not. But this argument proves too much. For, given that there is a concluded agreement then sometimes the circumstances will be such that the *Statute of Frauds* may be satisfied by some writing other than that which included "subject to contract". Alternatively, the doctrine of part performance (which is considered later in this chapter) may apply.

2.040 The relevance of this analysis in the present context lies in the fact that, typically in the sale of a new house, it happens that, because all the persons involved on the vendor's side are professionals, the oral negotiations will take place more or less simultaneously with the provision of some writing, evidencing the transaction but bearing the formula 'subject to contract'. (By contrast, in the sale of a second hand house, where a lay vendor is involved, there will sometimes be a delay between the oral negotiations and the writing.) The consequence of this proximity is significant: it means that it is more likely that it would be held that the use of the phrase 'subject to contract' in the writing prevented there from being a concluded oral agreement.

Phrases other than "Subject to Contract"

2.041 Obviously, this is not the only phrase that may have this effect; once any phrase is used which makes it clear that the document does not acknowledge the existence of a written contract, or that the parties have agreed that they will not yet be bound, the document clearly cannot be used to evidence a contract.⁵⁰ Provided a suitable phrase is inserted in any receipt issued by a vendor, it cannot satisfy the *Statute of Frauds*. For example, in the receipt which the I.A.V.I. recommends should be issued by its members on the taking of a booking deposit, not only is "subject to contract" used as a heading, but it is also stated that "no agreement shall be deemed to be in force and binding until a formal contract has been signed by both parties." Likewise, solicitors and other professionals frequently head their documents "subject to contract/contract denied" and this phrase is treated in the same way as "subject to contract."

2.042 Even if a receipt is issued without that phrase, a careful vendor can avoid creation of a memorandum in another way: by stating that he regards a particular issue as essential, and not referring to that term in the receipt, he avoids the danger of binding himself. In any event, the receipt will often not state all essential terms. For example, it might omit the full price, referring only to the property, the purchaser and the amount of the deposit. However, the inclusion of the words "subject to contract" or other phrase denying the existence of a binding contract should ensure that no memorandum is created.

⁵⁰ See the judgment of Lord Denning in *Tiverton Estates Ltd. v. Wearwell Ltd.* [1975] Ch. 146, approved by Keane J. in *Mulhall v. Haren*, [1981] 1R 364.

Booking Deposits and "Subject to Contract": The Necessity for a Concluded Oral Agreement

2.043 There have been a number of recent cases on booking deposits which deal directly with the type of situation which has given rise to public concern. The following two High Court decisions show that there is usually no concluded agreement at the time the booking deposit is paid.

2.044 In *Lakes v. Unipark Properties Ltd. and Durkan New Homes Ltd.*,⁵¹ the booking deposit receipt stated that it was "received on behalf of the vendor as intent only, without obligation on either party until such time as a formal contract is exchanged."⁵² Consequently, McCracken J. held that the payment of the deposit was not intended to bind either party until such time as formal contracts were executed, and that there was no concluded oral agreement. This case suggests that even where a price is settled, and a booking deposit paid, in circumstances where it is made clear that the negotiations are subject to contract, the question of whether there is a concluded oral agreement (a question of fact) will usually be answered in the negative.

2.045 This case was subsequently applied by Her Honour Judge Linnane in the Circuit Court in *Butler v. Greenhills Construction Ltd. and Loughlin Developments Ltd.*,⁵³ where a booking deposit was paid, and a receipt issued which, although stating that the price was fixed, also stated that the agreement was "subject to contract."⁵⁴

2.046 In *Murphy v. Pierse Developments (Cork) Ltd.*,⁵⁵ the High Court (Smyth J.) found, for various reasons, that there was no concluded oral agreement. Here, the plaintiff had paid a booking deposit on an apartment, and admitted in evidence that there had been no agreement on the exact sum of deposit to be paid; nor had there been agreement on the management fees or service charges. As already noted, a deposit is not always an essential term, although it may be in any particular case. In

⁵¹ *Ex tempore* judgment of McCracken J., Unreported, High Court, 11 May, 1998. The Commission is grateful to Mr. Brendan Watchorn B.L., counsel for the plaintiff, for providing a short note of the judgment. See also *The Irish Times*, 12 May 1998.

⁵² These terms were stated on the receipt.

⁵³ *The Irish Times*, 22 October 1998

⁵⁴ In a decision of the Circuit Court given prior to the *Lakes* decision, *Prendeville v. Gable Holdings Ltd., Clarke Homes Ltd. and O'Sullivan* (1998) 8 ILT 125-6 a different approach was adopted. Most of the judgment concentrates on the application of the doctrine of part performance, but that necessarily implies a finding that an agreement had been concluded. However, all of the documents surrounding the alleged agreement deny that any agreement existed. The receipt stated that the deposit paid was "subject to the terms of a formal contract yet to be agreed between vendor and purchaser." Moreover, the receipt also referred to "a deposit in respect of a proposal to purchase the above property" and stated that the sale was conditional on contract and title. However Honour Judge Buckley, took this to mean that a conditional agreement had been reached, and granted an order of specific performance. While the defendant had made it clear at the time the booking deposit was accepted that the matter was subject to title and contract, His Honour Judge Buckley commented that the plaintiff was not experienced in the purchase of houses and did not appreciate that this was intended to mean that there was as yet no binding agreement. This case must now be regarded as overruled since the decision in *Lakes*.

⁵⁵ *Ex tempore*, Unreported, High Court, 13 January 1999. See *The Irish Times*, 14 January, 1999.

this case, the sales advice notice had a special condition to the effect that no agreement would be binding upon the parties until a formal contract had been signed and a full deposit paid. Furthermore, the title to be given was leasehold and there was no agreement on the commencement date of the lease. This certainly is an essential term. While there is no written note or transcript of the judgment available, it appears that all of these factors persuaded Smyth J. to find that there was no concluded oral agreement.

2.047 Even where no essential terms remain to be agreed, it is a fact that booking deposits are usually accepted "subject to contract." Whether this means there is no concluded agreement is a matter of fact, but on the authority of *Mulhall v. Haren*⁵⁶ and on the basis of the recent High Court judgments, it seems that the use of the phrase at the time of the taking of the booking deposit is evidence that the parties did not in fact intend to be bound.

2.048 It would appear, therefore, that when a booking deposit is paid, "subject to contract", there will not usually be a concluded oral agreement. This cannot be emphasised too much, since the absence of any contract poses greater obstacles to reform than would a situation where a contract had been concluded, but was merely unenforceable.

Taking the Contract out of the Statute: the Doctrine of Part Performance

2.049 We have seen that, since the existence of a concluded oral agreement is a question of fact, there is a possibility (albeit not a very likely one) that such an agreement will be found to exist at the time of the payment and acceptance of a booking deposit. We have also concluded that in such cases, there will, very rarely, be a sufficient memorandum of the agreement available. However, even without a memorandum, a concluded agreement may be "taken out" of the *Statute of Frauds (Ireland)*, 1695 and enforced by recourse to the doctrine of part performance. The issue for this Report, is whether a booking deposit can be regarded as constituting an act of part performance. However before coming to this, we must give a general outline of the law on part performance.

2.050 Shortly after the enactment of the Statute the courts realised that its requirements might perpetuate fraud (in the equitable sense) where there had been an oral agreement but one party was now denying that agreement.⁵⁷ Initially, it was not clear whether the doctrine of part performance evolved on the basis of an equity raised by the actions of the plaintiff, or because acts taken on foot of the contract were regarded as clear alternative evidence of a contract, which would suffice *in lieu* of a memorandum. It may now be regarded as settled that the basis for the doctrine is the former. The doctrine was defined by Lord Reid in *Steadman v. Steadman*⁵⁸ as follows:-

⁵⁶ [1981] IR 364

⁵⁷ See the judgment of Lord Simon in *Steadman v. Steadman* [1976] A.C. 536 at p.558 for an account of the development of the doctrine.

⁵⁸ *Ibid.* at p.540.

"If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid he will not then be allowed to turn round and assert that the agreement is unenforceable. Using fraud in its older and less precise sense, that would be fraudulent on his part and it has become proverbial that courts of equity will not permit the statute to be made an instrument of fraud."

2.051 The essence of the doctrine is that where the plaintiff in reliance on a concluded agreement with the defendant, has commenced performance of the agreement it would be inequitable for the defendant to deny the existence of the contract, or to be able to raise the Statute against him.

2.052 In applying the doctrine, one problem which may arise is that the acts alleged to be in part performance may have been undertaken for reasons other than as performance of the contract now alleged by the plaintiff to exist. They may have been performed voluntarily or in performance of a contract other than the one alleged. The significant question as to how far the acts which are alleged to be acts of part performance must tend to prove the alleged contract, without any oral evidence to explain them, is a difficult one. In *Mackie v. Wilde (No. 2)*⁵⁹ the Supreme Court quoted the following statement of law by Andrews L.J. in *Lowry v. Reid*:⁶⁰

"I make no apology for citing, in conclusion, as a correct summary of the law a passage from Fry on Specific Performance 5th Edit. 292, where the editor states that the true principle of the operation of acts of part performance seems only to require that the acts in question be such as must be referred to some contract and may be referred to the alleged one; that they prove the existence of some contract, and are consistent with the contract alleged."⁶¹

2.053 However, later in the judgment, Barron J. states:

"[I]t seems to me that while the passage from *Fry* on Specific Performance cited by Andrew L.J. in *Lowry v. Reid* ... expresses the law, the different approach requires the statement of principle to be altered. It would then read: What is required is that the acts, relied upon as being acts of part performance be such that on examination of the contract which has been found to have been concluded and to which they are alleged to refer, show an intention to perform *that* contract."⁶² [Emphasis added.]

2.054 It is clear from the context that this last statement should be read with an emphasis on the word "that," so as to mean that the acts of part performance must

⁵⁹ [1998] 2 I.R. 578. The judgment of the court was delivered by Barron J with Hamilton C.J. and Barrington J. concurring.

⁶⁰ [1927] N.I. 142.

⁶¹ *Ibid.* at p.159. That principle originated in the 5th edition of FRY ON SPECIFIC PERFORMANCE and was approved by Lord Morris, Viscount Dilhorne and Lord Salmon in *Steadman v. Steadman*.

⁶² *Mackie v. Wilde (No. 2)*, [1998] 2 IR 578 p.587.

refer specifically to the contract alleged. This is a stricter test than that set out in *Lowry v. Reid* (though it should be added that, on the facts, the point was not actually at issue in *Mackie v. Wilde (No. 2)* because there was no concluded agreement in the case.)

2.055 A further point established in *Mackie* concerned the sequence in which the doctrine should be applied. The traditional approach was to ask whether the acts alleged to be acts of part performance could only be explained by the existence of a contract such as the one alleged. If that was so, the courts would then consider the oral evidence as to the terms of the precise contract alleged. This approach was well-established in England,⁶³ but there was no conclusive decision on the point in this jurisdiction. That decision has now been given in *Mackie v. Wilde (No. 2)*, and the reverse position has been adopted.⁶⁴ The new approach adopted by Barron J. is that the court will first consider the terms of the contract, and will then determine whether the behaviour of the parties justifies the application of the equitable doctrine to modify the legal rule, by considering whether the plaintiff has proceeded to perform the contract, and whether the defendant has broken faith with the plaintiff. The order in which the relevant matters were considered is irrelevant. What was essential was that:

- (1) there was a concluded oral contract;⁶⁵
- (2) that the plaintiff acted in such a way that showed an intention to perform that contract;
- (3) that the defendant induced such acts or stood by while they were being performed; and
- (4) it would be unconscionable and a breach of good faith to allow the defendant to rely upon the terms of the *Statute of Frauds* to prevent performance of the contract."⁶⁶

2.056 Having established what the terms of the concluded agreement are, the court will then proceed to consider whether the acts are ones in performance of that agreement. Insofar as Barron J. referred to the degree to which the acts must relate to the alleged contract, his only other comment was that the acts of part performance must necessarily relate to and affect land.⁶⁷

2.057 However the traditional doctrine is upheld, to some degree, in the clear statements in *Mackie v. Wilde* that the doctrine is based on the equities raised, and not on the need to provide alternative evidence of the contract. Were the doctrine to be evidential in its nature, it would be proper to require that the acts would prove the terms of the particular contract.⁶⁸ But the doctrine is an equitable one, and it is sufficient to show that the acts raise an equity in favour of the plaintiff which

⁶³ See *Steadman v Steadman*, [1976] AC 536

⁶⁴ See Wylie, a casebook on equity and trusts in Ireland, 2nd ed., (Butterworths, 1998) at p.314.

⁶⁵ The court found that there was no such concluded agreement in this case.

⁶⁶ [1998] 2 I.R. at p.587

⁶⁷ Ibid.

⁶⁸ See the comments of Lord Reid in *Steadman v. Steadman*, *op. cit.*, fn.63 at pp.541-2.

requires that the defendant be ordered to perform the contract. To claim specific performance, all that the plaintiff must show is that he has prejudiced himself by performing the contract, and he must show on the balance of probabilities that his acts relate to the contract alleged. No higher standard of proof is required of him.⁶⁹

2.058 All this has substantial relevance for this Report. It would seem that the acts alleged to be acts of part performance must refer to a contract such as the one alleged, i.e. in a gazumping case, they must suggest a contract for the sale of land. Furthermore, those acts must show an intention on the part of the plaintiff to perform the agreement which has been concluded with the defendant. As we shall see in paras.2.084-2.086, in a typical gazumping case, the plaintiff-purchaser will usually fall at the latter fence.

Gazumping in the Context of Part Performance

2.059 In the first place, in *Mackie v. Wilde (No. 2)*,⁷⁰ Barron J. stated that it must be established that the plaintiff acted in such a way as to show an intention to perform the contract. The plaintiff would usually be able to satisfy this requirement.

2.060 Next, in *Howlin v. Power (Dublin) Ltd.*,⁷¹ McWilliam J., in assessing the previous case law, suggested that the plaintiff must have taken some conclusive or irrevocable or prejudicial step "in pursuance of the contract."⁷² This phrase would appear to have been taken from *Lowry v. Reid*, where Andrews L.J. stated that "[t]he right to relief rests not so much on the contract as on what has been done in pursuance or in execution of it."⁷³ McWilliam J. seems to have regarded this as including not just those acts done in performance of the contract, but also those acts which the plaintiff would be entitled to do if the contract had been completed. For example, in *Howlin*, one of the acts relied on was the plaintiff's negotiations regarding the transfer of a lease of the premises to a third party. This was not done in performance of the agreement, but was something which the plaintiff would be entitled to do if the agreement were completed.

2.061 The clearest example of an act of part performance occurs where a purchaser enters into occupation.⁷⁴ Alternatively, the plaintiff may have ejected tenants at the request of the other party, thereby affording the defendant vacant possession.⁷⁵

2.062 Acts of the defendant can never be acts of part performance.⁷⁶ This is consistent with the equitable basis of the doctrine. Acts of the defendant provide

⁶⁹ Ibid.

⁷⁰ [1998] 2 I.R. at 587

⁷¹ Unreported, High Court, 5 May 1978.

⁷² *Ibid.*, at p.7 of the transcript.

⁷³ [1927] NI 142 at p.155

⁷⁴ See *Clinan v Cooke* (1802) 1 Schoales & Lefroy 22.

⁷⁵ See *Howlin v. Power (Dublin) Limited*, *op. cit.* fn.71 at pp.6-7 of the transcript.

⁷⁶ This was confirmed in *Mackie v. Wilde (No. 2)*, [1998] 2 IR 578 at p.588. See also *Lowry v. Reid*,

evidence that a contract has been made, but they do not create an equity in favour of the plaintiff.

2.063 The payment of money was traditionally thought to be an insufficient act, since it is not referable only to a contract for the sale of land but might have been paid for many other reasons. This is however no longer necessarily the case. In *Steadman v. Steadman*⁷⁷ Lord Salmon stated:

"I do not accept the line of authority which ... laid down that payment can never constitute [an act of part performance] because it is impossible to deduce from payment the nature of the contract in respect of which the payment is made. It is no doubt true that often it is impossible to deduce even the existence of any contract from payment.... Nevertheless the circumstances surrounding a payment may be such that the payment becomes evidence not only of the existence of the contract under which it was made but also of the nature of that contract. What a payment proves in the light of its surrounding circumstances is not a matter of law but a matter of fact. There is no rule of law which excludes evidence of the relevant circumstances surrounding the payment - save parol evidence of the contract on behalf of the person seeking to enforce the contract under which the payment is alleged to have been made."⁷⁸

2.064 In that case, there were other acts of part performance⁷⁹ which connected the payment to a contract, one term of which provided for the transfer of an interest in land. When taken together with the payment, the existence of the oral contract was proved.

2.065 In *Howlin v. Power (Dublin) Ltd.*, McWilliam J. declined to hold that the payment of £200, which he referred to as a "comparatively small"⁸⁰ amount, was a sufficient act of part performance. By this, he presumably meant that the payment of such a small amount was not referable to a contract such as the one alleged, viz., an agreement for the surrender of a lease, the full consideration for which was £4,000. This suggests that the amount paid may be relevant in considering whether a payment is referable to a contract for the sale of land.

Preparatory Acts

2.066 It seems well-settled that preparatory acts, by which the plaintiff puts himself in a position to perform the contract, cannot constitute part performance.

[1927] NI 142 at p.155, *per* Andrews L.J., citing *Caton v. Caton*, (1867) LR 2 HL 127.

⁷⁷ [1976] AC 536

⁷⁸ A similar view was taken by Lords Reid and Simon.

⁷⁹ The payment by the plaintiff to his wife was one act in a process of compromise of proceedings. The plaintiff had consented to a court order, had refrained from seeking orders which would have been advantageous to him, and had instructed his solicitor to prepare a draft deed. Those judgments which did not regard the statements in court as an act of part performance took it into consideration in considering whether the payment of money was equivocal in this case.

⁸⁰ *Op. cit.*, fn.71 at p.10 of the transcript.

2.067 In *Steadman v. Steadman*, there was some argument that the preparation of the deed of transfer and the incurring of legal costs should not be considered to be acts of part performance. However, it is clear from the judgments that the act of sending the deed for execution was distinguished from acts which were merely preparatory to the performance of the contract. In the absence of conditions it was the husband's duty to send the transfer for execution by the wife.⁸¹ On the other hand, the mere incurring of expense other than in performance of a contractual obligation was not regarded as part performance.⁸²

2.068 The case of *Daulia Ltd. v. Four Millbank Nominees Ltd.*⁸³ is also instructive. The parties had entered into negotiations for the sale of land. The plaintiff alleged that the parties had agreed for the sale of the property at a particular price. The deposit had also been agreed and was payable by bank draft, and the plaintiff had signed the draft contract. The plaintiff's case was that the defendant had agreed to enter into an enforceable contract for the sale of land on the plaintiff's obtaining a bank draft for the deposit, attending at the defendant's offices on a certain morning and tendering the draft together with the plaintiff's part of the contract in the terms already agreed: this was a unilateral contract, and the plaintiff had performed the required acts. The Court of Appeal agreed that there was a concluded oral contract as alleged by the plaintiff. However, since the effect of that contract was to oblige the defendant to enter into a further enforceable contract for the sale of land, s.40 of the *Law of Property Act, 1925*⁸⁴ applied. There being no written memorandum, s.40 was not satisfied. The plaintiff relied on the acts done as acts of part performance.

2.069 The acts, however, were held to be insufficient:

"[N]one of the alleged acts of part performance of themselves suggests that there was any contract between the parties. Indeed they point to the exact opposite and suggest that the parties were about to make or contemplated making a contract."⁸⁵

2.070 These cases show that putting oneself in funds is preparatory to a contract and not in performance of it. Carrying out a survey is similarly preparatory: the purpose of the survey is to reassure the purchaser, before he buys the property, that it is prudent to buy it.

2.071 However, where acts do not amount themselves to acts of part performance, it may nonetheless be necessary to consider them so as to judge whether they help to show that other purported acts of part performance are sufficiently unequivocal in

⁸¹ *Per* Lord Reid at p.540; Viscount Dilhorne at p.553-4; Lord Simon at p.563; Lord Salmon at p.573.

⁸² It is also worth noting that the husband had borrowed the full amount of the purchase price from a building society and paid it over to his solicitor. It was not argued that this was an act of part performance

⁸³ [1978] Ch. 231.

⁸⁴ This was the equivalent of s. 2 of the *Statute of Frauds (Ireland), 1695*.

⁸⁵ *Supra per* Goff L.J. at p.243. See also Buckley L.J. at p.250. Orr L.J. concurred with both judgments.

all the circumstances. Furthermore, where there are acts of part performance it may be necessary to consider other acts, not carried out in performance of the contract in order to decide whether it would be unconscionable to allow the defendant rely on the absence of writing.⁸⁶

Unconscionable Conduct

2.072 *Mackie v. Wilde (No. 2)*⁸⁷ states that in addition to acts of part performance, it must be established that the defendant induced such acts or stood by while they were being performed and that it would be unconscionable and a breach of good faith to allow the defendant to rely upon the terms of the *Statute of Frauds* to prevent performance of the contract. In effect, the plaintiff must show that he has been prejudiced by the unconscionable conduct on the part of the defendant. It is this element of unconscionability which raises the equity in favour of the plaintiff which the doctrine is designed to satisfy.

2.073 In *Lowry v. Reid*,⁸⁸ the plaintiff had conveyed his farm to his brother. In return, his mother was to leave him the farm in her will. The plaintiff having performed his side of the bargain, it was held that it would be fraudulent to allow the defendant to rely on the absence of formalities.

2.074 In *Howlin v. Power (Dublin) Ltd.*⁸⁹ the plaintiff alleged that he had paid over £200 of the £4,000 purchase price, and had his agent negotiate the letting of the premises to a building society for an agreed rent. He had not, however, entered into a binding agreement with the building society. McWilliam J. held that the plaintiff had not prejudiced himself or left himself in a position where he could be required to perform any act which he was not able to do. He had suffered disappointment at the loss of his bargain, but there was no special equity to take the case out of the statute.

2.075 Moreover, in that case – and this is a point of especial interest in the present Report – the defendant had tendered repayment of the money. A further reason for the traditional rejection of the payment of money as an act capable of being an act of part performance, was that if the defendant offered to repay it, there was no need for equity to intervene to enforce the contract.⁹⁰ McWilliam J. therefore held that the offer to repay removed any injustice which the doctrine of part performance was designed to remedy.

⁸⁶ SPRY, *EQUITABLE REMEDIES* (4TH ED.) at pp.264-5. See also *Lowry v. Reid*, *op. cit.* fn.73 where both judgments take into account circumstances and acts other than acts of part performance in deciding these questions.

⁸⁷ [1998] 2 IR 578

⁸⁸ *Op. cit.*, fn.73.

⁸⁹ Unreported, High Court, 5 May 1978

⁹⁰ See *Steadman v. Steadman*, [1976] AC 536 per Lord Reid at p.541, Lord Salmon at p.573. Viscount Dilhorne at p.555 refers to the retention of the sum paid in considering the equities of the case.

2.076 However, an offer of repayment may not always be sufficient to remove the injustice. Lord Simon in the *Steadman* case pointed out that there may be other factors to consider: the payee might not actually be able to repay the money; the land might have a particular significance for the plaintiff; or it might have greatly risen in value since the payment (as perhaps in a case of gazumping in which land prices had risen steeply); or money might have lost some of its value.⁹¹ In such circumstances, mere repayment will not do equity for the plaintiff and provided the payment is not equivocal, the payment of money may constitute part performance. It remains to be seen whether these views will be accepted and applied in this jurisdiction. If they are, they will have direct application to cases of gazumping, since the purchaser may then be able to claim that the repayment of any money paid does not remove the inequity to him. However, the significant point is that, even if the purchaser succeeds in jumping this hurdle, he is likely to fail to satisfy another of the conditions, since, as we shall see in the following section, a booking deposit probably does not constitute an act of part performance.

Part Performance and Booking Deposits

2.077 On the taking of a booking deposit, a prospective purchaser may embark on a number of activities in the expectation that he will shortly have a binding legal contract. For example, he will organise finance, commission a survey and he may put his own house on the market or enter into a binding contract for its sale. Where the sale is of a new house, the purchaser may ask the vendor/developer to change the specifications to suit his particular needs or tastes.

2.078 It is worth repeating that there is usually no concluded agreement at this stage. However, it is possible, if the negotiations are not stated to be "subject to contract," that such an agreement does exist. In that situation, if there is no memorandum, the issue is whether the purchaser will be able to rely on the doctrine of part performance?

2.079 The question arises as to whether any of the acts mentioned above will, either individually or with others, constitute part performance of the contract.

2.080 The principle established in *Steadman* is that the payment of money can be a sufficient act of part performance if the surrounding circumstances show that it is referable to a contract between the parties of the kind alleged by the plaintiff.

2.081 However booking deposits are usually paid in circumstances where the person receiving the deposit stipulates that there is no binding agreement. The deposit is also refundable, although this might not be made clear to the depositor. Furthermore, the amount paid is a small fraction of the purchase price, and usually far below 10% of the purchase price,⁹² which is the amount usually required as a deposit on the house, upon signing the contract and which will be forfeited to the

⁹¹ *Ibid.*, at p.565.

⁹² See the judgment of Mc William J. in *Howlin v. Power (Dublin) Ltd.*, *op. cit.*, fn.71 where he implies that a substantial sum of money must be paid by way of deposit, if it is to be regarded as part performance.

vendor if the purchaser withdraws. All of these matters suggest that the money is not paid in performance of the contract and that no irrevocable step has been taken by the depositor. In other words, the payment of the booking deposit is a separate transaction and not part of the contract for the sale of land.

2.082 Therefore, it is extremely unlikely that the payment of a booking deposit - even if the plaintiff can show that there was a concluded oral agreement - would be held to constitute part performance for one or more of the following reasons:

if repayment is tendered, there will probably be no justification for the intervention of equity. In fact, repayment is the norm, since booking deposits, by definition, are refundable.

on its own, a booking deposit may not suggest any contract between the parties. The amount paid is so far below the purchase price that it could not be said to be referable to a contract for sale.

it is not paid as part of the purchase price, although it may eventually be put towards payment of the purchase price. It is paid on the basis that it is refundable if the parties do not proceed to a contract. The circumstances of payment, unlike those in *Steadman v. Steadman*, do not suggest a contract for the sale of land.

2.083 Exceptional cases may arise where the circumstances in which a deposit is accepted are not the usual ones, i.e., it is not made clear that the payment is in the nature of a booking deposit only and is refundable, and the agreement is not expressed to be "subject to contract." Even if that is the case, because the amount is repayable, there would probably still have to be other acts of part performance. However, since it is well-established that preparatory acts cannot constitute part performance, it is unlikely that the doctrine could ever apply in the normal circumstances.

Recent Irish Cases on Booking Deposits: Application of the Doctrine of Part Performance

2.084 In recent times, the courts have been asked to apply the doctrine in a number of cases involving booking deposits where no written contract was signed. All but one of them seems to support the view that the payment of a booking deposit is not an act of part performance. However, since the prospective purchasers' cases were dismissed in *ex tempore* judgments and without any detailed analysis of the application of the doctrine, a really authoritative judgment which clarifies this point is still lacking.

2.085 In *Lakes v. Unipark Properties Limited and Durkan New Homes Limited*⁹³ the plaintiffs had paid a booking deposit and received a receipt which set out the terms of that booking deposit. It stated that the deposit was received "on behalf of the vendor as intent only, without obligation on either party until such time as a formal contract is exchanged." It was argued that the payment of the deposit amounted to part performance of the contract. However, McCracken J. held that the

⁹³ *Ex tempore*, McCracken J., Unreported, High Court, 11 May 1998.

terms under which the deposit were paid were quite clear. The payment was not part performance. This would seem to suggest that the payment of a booking deposit is not usually an act of part performance.

2.086 In *Murphy v. Pierse Developments (Cork) Ltd.*,⁹⁴ another *ex tempore* judgment Smyth J. overturned a Circuit Court finding that the plaintiff had an enforceable contract.⁹⁵ The receipt for the £2,000 booking deposit was clearly marked "subject to contract." The plaintiff claimed that her acts in buying furniture for the apartment and in taking out insurance policies were acts done in part performance of the contract. This was rejected by the High Court.

2.087 Against this line of High Court authority there is only the Circuit Court judgment of *Prendeville v. Gable Holdings Ltd., Clarke Homes Ltd. and Kevin O'Sullivan*.⁹⁶ Here the plaintiffs had arranged mortgage finance and had the builder's foreman make some changes in the house. They engaged a firm of interior designers to advise on decoration of the new house, bought furniture and a fireplace and selected tiles and carpeting. They also engaged an estate agent for the sale of their existing house and advertised it for sale.

2.088 His Honour Judge Buckley found that all of these acts were acts of part performance. They were referable to an oral contract for the sale of the house, and it would be inequitable to permit the defendants to rely on the Statute. The Judge held that the defendants should have taken steps either to warn the plaintiffs not to commit themselves in relation to matters related to the new house or the sale of their old house until they had a binding agreement, or when they became aware of the steps that the plaintiffs were taking, such as putting their house on the market, to advise the plaintiffs that such steps were premature.

2.089 Although it may be difficult to reconcile this judgment with previous caselaw and with the subsequent judgments of the High Court in the *Lakes* and *Murphy* cases, it is arguable that the act of the plaintiffs in requesting changes to the house is in fact an act of the plaintiff in pursuance of the contract. However, the finding of the Circuit Court that the plaintiffs' act of putting their house on the market was an act of part performance appears to run counter to *Howlin v. Thomas Power (Dublin) Ltd.*, which stated that only the assumption of binding obligations would constitute part performance.⁹⁷

⁹⁴ *Ex tempore*, Smyth J., Unreported, High Court, 13 January 1999.

⁹⁵ This was not a case of "gazumping." The apartment in question was offered to a couple on the defendant's waiting list for the same price mentioned to the plaintiff. The plaintiff had in fact been sent the contract, but had not returned it.

⁹⁶ 12 February 1998, (1998) 8 ILT 125-6

⁹⁷ Another point of importance is that the Court held in *Prendeville* that the defendant should have warned the plaintiffs that they were acting prematurely. This was despite the evidence of the defendant that any agreement was dependent on the preparation of a formal contract and the inclusion of phrases similar to "subject to contract" at the time of the taking of the booking deposit. The obligation to warn the plaintiffs, who did not respond to any correspondence or return a contract which had been sent to them for execution, would seem to overstate the duties of the defendant who did not, on the evidence, act in an unconscionable way.

2. Obtaining a Remedy in the Absence of an Enforceable Agreement

Estoppel: the Wider Effect of "Subject to Contract."

2.090 Our basic conclusion is that since negotiations between vendors and purchasers are normally conducted "subject to contract," there is no concluded oral agreement. It is therefore within the legal rights of either party to withdraw. The concern giving rise to this Report is that this legal right is being abused by the vendor. If the vendor is allowed to rely on his legal rights, he may act in an unjust way. Since, the doctrine of estoppel operates to prevent a person from exercising his strict legal rights where it would be unjust to do so, it might be thought that it would afford some remedy to a purchaser who has been gazumped.

2.091 However such an argument would probably fail since "subject to contract" has a wider effect than merely preventing the coming into being of a concluded agreement. In addition to meaning that there is no contract between the parties, the phrase also limits the possibility of succeeding in an action based on estoppel. The use of the phrase in negotiations means that the parties are taken to know that either is legally free to back out of the arrangement. In *Attorney General for Hong Kong v. Humphrey's Estate (Queen's Gardens) Ltd.*⁹⁸ Lord Templeman stated:

"It is possible but unlikely that in circumstances at present unforeseeable a party to negotiations expressed to be 'subject to contract' would be able to satisfy the court that the parties had agreed to convert the document into a contract or that some form of estoppel had arisen to prevent both parties from refusing to proceed with the transactions envisaged by the document."

2.092 In that case the defendant did not at any stage indicate expressly or by implication, that they had surrendered their right to change their mind and to withdraw. The defendant did not encourage the plaintiff's actions. Furthermore, the evidence was that the plaintiff did not believe that the defendant was bound to proceed. As a result the defendant was not estopped from denying that the agreement was binding.⁹⁹

2.093 The conclusion as regards estoppel is that it is possible for a party to negotiations for the sale of land to establish a claim for an order equivalent to specific performance, even though those negotiations never resulted in a concluded oral agreement. However, the facts which would give rise to such a finding will almost never arise in the context of negotiations for the sale of a house.

⁹⁸ [1987] A.C. 114. In this, it was also made clear that an earlier case, *Salvation Army Trustee Co. Ltd. v West Yorkshire Metropolitan City Council*, (1980) 41 P.&C.R. 179 where the defendant authority was estopped from refusing to conclude a sale with the plaintiff even though the negotiations were stated to be "without prejudice," was exceptional.

⁹⁹ See also *Devlin v. Northern Ireland Housing Executive* [1982] N.I. 377, at 391 where Lord Lowry L.C.J., in considering whether the plaintiff had acted under a mistaken belief, encouraged by the owner that he owned or would obtain a sufficient interest in the property to justify his expenditure, rejected the plaintiff's claim based on proprietary estoppel saying:

"the defendant here did nothing actively or passively to encourage the plaintiff ... into believing that she would obtain a proprietary interest in the house, other than by agreeing in principle to sell to the sitting tenant 'subject to a proper contract.' "

2.094 In the first place, the purchaser would have to show that he mistakenly believed that he had a binding contract, or that he would acquire one. To do so, he would have to show that he did not understand the meaning of "subject to contract" and that it was reasonable for him to do so. In circumstances where vendors are normally careful to state in their letters that no contract is to come into existence until formal contracts have been drawn up and executed by both parties, it is difficult to envisage the acceptance by a court that it was reasonable for a purchaser to believe that a contract existed, even where the purchaser was a first-time buyer who had never entered into this sort of transaction before.¹⁰⁰

2.095 Of course, that belief could be created as a result of the conduct of the vendor after the initial "subject to contract agreement." For example, the purchaser might indicate his mistaken belief in his dealings and that mistake might go uncorrected by the vendor. Or the vendor might make further assurances which reasonably create an expectation that he will not exercise his right to withdraw. Again, this is highly unlikely to occur. A developer or builder who acts as vendor, and is legally advised, is unlikely to create such an expectation and all correspondence will continue to be headed "subject to contract."

2.096 Secondly, the purchaser will have to show that he has suffered detriment as a result of the expectation created by the vendor. Even commentators who are optimistic that estoppel can sometimes provide a remedy in the case of "subject to contract" agreements admit that a purchaser in this situation would have to show something more in terms of loss or expense than would normally be incurred in the pre-contract stage of house purchase.¹⁰¹ However it may be that the action of a prospective purchaser who has placed a booking deposit on a new house, and waited a considerable period of months for a contract to issue from the vendor could be said to have suffered a detriment in that the vendor has allowed him to withdraw from the housing market for so long that he may now have to pay a considerably higher price. This might be regarded as unconscionable behaviour by the vendor, and provided that the purchaser's reliance was held to be reasonable, an order

¹⁰⁰ It has been suggested that persons not experienced in conveyancing would find it easier to establish a claim in estoppel than would commercial undertakings such as the plaintiff in *Attorney General for Hong Kong v. Humphrey's Estate (Queen's Gardens) Ltd*: see M.P. Thompson, *Compensation for Pre-Contractual Expenditure* [1995] Conv. 135 at p.139. However, most ordinary home-buyers take legal advice, albeit after the payment of a booking deposit. In *Devlin v. Northern Ireland Housing Executive*, *op. cit.*, fn.99, Lord Lowry L.C.J. in considering the issue of mistaken belief, took this factor into account in finding against the plaintiff, saying that both parties were on an equal footing and had available the advice of a solicitor. Given that the Irish courts have recognised the importance of giving effect to the phrase "subject to contract," it must be doubted that they would uphold a claim based on estoppel by purchasers who, although not experienced in the procedures of house purchase, had available legal advice.

¹⁰¹ See Thompson, *ibid.*, at pp.140-1:

"[I]t is not suggested that estoppel will always operate to prevent [gazumping] occurring. Indeed, where the main expenditure of the prospective purchaser is related to the survey, it seems impossible, at least in most cases, to argue that the purchaser will have any right to prevent the vendor from withdrawing from the transaction, or indeed *vice versa*. The more that either party is encouraged to do, however, in the belief that the exchange of contracts is a mere formality then, it is argued, the more difficult it will be for the other to withdraw from the projected transaction, despite the negotiations being expressed to be subject to contract."

equivalent to specific performance or some form of compensation might be awarded. There is no authority on this point at present.

2.097 At present, we can only conclude that, while exceptional cases may arise, the principles of estoppel provide no general solution to the problems associated with booking deposits.¹⁰²

Negotiating an Ancillary Agreement: "Lock-out" Agreements and Costs Guarantees

2.098 Since there is no concluded oral agreement, a depositor who seeks to ensure that the property will be transferred to him, or to protect himself against the costs of failed negotiations, may be able to do so, if there is, on the facts, some form of ancillary agreement. We turn next to consider examples of such ancillary agreements, which will sometimes have been made.

(i) "Lock-out" Agreements

2.099 For example, it is open to the parties to negotiate a "lock-out" agreement. This is an agreement whereby the vendor is bound to negotiate exclusively with the purchaser for a particular period. These agreements provide only a very limited protection against gazumping.¹⁰³ First, it does not compel the vendor to sell to the purchaser at that price. If the vendor delays beyond the period specified in the agreement, he can then negotiate with others. This gives him the leverage to demand a higher price from the would-be purchaser. Second, the agreement would have to be supported by consideration. It would be surprising if home buyers would welcome a new practice which involves additional expense for them.

2.100 There is a recent decision on the subject of "lock-out" agreements, which is worth mentioning for its unusual facts, even if it is this very feature which means that it is of limited value as a precedent. In *Pitt v. PHH Asset Management Ltd*,¹⁰⁴ a conversation between the plaintiff, who had been gazumped, and the defendant, who was playing the plaintiff off against another interested party in a private treaty sale, was interpreted by the Court of Appeal as a lock-out agreement.

2.101 In this case, the plaintiff was annoyed to discover that, having entered into a "subject to contract" agreement for the purchase of the defendant's property, the defendant had proceeded to enter into another such agreement with a third party. He telephoned the defendant's agent and threatened to contact the third party and tell her that he was withdrawing. This was a real threat, since she might well reduce her offer if she knew she had no opposition. He also threatened to take proceedings

¹⁰² See Pawlowski, *Proprietary Estoppel and Gazumping* (1998) 17 *Litigation* 179-186, where a similar conclusion is reached.

¹⁰³ Nevertheless, it has been suggested that this type of agreement might assist people in protecting themselves against gazumping. See *The Key to Easier Home Buying and Selling: A Consultation Paper* (Department of Trade, Environment and the Regions, 1998), para.107.

¹⁰⁴ [1994] 1 W.L.R. 327.

to enjoin the defendant from selling to the third party. Finally, he said he was ready to exchange contracts at any time. In response, the agent undertook not to consider any further offers for the property on the understanding that the plaintiff would exchange contracts within two weeks of the receipt of the draft contract. Despite this, the defendant sold to the other party and the plaintiff sued for breach of an oral contract.

2.102 If the arrangement were regarded as a contract for the sale of an interest in land, it could not be enforced, since the requisite formalities had not been complied with. However, the Court of Appeal interpreted it as a lock-out agreement, thereby avoiding the problem of formalities. As an ordinary oral contract, the crucial issue became that of consideration. Again, the court was happy to assist the plaintiff. Both the threat of an injunction (which was an illusory threat, since there were no legal grounds for such an order) and the threat to inform the other party that he was withdrawing were accepted as good consideration for the agreement.

2.103 Damages were not assessed in the judgment, but presumably they would relate only to loss of opportunity, i.e. the loss of the opportunity to negotiate with the defendant.¹⁰⁵

2.104 While the case indicates that the courts will, if possible, find a remedy for a purchaser who has been gazumped, its facts are unusual and do not demonstrate any general solution to the problem of gazumping. It does no more than establish that the courts will enforce "lock-out" agreements, and that such an agreement can be held to exist on the basis of relatively informal undertakings. However, in the usual circumstances in which "subject to contract" agreements are made, the facts will not support such a finding.

(ii) *Costs Guarantees*

2.105 Another alternative is to negotiate an agreement that, should the parties not proceed to a contract for sale, the vendor will reimburse the purchaser for any costs he has incurred. Such an agreement was enforced in *Farah v. Moody*¹⁰⁶ where the Court of Appeal affirmed the order of the County Court. The plaintiff landlord had stipulated in the correspondence surrounding the negotiation of the grant of a lease that should the prospective tenants withdraw from the negotiations, they would have to pay his legal fees, the costs of the works which were being undertaken immediately at the tenants' behest and the costs of reinstating the premises to its former condition so that it could be used by others. This stipulation was contained in a letter headed "subject to contract," as was the reply to it in which the defendants indicated their general assent to the plaintiff's letter.

2.106 The Court of Appeal stressed that the negotiations, being "subject to contract", had not resulted in any contract. However, in order to make sense of this particular stipulation, it had to be regarded as independent of any formal agreement

¹⁰⁵ See Thompson, [1994] Conv. 58.

¹⁰⁶ Court of Appeal, 12 January, 1998. See Conveyancer's Notebook [1998] Conv. 159.

between the parties; it was therefore binding and the defendants were ordered to reimburse the plaintiffs.

2.107 Again, this case does no more than point to one option available to the parties to negotiations.¹⁰⁷ It is possible to negotiate for this type of agreement, but a purchaser would have to provide consideration. Furthermore, in the context of typical negotiations for the sale of residential property, the purchaser will not usually be able to insist on this type of indemnity, and any vendor is unlikely to give an indemnity which he is not obliged to give according to prevailing practice.¹⁰⁸

Conclusion

2.108 If a purchaser is in a position to do so, he may be able to induce the vendor to make an ancillary agreement with him, such as a lock-out agreement, or a costs guarantee.¹⁰⁹ However, in a rising market, when the purchaser is in most need of protection, he will probably not be able to persuade the vendor to make such an agreement. In the *Pitt* and *Farah* cases, the agreements were oral and made in such a manner that the vendors may well have been surprised to find that they were bound to anything. If a purchaser is to have the security of knowing that he has an ancillary agreement, he would need it in writing. It is unlikely that a vendor would be persuaded to enter into such a written agreement. These agreements are therefore of limited use to purchasers and provide no general solution to gazumping. As for raising an estoppel, the circumstances surrounding the payment of a booking deposit will not usually support a claim based on estoppel.

¹⁰⁷ Costs guarantees were also suggested by the U.K. Department of Trade, Environment and the Regions. See *The Key to Easier Home Buying and Selling: A Consultation Paper* (1998), paras.109-111.

¹⁰⁸ The Conveyancing Standing Committee of the English Law Commission made a practice recommendation in 1987 in which it was suggested that parties to a contract should each deposit 0.5% of the purchase price at the pre-contract stage. This deposit would be forfeit by the party who withdrew from the negotiations, save in specified circumstances, and was designed to cover wasted expenditure by the other party. See Law Commission (Conveyancing Standing Committee), *Pre-contract Deposits: A Practice Recommendation by the Conveyancing Standing Committee* (1987) This was a voluntary system which was not subsequently adopted in conveyancing transactions.

¹⁰⁹ In Chapters 4 and 5, the possibility of providing compensation to a gazumped purchaser, and the possibility of imposing time limits on the issue and execution of contracts, during which the vendor is precluded from negotiating with anyone else, are discussed.

CHAPTER 3 POSSIBLE REFORM OF THE EXISTING LAWS

3.01 The opportunity to gazump arises in the period before a binding contract for sale comes into being. From our discussion of the law on contracts for the sale of land, it transpires that there are two possible reasons why the initial negotiations cannot be regarded as constituting a contract. The first is that the parties may not have agreed on all the essential terms of the contract. The second possibility is that the parties have concluded an oral agreement, but the written evidence required by law is not available, often because such writing as there is bears the formula "subject to contract".

3.02 Accordingly, any proposed reform of the current laws must address the situation where the parties have stated that their negotiations are "subject to contract." In other words, it would have to make "subject to contract" agreements enforceable. Only if this is done will a general solution to gazumping be found.¹ We therefore consider, first, in this chapter, whether legislation should be introduced to provide that the payment of a booking deposit constitutes a statutory contract, even though there is in fact no agreement for sale.

Option 1: Enforcing "Subject to Contract" Agreements: a Statutory Contract?

3.03 An initial reaction to the injustice of gazumping might be to suggest that the parties should be legally bound once the price is agreed and there is nothing in law to prevent this. As already stated, the law does not require that every detail of the transaction should be settled in order to achieve a concluded oral agreement.² Once parties, property and price have been agreed, negotiations for the sale of land are regarded as having been concluded, unless there are other matters deemed essential by the parties which are yet to be agreed. The only further legal requirement is that there be evidence of the agreement, and if either party can produce a memorandum, the courts will grant specific performance. This might suggest that there should be no difficulty, as a matter of principle, in allowing the enforcement of an agreement made at the time a booking deposit is paid. The three essentials for an agreement for the sale of a freehold interest have been agreed, and the only problem is that there is no memorandum or part performance.³

¹ Changes to the *Statute of Frauds (Ireland), 1695* would not alter the position of most homebuyers, and therefore, while we consider this at paras.3.18 *et seq* we are making no proposals in this regard.

² See *supra*, para.2.003

³ Obviously, if the title to be given is leasehold, other matters such as the term and date of commencement of the lease, and the rent will also have to be agreed. See *supra*, para.2.006.

3.04 However, we have already indicated why the parties to a contract for the sale of land usually prefer to enter into a written contract.⁴ These same reasons gave rise to the concept of "subject to contract", and explain the courts eagerness to uphold its effect. The negotiation of a mutually acceptable contract dealing with all aspects of the agreement is agreed by the parties to be necessary, and until a formal contract is drawn up, there is in fact no concluded agreement. It should be borne in mind that this caution is, in most cases, much more to the benefit of the purchaser than the vendor.

3.05 It is against the background of these considerations that the enforcement of "subject to contract" agreements should be considered. While this would prevent gazumping, it is not a simple matter, and we now examine the various problems which such a course would present.

Constitutional Considerations⁵

3.06 The Constitution deals with property rights in two provisions but the slightly different formulation need not affect the present discussion. Article 40.3.2° provides that the State shall by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the property rights of every citizen. Article 43 provides that the State may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good. Chief among the bundle of rights which comprise ownership of property, is the right to sell one's interest in property. Any proposal which would have the effect of compelling a property owner to sell his property to another private citizen with whom he has made no agreement would be of doubtful constitutionality.

3.07 In the end the question would come down to whether the proposed law would within the accepted qualifications to the constitutional property rights. On this general point, in the most recent edition of Kelly's *The Irish Constitution* it is suggested that,

"...the courts should consider two distinct points. First, is the objective giving rise to the restriction justified in terms of social justice and the exigencies of the common good? Second, are the means for securing that objective compatible with the Constitution?"⁶

A proposal to enforce an agreement which was explicitly stated to be non-binding might provoke a negative response to the first enquiry, since it is difficult to see why the exigencies of the common good or the principles of social justice would require a property owner to sell to one person rather than another, or for one price

⁴ See *supra*, paras.2.020

⁵ On this area generally, see J.M. KELLY, *THE IRISH CONSTITUTION*, EDS. HOGAN AND WHYTE (3rd ed. Butterworth, 1994) 1061-91. On the unconstitutionality of arbitrary interference with property rights, see Gerard Hogan, *The Constitution, Property Rights and Proportionality*, XXXII (1997) *Irish Jurist* 373.

⁶ *Ibid.* p.1076.

rather than another. The effect of such a proposal would be neither to increase the supply of affordable housing nor to ensure that indigent persons were able to acquire it. As against this, it could be said that the law prevented the exploitation of purchasers who, though aware that the vendor has not agreed to sell, were obliged, because of market forces, to wait in the hope of acquiring a contract and then saw their hopes dashed and time lost. As regards the second test, as to whether the means for securing the objective are compatible with the Constitution, the proposed law might be vulnerable at this hurdle too. In the first place, it would involve the enforcement of a 'contract' in respect of which, often there has not been agreement on all essential issues.

3.08 In this context, an important distinction must be made between a law which altered the conditions necessary to make an agreement enforceable (which would not offend the Constitution), and a law which would compel a sale where no agreement has been made. The latter would almost certainly be found to infringe the private property rights of the owner.

3.09 In the light of this distinction, those aspects of the law on "subject to contract" which relate only to the enforceability of concluded agreements might be successfully altered. For example, a memorandum which contained this phrase might be deemed to be sufficient for the purposes of the *Statute of Frauds*; or the need for any memorandum whatsoever might be removed. Since these changes would relate only to the formal conditions necessary to enforce an existing agreement, they would be constitutionally sound. However, such changes would not alter the position of most persons paying booking deposits, since the legal position in many of those cases is that there is no concluded agreement on all essential issues.⁷

Freedom of Contract

3.10 Apart from these constitutional considerations, legislation allowing enforcement of a "subject to contract" agreement would have to override an express statement of the parties that they did not intend to be contractually bound. As such it would run counter to the very idea of a contract, which is that legal obligations be voluntarily assumed. This was one of the reasons why the English Law Commission did not recommend the enforcement of "subject to contract" agreements.⁸

Settling the Terms of the 'Statutory Contract' (other than price)

3.11 Apart from these conceptual difficulties, there is a practical problem. A house or other piece of land is unlike any other form of property in that it can be the subject of a variety of property interests held by many different people. Land is also the subject of extensive statutory regulation in the form of planning and

⁷ See *supra* paras.2.003-007.

⁸ See Law Commission, Working Paper No. 51, *Transfer of Land: "Subject to Contract" Agreements* at para.62.

environmental legislation. In addition, each piece of real property is likely to be physically different from any other. It cannot be bought from a catalogue. It may differ in size, structure, or location from any other piece of real property, even if the properties are regarded as comparable by the vendor. As a result, it is extremely difficult to draw up a standard form contract to be used in the sale of land, or even for the sale of residential properties. The Working Group on Land Law and Conveyancing established by the Commission has already attempted to do this, but:

"After a number of meetings the Working Group came reluctantly to the conclusion that the preparation of a statutory set of conditions even with the advantage of an apparently suitable model [the Law Society of Ireland's contract] presented insuperable difficulties and that the drafting of a statutory set of conditions was not feasible."⁹

The exercise has also been attempted by the English Law Commission without success.¹⁰

3.12 Given the absence of such a statutory set of conditions, if an agreement were to be enforced as soon as the price were agreed, there would have to be some mechanism for settling the other terms. The Law Commission concluded that a court or arbitrator might be able to settle terms in simple cases, but not in all cases. In addition, the contract would have to be drawn up in a way that was acceptable to the vendor also. This would inevitably lead to dangers for a purchaser¹¹

Protecting the Purchaser

3.13 Even if these matters could be resolved by means of automatically implied terms or by arbitration, most depositors will not have taken legal advice prior to paying a deposit. To deem the payment of a booking deposit to be a binding agreement would not be in the depositor's interest. Yet the effect of such a provision, would be that the purchaser as well as the vendor would be bound even though the former had acted without legal advice. The point here is that the "subject to contract" phrase generally operates for the benefit of purchasers. It should also be remembered that gazumping is a transient and limited problem. It would be imprudent to sacrifice the general protection afforded to purchasers by the phrase "subject to contract" in order to address the phenomenon.

3.14 In order to protect purchasers, it might be possible to draft legislation so as to make the contract enforceable by the purchaser only. This could be done by deeming the payment of a booking deposit to be an option. Alternatively, the legislation could provide for a "cooling off" period, during which a purchaser could change his mind. Each of these suggestions is considered later in this chapter.

⁹ See Report on Land Law and Conveyancing Law: (6) Further General Proposals including the Execution of Deeds (LRC 56-1998) at paras. 3.6.

¹⁰ See Law Commission: Working Paper No. 51, *Transfer of Land: "Subject to Contract" Agreements* at paras.41-51.

¹¹ *Ibid.*, at para.63.

Evaluation of Option 1

3.15 We feel that there are objections, both principled and pragmatic, to the enforcement of "subject to contract" agreements, and we cannot recommend it. In this respect we note that the English Law Commission also rejected the idea of making "subject to contract" agreements legally binding as contracts.¹² The fundamental question, as identified by the Law Commission was "whether there is something so special about the sale and purchase of dwelling houses that agreement of price alone should be sufficient to bring a binding contract into existence."¹³

3.16 The subsequent report of the Law Commission¹⁴ recommended no change to the law. It concluded that:

"the existing 'subject to contract' procedure for the sale of houses by private treaty, though it has drawbacks and is capable of being abused in certain circumstances, is based on a sound concept, namely, that the purchaser should be free from binding commitment until he has had the opportunity of obtaining legal and other advice, arranging his finance and making the necessary inspections, searches and enquiries."¹⁵

3.17 Subsequent attempts to prevent gazumping in England and in New South Wales,¹⁶ not all of them well-received,¹⁷ have taken the form of recommendations for change in conveyancing practice so as to reduce the period of time before a formal contract comes into existence. Conveyancing practice in Ireland is certainly in need of reform. The Commission's Working Group on Land and Conveyancing Law has an ongoing remit to review "conveyancing law and practice in areas where this could lead to savings for house purchasers."¹⁸ It is clear that a great deal of the delay which makes gazumping possible is the result of the necessity for the purchaser to undertake pre-contract enquiries. In our view, this delay could be considerably reduced by the introduction of a comprehensive system of registration of title. However, even with more efficient conveyancing procedures, gazumping will always be possible before the parties enter into binding legal obligations.

¹² *Ibid.*, at paras.60-63.

¹³ *Ibid.*, para.61.

¹⁴ Law Com. No. 65: Transfer of Land: Report on "Subject to Contract" Agreements.

¹⁵ *Ibid.*, at para.13.

¹⁶ See *The Key to Easier Home Buying and Selling: A Consultation Paper* (Department of the Environment, Transport and the Regions, 1998) which makes various recommendations for changes in conveyancing practice. See also the *Conveyancing (Sale of Land) Amendment Act, 1990* and the *Conveyancing (Vendor Disclosure and Warranty) Regulation, 1986* (N.S.W.).

¹⁷ The DETR Consultation Paper has already come in for criticism. See Conveyancer's Notebook [1999] Conv. 78-9, and also [1999] Conv. 81-83.

¹⁸ From the Attorney General's reference to the Law Reform Commission of the 6th March, 1987.

Option 2: Reform of the Statute of Frauds (Ireland), 1695

3.18 Since in the majority of cases of the type under discussion in this Report, a concluded agreement does not exist, changes to the *Statute of Frauds* would not alter the legal position of the disappointed homebuyer. However, if the circumstances in which a booking deposit is paid differ from the norm, for example it is not stated to be "subject to contract", there may well in fact be a concluded oral agreement. Alternatively, if the objections to enforcement of "subject to contract" agreements as stated above were overcome, the question would again arise as to whether the law regarding formalities for contracts for the sale of land should be reformed.

3.19 In either of the cases, the purchaser still has to jump the hurdle of the *Statute of Frauds*. At present, satisfying the Statute is often a matter of chance. Of the small number of purchasers who will be able to prove that there has in fact been a concluded agreement, an even smaller number will be able to overcome this second hurdle. In some cases, those agreements might be rendered enforceable by reform of the *Statute of Frauds*. We summarise, in Appendix 4, proposals for reform in some other jurisdictions. However, the enforcement of these agreements would not provide a general solution to gazumping, though it might prevent injustice in a small number of cases.

3.20 There are other objections to any change to the Statute. First, reform of the *Statute of Frauds* would affect all contracts for the sale of land, and not just sales of residential property. The effect of any repeal or amendment of the Statute on all land contracts would therefore require very careful consideration. It seems inadvisable to propose any change in order to attempt to remedy the relatively rare and probably temporary problem of gazumping.

3.21 Second, an alteration in the necessary formalities may have the effect of increasing the prospect of litigation in conveyancing. Moreover, unless one is to adopt an extreme solution - for example to remove the need for writing altogether - any reformed statute would be the product of divergent policies and would thus be inherently likely to be complex. The Commission's Working Group on Land and Conveyancing Law remarked recently:

"Amendments of the Statute of Frauds in other jurisdictions have not always been entirely successful and the Working Group have reservations about how easy it would be to draft amending legislation successfully."¹⁹

Currently, the Statute can operate in an anomalous fashion, but it is well understood and litigation in this area generally focuses on questions of fact rather than of law. Changes might lead to increased litigation in order to clarify legal points arising out of any reform. Certainly, this appears to have been the English experience.²⁰

¹⁹ Law Reform Commission, Report on Land Law and Conveyancing Law: (6) Further General Proposals including the Execution of Deeds, (LRC. 56-1998) para.3.3.

²⁰ See for example, *Spiro v Glencrown Properties Ltd* [1991] 1 All ER 600; *Record v Bell* (1991) P & CR 192; *Tootal (Clothing) Ltd v Guinea Properties Ltd* [1992] 41 EG 117.

Option 3: Equating the Payment of a Booking Deposit with an Option to Purchase

3.22 Paragraph (c) of the reference by the Attorney General asks the Commission to consider whether it is feasible to equate the payment of a booking deposit with an option to purchase property.

3.23 An option to purchase is a contract whereby the prospective purchaser obtains the right to acquire property (or to chose not to do so) for some specified period. It constitutes an irrevocable offer by the vendor to sell to the purchaser within a specified time.

3.24 There are a number of reasons why the proposal to equate the payment of a booking deposit with an option is not a feasible one.

3.25 First, since this is a separate contract, it must be supported by consideration. While the law is satisfied by nominal consideration, the amount is a matter for negotiation. In a rising market, where gazumping may occur, the consideration sought for an option will be more than nominal. In fact, it could be so substantial that the cost would defeat the purpose of acquiring the option in the first place, i.e. to protect the purchaser from a possible increase in house prices.

3.26 Therefore, any legislation which proposed to deem the payment of a booking deposit to be an option to purchase the property would also have to fix the consideration at an artificially low level if it was to protect purchasers. For example, legislation could stipulate that the amount of the booking deposit, which should not be more than 1% of the price, would constitute consideration. This amount would not then be refundable if the purchaser failed to exercise the option. This would be a departure from current practice in relation to booking deposits, where the sum paid is refundable. The probability then arises that some depositors might fail to understand the consequences of payment, and the possibility that the sum would not be returned, particularly since the deposit is paid prior to the taking of legal advice.

3.27 The second objection to any proposal to deem the purchaser to have acquired an interest in the property is that it would raise constitutional difficulties. These are twofold. All of the constitutional objections to the enforcement of "subject to contract" agreements (examined at paras.3.06-09) apply with equal force here, since the creation of a statutory option would vest in a depositor the right to acquire the owner's property at some time in the future despite the absence of any concluded agreement for sale. Furthermore, as it would be necessary to fix the consideration for the option, the legislation might be open to constitutional challenge on the grounds of price-fixing. It is by no means certain that the Oireachtas can never engage in price control, but it certainly cannot act in an arbitrary or excessive fashion.²¹ It is arguable that an option granted by statute, rather than by agreement, at a nominal consideration would be an excessive and arbitrary interference with the vendor's property rights. It might therefore be necessary in this context to provide

²¹ See Gerard Hogan, *The Constitution, Property Rights and Proportionality*, XXXII (1997) Irish Jurist 373.

that the option was subject to a relatively short time limit, so that the payment of a mere 1% of the purchase price by the purchaser would not arbitrarily create unilateral rights in his favour which would result in injustice to the vendor in the form of an unreasonable restriction on his rights to deal with his own property.

3.28 Even if the issue of consideration could be resolved, there is a third difficulty in that, when an option is granted in relation to land, the terms of any future contract for sale are naturally also fixed at that time. However this would not be the case in the artificial situation we are discussing. How, therefore, would the terms of the contract be settled? This is a similar problem to that discussed earlier in relation to the possibility of making a "subject to contract" agreement legally binding. This would require the establishment of a tribunal, and for the reasons already rehearsed, we do not recommend this.²²

3.29 Fourthly, legislation which equated the payment of a booking deposit with an option to purchase the property could easily be circumvented by a vendor. The legislation would result in no such deposits being taken, and since we believe that the booking deposit system benefits depositors to some extent, we are of the opinion that such a proposal would actually harm the interests of homebuyers.

3.30 Furthermore, it might be suggested that the creation of an option might have Capital Gains Tax implications since an option is within the scope of this tax.²³ However a principal private residence is exempt and almost all the house purchases under discussion here would fall within this exemption. Alternatively the difficulty could be overcome by a specific statutory provision.

3.31 Finally, any proposal creating an option exercisable by the purchaser could be open to abuse if market conditions changed so that the purchaser was in a stronger bargaining position.

3.32 Accordingly, the Commission does not recommend that the payment of a booking deposit should be deemed to create an option to acquire the property. It would add an extra layer to conveyancing practice, which is already in need of simplification, without conferring any benefit on a purchaser. This conclusion is supported by the views of the English Law Commission which declined to recommend the use of options in sales of dwelling houses by private treaty for similar reasons to those stated above.²⁴

²² *Supra* at para. 3.12

²³ Taxes Consolidation Act, 1997, s. 532

²⁴ See paras.25-28 of the Law Commission's Working Paper No. 51, *Transfer of Land: "Subject to Contract" Agreements*. The reasons were that in a rising market an option would itself be expensive and that the terms of the contract would have to be fixed at the time the option was created.

Option 4: Compensation for Purchasers

3.33 If a depositor is precluded from completing the sale, he may suffer damage in two ways. First, he may have expended money in the expectation or belief of having an enforceable contract. Secondly, he may be forced to pay a higher price for a similar house because of the delay and the difference in price may often be measured in thousands of pounds. We turn now to consider each of these possibilities.

Compensation for Expenses

3.34 At first sight this proposal would seem to be an attractive way of mitigating the effects of gazumping. In its Questionnaire, the Commission asked if, assuming that the booking deposit system were retained, it would suffice if a gazumping vendor were obliged by law, besides returning the deposit, to compensate the depositor for out-of-pocket expenses actually and reasonably incurred on the strength of the deposit. The majority of responses favoured such a proposal and this implies that compensation would seem to be justified in principle. However, a number of practical objections arise.

3.35 First, compensation for expenses would not actually deter gazumping, since the amount involved is likely to be significantly less than the amount the vendor would gain by selling to another buyer at an increased price, or by putting pressure on the purchaser to pay more than the amount originally quoted.

3.36 Secondly, compensation would only be payable where the money was spent in reasonable reliance on obtaining a contract. This is a difficult concept to apply, but without it a purchaser might be able to act unilaterally and thereby fix the vendor with liability in a situation where it was quite clear that no binding legal obligations were intended. In order to avoid injustice to vendors, some objective criterion would have to be introduced in order to judge when it is reasonable for a purchaser to rely on a legally binding contract coming into being. A requirement that a purchaser show reliance and the reasonableness of that reliance could be open to varying interpretations and therefore lead to uncertainty. Negotiations would be overshadowed from the vendor's point of view by the threat of litigation. The Commission does not support any proposal which would introduce uncertainty, or the possibility of litigation, into negotiations for a contract for the sale of land.

3.37 It might be thought possible to eliminate this uncertainty by stating that once a depositor has paid a booking deposit as evidence of his good faith, surely it is reasonable for him to engage a solicitor to undertake pre-contract enquiries and to carry out a survey of the property? If he incurs expense in this way, and the vendor does not reciprocate good faith in his conduct, should the depositor not be entitled to reimbursement of his expenses?

3.38 The problem with using the acceptance of a booking deposit as a trigger for any possible liability is that this might deter the acceptance of a booking deposit.²⁵ Suffice to say at this stage that the practice of taking booking deposits confers advantages on the depositor and should be retained.

3.39 A third difficulty is that compensation would only be payable where the vendor unreasonably withdrew from the sale. This concept of "unreasonable withdrawal" is extremely difficult to define. There are many reasons why a vendor might seek to withdraw, apart from the unjustifiable reason that the vendor wishes to gazump. For example his "subject to contract" agreement to purchase another property may have fallen through, or personal reasons such as redundancy or illness may oblige him to reassess an earlier decision to sell.

3.40 Any proposal, therefore, has to be carefully framed to avoid fixing vendors with liability for the depositor's expenses in circumstances where withdrawal from the agreement is due to matters outside the vendor's control or is for reasons which do not show any sharp practice. If it were too easy to set up a plausible claim to compensation, a depositor would be able to use the threat of a claim as an unfair bargaining tool.

3.41 One way of meeting this objection might be, instead of establishing a general provision which imposes liability for any unreasonable withdrawal, to impose liability in specific instances only. Examples would be where the vendor enters into a contract for sale of the property within a stated period for a higher price;²⁶ or where the vendor has approached the purchaser seeking a higher price. Thus while the eventual onus would then be on the vendor to show that his withdrawal was reasonable, there would be an initial burden on the purchaser to establish that his claim fell within the specified grounds.

3.42 It is clear from the foregoing that what appeared to be a very simple principle, in practice, would call for detailed examination of the negotiations. Any legislation imposing liability for compensation would have to provide for a means of determining the following: that the sale fell through as a result of the withdrawal by the vendor; that withdrawal was unreasonable, i.e. it was not caused indirectly by the depositor through delay or otherwise, nor by legitimate reasons, for example, an increase in building costs, or an increased cost imposed by legislation

3.43 The possibility of recovering a sum which would be probably be confined to hundreds of pounds rarely warrants litigation and the incidence of the problem does not justify the establishment of an *ad hoc* tribunal. The report of the English Law Commission examines this proposal and likewise concludes that a compensatory scheme is not feasible.²⁷ Moreover, since we recommend that a receipt for a booking deposit be given in a prescribed form which clearly states that there is no contract, if this proposal is implemented, it is reasonable to conclude that purchasers

²⁵ We deal with the desirability of retaining the practice of taking booking deposits in chapters 1 and 5.

²⁶ A Code of Practice has recently been issued and another one proposed, in which it is stated that prices should not be increased save for very specific reasons. See chapter 4.

²⁷ Law Commission, Working Paper No. 51, *Transfer of Land: "Subject to Contract" Agreements*, (1973) at paras.64-67

will be aware of the possibility that no contract will ever materialise before they incur expense.²⁸

Compensation for Loss of Expectation

3.44 Notwithstanding some positive aspects to this head of compensation, the Commission does not feel that it is desirable. Even though a possible liability for loss of expectation would provide a strong deterrent to a gazumper and the sum in question would be more likely to warrant the institution of proceedings than in the case of compensation for expenses, the disadvantages of such a recommendation greatly outweigh its merits.

3.45 There are two very substantial objections. The first relates to the quantification of the loss. The English Law Commission declined to propose a right of compensation for loss of expectation on these grounds:

"Since there is, by definition, no contract in the background, the injury being made good would be of an intangible nature (disappointment, etc), and not a loss of bargain. Inevitably, a change in the law in this direction would create an area of uncertainty, and it would be impossible to avoid an element of arbitrariness in the assessment of damages. At the same time, it is clear that there should be a ceiling to any award under this head, because financial recompense for disappointment over a hoped-for contract could not properly exceed the contractual damages which would have been payable if there had actually been a contract and that contract had been repudiated. What those damages would have been (on the given hypothesis) it is almost impossible to tell because, as we have already indicated, it is very difficult to construct for the parties a contract which was never in fact made."²⁹

3.46 In response to this, we comment that the imposition of liability for loss of expectation would really create a new tort. There are, of course, difficulties with the quantification of damages for certain other torts, such as libel or personal injuries and this has not prevented the law from providing a remedy. Damages are also awarded *in lieu* of specific performance in cases of contracts for the sale of land. In the present case, evidence as to the increase in house prices would help to establish the appropriate level of damages. Thus it seems possible that difficulties in relation to quantification could be overcome.

²⁸ *Infra* at paras.5.08-5.12.

²⁹ Law Commission: Working Paper No. 51, *Transfer of Land: "Subject to Contract" Agreements* at para.70.

3.47 The second difficulty is however insurmountable. That is that the entire of the negotiations would have to be subject to scrutiny in order to establish the situations in which it was reasonable for the purchaser to rely on his expectation of a contract or unreasonable for the vendor to withdraw. In essence, liability for compensation under this heading would undermine the law of contract. If the vendor is not protected by his use of "subject to contract" and other phrases denying legal obligation, "subject to contract" agreements will in effect be enforceable. We have already given our view that such agreements should not be enforceable.³⁰

³⁰ *Supra*, paras.3.06-3.16.

CHAPTER 4 COMPELLING THE VENDOR TO ISSUE A CONTRACT WITHIN A FIXED PERIOD AND NOT TO ACCEPT ALTERNATIVE OFFERS

4.01 Gazumping occurs in the period before the assumption of binding legal obligations. Accordingly, one way of ameliorating the problem would be to reduce this time period. This could be done by compelling the vendor to issue a contract within a particular period from the acceptance of a booking deposit, and then setting time limits for the signature of both parties. During the relevant time periods, the vendor would be precluded from negotiating with anyone else, or accepting an offer to purchase the property. We have already considered, in chapter 3, the difficulties inherent in the enforcement of obligations by alteration of the law: this chapter considers indirect methods - by way of controls upon the vendor - by which the same result might be achieved or, at least, made more likely.

Imposing Time Limits by a Code of Practice

4.02 The obligation to issue a contract within a specified time, coupled with a further obligation not to accept any offer to purchase the property for a specified time might be imposed upon the vendor through a Code of Practice. Such a Code would not confer enforceable rights on individuals, rather it would require good faith on the part of vendors in their dealings with purchasers. In Codes of Practice, associations strive to ensure that their members comply with desirable practices in their dealings with the public. The sanction for breach of the Code is typically that - especially if there are several breaches - the culprit may be expelled from the association. Two such Codes must be considered.

Irish Home Builders Association Pledge

4.03 The Irish Home Builders Association (IHBA) has recently issued in February 1999 a 'Home Purchase Protection Pledge'. This is a Code of Practice which sets out what the Association regards as good practice with regard to four matters: the taking of booking deposits, the phased release of developments, interim payments and complaints by members of the public.

4.04 Insofar as it is relevant to this discussion, the Code provides as follows:

“Where, in the case of an intended private treaty sale of a new house or apartment (the 'Property'), a deposit (the 'Booking Deposit') is paid by a prospective purchaser (the 'Purchaser') of the Property to a member of the IHBA (the 'Member') or its agent, the following shall apply:

- (i) payment of a Booking Deposit (the amount of which shall be agreed between the Purchaser and the Member) and the acknowledgement thereof does not constitute a contractually binding commitment on the part of the Member or the Purchaser;
- (ii) upon receipt of the Booking Deposit the Member or its agent will furnish to the Purchaser a description of the basis on which the Booking Deposit is being taken and the manner in which the transaction is to be carried out including the entitlements of the Purchaser as regards the price of the Property, the issue of the contract for the sale of the Property (the 'Contract') and the non-binding nature of the Booking Deposit;
- (iii) before the expiration of four weeks from the receipt of the Booking Deposit or within such other period as may be agreed between the Purchaser and the Member, the Member will issue the Contract at the price agreed between the Purchaser and the Member at the time the Booking Deposit was paid;
- (iv) the Contract shall be in the form of contract approved by the Incorporated Law Society of Ireland and the CIF and those standard conditions shall remain unamended except as to matters of title or other matters which are generally regarded within the legal profession as proper matters for amendment;
- (v) the Member undertakes (subject to sub-clause (vi) below) to hold fixed the price of the Property and to refrain from accepting an offer for the Property from any other party between the date of acceptance of the Booking Deposit by the Member or its agent and the execution of the Contract by the Member provided that all of the conditions set out at sub-paragraphs (a) to (c) below are complied with:
 - (a) the Purchaser must return the signed Contract to the Member or its solicitor within three weeks from the date of the issue of the Contract;
 - (b) the signed Contract must be accompanied by the full deposit referred to in the Contract (the "Contract Deposit") and as agreed between the Member and the Purchaser; and
 - (c) no alterations may be made to the terms and conditions of the Contract by the Purchaser or the Purchaser's solicitor or other agent without the prior written agreement of the Member or its solicitor.
- (vi) A member shall be entitled to increase the price of the Property if and to the extent that such increase is due to an increase in the rate of Value Added Tax applicable to the Property or to any other legislative enactment directly affecting the price of the Property.

4.05 This Code constitutes an attempt to provide some (non-legally binding) guarantee to the public that while other terms are being settled, within a finite period, in a fair way and according to normal practice, the term already settled, i.e. price, will not be renegotiated.

4.06 In its Questionnaire, the Commission asked whether such a self-regulatory system, if widely adopted by the construction industry, might offer a satisfactory solution to the problem of gazumping.¹ Responses were mixed, and reflected the views already held by the Commission. While the Code is welcome insofar as it promises that there will be no price increase (apart from those due to V.A.T. or a relevant legislative enactment), there are limits to its usefulness.

4.07 First, it is the very builders who are not registered with the IHBA, (about 20% of house-builders), who are probably more likely to gazump. Secondly, even exclusion from the IHBA might not be a very stringent sanction since in the present economic climate, it is uncertain to what extent this would reduce the number of people interested in purchasing the builders' houses. In this context one should note that there were a number of suggestions, in the responses received, to the effect that sanctions should include not just exclusion from the Association, but an exclusion from the Homebond scheme. Most lending institutions would refuse to lend on the security of a newly-built house not covered by Homebond, and the threat of exclusion would be a strong incentive to comply with the code of practice. However, these responses assume that Homebond and the IHBA are inter-linked. It bears emphasising that Homebond (which offers a guarantee in respect of houses built by builders registered with it) and the IHBA (which is a builders' representative organisation) are separate and independent bodies. Not all builders and developers who are registered with Homebond are members of the IHBA and therefore it does not seem that this suggestion can be implemented. However notwithstanding these flaws, it is reported so far as builders registered with the IHBA are concerned, that complaints to the IHBA (which were never numerous) have fallen significantly since February, 1999 when the Code was established.²

4.08 But it bears repeating that if a builder wished to avoid the impact of the Code, with or without a sanction of exclusion from Homebond, it is easy to do so by simply not taking deposits. We have already explained why it is not necessarily in the interests of purchasers that the taking of deposits be banned or discouraged.

Draft Joint Code of Practice

4.09 Partly because of the limitations on the IHBA Code, an attempt is being made to establish another Code of Practice. As of July 1999, the Conveyancing Committee of the Incorporated Law Society have drawn up a draft. If this is accepted by the Law Society as a whole it is then intended that the following bodies would be approached with a request to adopt the code: the Construction Industry Federation, the Irish Home Builders Association, the Irish Auctioneers and Valuers Institute and the Institute of Professional Auctioneers and Valuers. The Code is however still only an unapproved draft at this stage, and its content is summarised here merely as an example of the type of arrangement which might be possible.

¹ Question 24 (c) of The Law Reform Commission questionnaire on Gazumping at Appendix 1.

² This decrease was reported by the Director of the IHBA, Mr Michael Goggins, in August of 1999.

4.10 The draft Code provides that when a booking deposit is received by an auctioneer acting as agent for a builder, the auctioneer shall forthwith (i.e. within two days) forward written instructions to the builder's solicitor. The builder's solicitor will then (within three weeks of the receipt of the instructions) issue a contract to the purchaser's solicitor.

4.11 In the event of the contract not being returned by the purchaser's solicitor, duly executed by or on behalf of the purchaser within two weeks, a letter of reminder shall be sent to the purchaser's solicitor giving a further time limit of at least two weeks.

4.12 At the end of this second period, the Code of Practice no longer applies to the proposed sale and the booking deposit is to be refunded forthwith. However, a further extension of time can be given in writing to the purchaser, and during this time the Code continues to apply.

4.13 During these periods, i.e. between the date of receipt of the booking deposit by the auctioneer and the execution of the contract the builder shall not alter the purchase price, (save for an amount to reflect an increase in VAT) and shall refrain from accepting an offer for the house from any other party.

4.14 The sanctions for such a code is critical to its success. At the time of writing, these have not been settled. One possibility would be that each of the professional bodies should regard it as a breach of their own codes of professional discipline if any of their members were involved in an act of gazumping, even if this were actually committed by the client. However such an arrangement would involve (to varying degrees, depending on which profession was concerned) an element of 'guilt by association', which might not be acceptable to the body of the profession. Another possibility would require the co-operation of Homebond and the lending institutions. The proposal here is that where premises were the subject of gazumping, neither a Homebond guarantee or a loan would issue in respect of those premises. But here, too, the necessary co-operation from Homebond and/or some or all of the lending institutions might not be forthcoming because it would involve the use of their powers for a purpose for which they were not intended.

4.15 In conclusion, it may be said that while both the IHBA Code and the draft Joint Code are potentially fruitful arrangements, major difficulties remain to be over-come before they achieve complete success.

Legislation

4.16 Since one of the main objections to a Code of Practice is that there is no effective sanction to secure compliance, it might be thought that legislation should be enacted to impose the same obligations with appropriate civil or criminal sanctions. Indeed, recently the private members *Home Purchasers (Anti-Gazumping) Bill, 1998* was introduced, though not enacted, to attempt to do just that.

4.17 However, such a scheme gives rise to a number of practical difficulties.³ First, to operate such a scheme, it would seem to be necessary to give the courts jurisdiction to make binding rulings concerning matters such as the content of a fair contract, the amount of the contractual deposit, etc., or to set up an *ad hoc* independent expert tribunal to settle such matters. This would be necessary in order to resolve disputes between the parties as to what terms were reasonable. Without a tribunal, a vendor could avoid his obligations by deliberately including unfair terms; the purchaser, being forced to object to the terms, would then miss the deadline for return of the contract. It should also be noted that, under such legislation, the vendor would have an equal opportunity to compel the depositor to enter into a binding contract, the terms of which would be settled by the courts or tribunal.

4.18 Secondly, if the time limits are very short, there will be insufficient time to deal with particularly thorny problems which inevitably arise with some properties. On the other hand, if the time-limits are longer, there will be an unacceptable uncertainty for a vendor who has no guarantee that the purchaser will execute the contract, but is unable to sell to anyone else in the meantime.

4.19 The effectiveness of such legislation as the ultimate method of preventing gazumping is doubtful, however, as it could easily be avoided by a vendor by refraining from taking booking deposits.

4.20 Finally, it should be noted that an attempt to impose a similar scheme in New South Wales has failed. The *Conveyancing Act, 1919* was amended by the *Conveyancing (Sale of Land) Amendment Act, 1987* in order to try to prevent gazumping. It provided for a scheme which required a vendor and purchaser to enter into a preliminary agreement before entering into a contract for the sale of residential property. The effect of the agreement was to require the vendor to issue the contract to the purchaser within five business days of entering into the agreement. During that time the vendor could not sell to another and if the purchaser agreed to the sale, the vendor was obliged to enter into that contract for sale. The agreement was to be made in a prescribed form, and if the vendor was in breach of it, the purchaser could sue for specific performance.

4.21 The Act was kept under review and was not considered a success. It was thought to have complicated conveyancing practice and to be ineffective to prevent gazumping. Consequently the Act has been replaced by different measures⁴

³ The Commission's questionnaire asked for views regarding the imposition of a framework for the speedy issue and return of contracts by way of legislation. Question 19 asked respondents if they would favour legislation designed to provide a mechanism whereby a vendor who has taken a booking deposit would be prohibited from selling to anyone else without first providing the depositor with a form of written contract on which, if the depositor agreed to it, he was prepared to sell to the depositor at the stipulated price and on other terms which were fair to both parties. On balance, the responses rejected such a scheme as unworkable. However, a significant minority were in favour of the proposal.

⁴ *Conveyancing (Sale of Land) Amendment Act, 1990* (N.S.W.) This Act provides for a "cooling-off" period of five days, within which a purchaser can withdraw from a contract. If the purchaser chooses to withdraw, he forfeits 0.25% of the purchase price to the vendor. The views expressed in this paragraph are those of the New South Wales Law Reform Commission.

Conclusion

4.22 A legislative scheme to compel the vendor to issue a contract is likely to be unworkable since it would fail to provide for the different circumstances which might arise. A Code of Practice would offer greater flexibility. While conscious of the limitations of any Code of Practice, in that it is not legally enforceable, if the relevant professional organisations and other interests combine to deal with the practice of gazumping, the Commission feels that that is a most practical way forward. Despite the various practical difficulties, which have been noted, the recent introduction of a Code of Practice, and proposal of a Joint Code, is welcome as an assurance of good faith in dealings with homebuyers.

CHAPTER 5 CONSUMER PROTECTION

Introduction

5.01 As part of the Reference from the Attorney General, the Commission was asked to consider "what protection if any could be afforded to such prospective purchasers." In earlier chapters, we have concluded that it would be impractical to impose some form of binding obligation on the vendor, given the absence of a conventional contract. In this chapter, we consider the possibility of some other modifications of the law to improve the purchaser's position.

5.02 There is no doubt that most home-buyers are, in the parlance of commercial law, "consumers". By contrast, in the case of new houses, the vendor with whom they are negotiating is likely to be a limited liability company, which is acting in the course of business. In such negotiations, there is always likely to be an inequality of bargaining positions. Indeed, in current market conditions, all purchasers negotiate from a weak bargaining position.

5.03 In recognition of the fact that purchasers of new houses are, in effect, consumers, they have already been afforded consumer protection as regards quality, in the form of the National House Building Guarantee Company's Homebond Scheme. This scheme protects the purchaser by attempting to ensure that newly-built houses will be of good quality, and by protecting the purchaser in the event of the builder becoming insolvent. It is enforced in practice by the fact that lending institutions are reluctant to take as security new houses which are not registered with Homebond.

5.04 Next, as regards title, the purchaser is protected by his legal advisors, and by the standard form contracts for sale which have been issued by the Law Society of Ireland.

5.05 But, in this Report, we are concerned with protection at the pre-contract stage. We are of the opinion that, unfortunately, very little can be done to protect a purchaser at this stage. We have already given our view that it would not assist a purchaser to impose contractual obligations on the parties at too early a stage.¹ In fact, this would undermine the protection deriving from the advice and enquiries of the purchaser's solicitor.

5.06 However, there may be some lack of understanding among the public as to the legal effect of the taking of booking deposits, and as to the enforceability of oral agreements (or at least agreements on price). The position is that even when a

¹ *Supra* paras 2.020 *et seq.*

booking deposit is paid and accepted according to the standard practice outlined in the introduction to this Report, there is no contract of any kind. The responses to the questionnaire show that some purchasers are confused about this, despite the written statements issued to them on payment of the deposit. More to the point, even if purchasers understand that there is no binding contract, they may often think that the price has been finally agreed and cannot be changed. They do not understand that, legally, as one term of a complex transaction, it is open to re-negotiation until all of the terms have been agreed.²

5.07 The Commission is also concerned that some developers may be advertising properties for sale at particular prices, but not in fact offering them for sale at those prices. This may be done by simply increasing the price on the day, or by releasing a very limited number of properties and leaving the rest for a second phase. While phased releases of a development are not of themselves objectionable, some sharp practices can be disguised as phased releases. An example would be where a developer realises that the market would bear a higher price than that advertised and decides to release only some of the properties on which he had intended to take bookings on that day. Against this background, we consider two possible ways of improving the purchaser's understanding of his position, and then the imposition of a maximum figure on the amount of the deposit.

Informing the Purchaser

5.08 In order to ensure that purchasers are fully aware of their legal position, we propose that further information be drawn to the attention of purchasers on payment of a booking deposit.

5.09 We therefore recommend that legislation be enacted to provide that every receipt issued to a purchaser on the payment of a booking deposit should be in the form prescribed by law.

5.10 While the exact contents of the receipt might need to be amended as the circumstances require, it is recommended that the statutory receipt should include the following information:

- (i) a statement that the receipt is one which merely confirms the payment and receipt of a booking deposit and does not of itself create a contract;
- (ii) the name of the person paying the deposit;
- (iii) the name of the person receiving the deposit;
- (iv) the amount of the deposit;
- (v) reference to the property concerned;
- (vi) a statement that the deposit is refundable in full in the event that the parties do not enter into any contract;
- (vii) a statement that the purchaser will not be entitled to reimbursement of any expenses incurred should the parties fail to proceed to a formal contract;

² See the conclusions drawn from the questionnaire discussed in chapter 1.

- (vii) such further matters as may be prescribed by law. For example, it might be desirable to require the payee to identify those organisations of which he is a member, e.g. the IHBA.

5.11 It is further recommended that the obligation to issue a receipt in the required form should be enforced by the criminal sanction deemed appropriate by the Oireachtas.

5.12 The duty should be imposed on the person who actually receives the money, or their employee, and will therefore apply to estate agents and auctioneers as well as to the builder or other vendors acting in the course of business.

Preventing the Abuse of Advertising

5.13 Advertising to consumers is already regulated by the *Consumer Information Act, 1978*. Section 8 (1) provides that,

"A person shall not publish or cause to be published, an advertisement in relation to the supply or provision in the course or for the purposes of a trade, business or profession, of goods, services or facilities if it is likely to mislead, and thereby cause loss, damage or injury to members of the public to a material degree. Breach of this provision is an offence, and may be restrained by the High Court on the application of the Director of Consumer Affairs."

5.14 But this provision is confined to "goods, services or facilities," it does not extend to land, including houses. It would not apply in the case of a person who has been misled by the house prices advertised by a developer.

5.15 However, there may already be legal consequences for such advertisements pursuant to the *European Communities (Misleading Advertising) Regulations, 1988*.³ Regulation 2 (2) provides for the application of the Directive's definition of 'misleading advertising':

"'Misleading advertising' means any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor."⁴

Regulation 5 provides that in determining whether advertising is misleading, account shall be taken of all its features. Of particular interest for our purposes are

³ S.I. No. 134 of 1988. These regulations implement the provisions of *Council Directive 84/450/EEC* of 10 September, 1984 (Official Journal L 250, 19 September, 1984) relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising.

⁴ Council Directive 84/450/EEC Article 2.2

those features concerning the price or the manner in which the price is calculated, and the conditions on which the goods are supplied or the services provided.⁵

5.16 These regulations allow for two courses of action where advertising is misleading. Regulation 3 provides that the Director of Consumer Affairs:

"may request any person engaging or proposing to engage in any advertising which is misleading advertising to discontinue or refrain from such advertising."

Regulation 4 provides for an application to the High Court by the Director of Consumer Affairs or "any person," on foot of which the High Court may make an order prohibiting the publication of the advertisement(s). It may also require publication of its decision, or publication of a corrective statement.

5.17 It would appear that if a development is advertised and particular prices, or minimum prices, are specified in the advertisement and if bookings are refused at those prices, there is a breach of the regulations. However, the right of the Director of Consumer Affairs to apply to the High Court to restrain the misleading advertisement can hardly be said to help the prospective purchaser at a show house who is under pressure to pay a deposit.

5.18 It seems then that while the regulations apply to the advertisement of new housing developments, there is no useful sanction available if the developer does not subsequently act in accordance with the advertisements.

5.19 We recommend the enactment of legislation regulating the advertisement of the sale of houses in new housing developments. Such legislation would, *inter alia*, provide for the following matters:

that every advertisement be required to specify the number of houses offered for sale at each price level as well as the period for which these prices are fixed;

that a criminal penalty be imposed on any person who fails to provide the required information, or fails to comply with the terms of the advertisement and dishonours the commitment which it implies.

Booking Deposits

5.20 The reference specifically asks,

"if it is not feasible to confer any form of protection on the prospective purchasers, to review the desirability of permitting such [booking] deposits to be required and the feasibility of making such a requirement unlawful."

5.21 In the Commission's questionnaire, respondents were asked if it would be of assistance to purchasers if a law were enacted banning the taking of booking

⁵ See Article 3 of the Directive for further details.

deposits by vendors where no binding contract was entered into, and if so, whether the ban should be backed by a criminal sanction⁶

5.22 As mentioned in chapter 1, the overwhelming majority of responses rejected this as a solution. The response of the IAVI was very clear that without a system of booking deposits, an estate agent would be obliged to market the property actively right up to the time that a formal contract was executed. With a system of booking deposits, the property is effectively taken off the market, so that while gazumping might still occur, it is less likely.

5.23 While we have mixed views on the interests served by the payment of booking deposits, there would appear to be no advantage in banning them, and every possibility of increasing the traps for purchasers.

5.24 It is recommended that legislation be enacted to prevent the taking of booking deposits of more than 0.5% of the purchase price.

5.25 This does not in any way injure the legitimate interests served by the booking deposit system, but is a sum more appropriate to the effect of the deposit. There can be no justification for a requirement that a purchaser pay a substantial percentage of the proposed purchase price while receiving no guarantee or legally enforceable advantages in return. Indeed, it may be that misunderstandings on the part of some purchasers arises from the very fact that these deposits may run to several thousand pounds. These quite substantial sums are retained by the vendors, sometimes for over six months.⁷ The Commission feels that a smaller sum is more appropriate to the nature of the deposit and will serve to reinforce in the minds of purchasers the fact that they do not yet have a binding contract.

5.26 Finally, we understand that, in a few instances, vendors of new houses retain a proportion of the booking deposit to defray "administrative costs."⁸

5.27 We recommend that legislation be enacted to provide that the entire amount of the booking deposit, without any deduction, should be refunded to the purchaser in any case where the parties do not proceed to a contract.

⁶ See questions 20 and 21 of the Law Reform Commission questionnaire on gazumping at Appendix 1.

⁷ See for example *Butler v. Greenhills Construction Ltd. and Loughlin Developments Ltd.*, *The Irish Times* 22 October, 1998 where the booking deposit was held for eight months before the contract was issued.

⁸ This was mentioned in the response of the Incorporated Law Society of Ireland to the questionnaire issued by the Commission.

5.28 We regard this recommendation as mitigating the effects of our conclusion that it is not feasible to recommend legislation which would entitle disappointed depositors to recover their out-of-pocket expenses.⁹ It is also consistent with the nature of the payment, which is that the parties indicate their good faith in entering into negotiations, but no legal obligations are created on either side.

⁹ *Infra.*, at para.3.34- 3.43.

CHAPTER 6 SUMMARY OF RECOMMENDATIONS AND CONCLUSIONS

6.01 Gazumping can occur during the stage of negotiations for the sale of land, before a concluded agreement on all relevant terms has been reached, even though the parties have informally settled the price. It is also possible where an oral agreement has been concluded, but the evidence required by law (i.e. a note or memorandum of the essential terms of the agreement, which does not deny the existence of a contract) is not available. In short, gazumping can take place at any stage before the parties enter into an enforceable contract for the sale of land. During this time, the vendor is free to accept other offers.

6.02 The reader may well query why there is a need for any delay between the conclusion of negotiations and the payment of a booking deposit and, on the other hand, the making of a formal contract. The brief answer is that it is usually in the purchaser's interest that there should be a delay to facilitate the arranging of finance or to ascertain if there are legal difficulties. The non-legal character of the relationship between the parties is preserved by the use of the term "subject to contract", as is explained in chapter 2. In the case of houses in the course of construction, this period of delay is sometimes unduly long and, in chapter 4, we consider non-legally binding codes of practice which attempt to reduce it. It seems to the Commission that in view of the unusual character of 'subject to contract' agreements such codes of practice may present the best avenue to reform.

6.03 A number of possible reforms of the existing laws are considered in chapter 3. Among these are proposals for legislation which would deem the payment of a booking deposit as creating either a binding contract for sale or an option to buy for the purchaser. Another option was to make compensation payable by a gazumping vendor to a purchaser, either for the purchaser's out-of-pocket expenses, or for his loss of expectation. While these proposals are initially attractive, for a variety of reasons, none of them can be recommended.

6.04 Our conclusion is that the only practicable reforms, are to take steps to inform purchasers and, in that way, to protect them; and also to regulate the terms according to which booking deposits are paid and accepted. These recommendations, which are summarised below, are set out at paragraphs 5.08-5.28.

6.05 In making these recommendations, the Commission is conscious that they are of limited usefulness, and that they do not in any way alter the legal framework within which gazumping occurs. However, the Commission is also conscious that gazumping is a temporary problem which is related to the present rapid rise in the price of houses and - most important of all - that our empirical research has shown

that it occurs rather seldom, despite the high publicity, which surrounds the few cases which occur. Moreover, the laws and practices relating to house purchases do not give rise to gazumping in a stable market, and in a falling market, the gap provided by the necessary delays in proceeding to a formal contract may be exploited by purchasers.

6.06 Accordingly, we recommend the following reforms. First, legislation should be enacted requiring that a receipt, in the form prescribed by law, be issued to a purchaser on the payment of a booking deposit. The receipt should include at least the following information:

- (i) a statement that the receipt is one which merely confirms the payment and receipt of a booking deposit and does not of itself create a contract;
- (ii) the name of the person paying the deposit;
- (iii) the name of the person receiving the deposit;
- (iv) the amount of the deposit;
- (v) reference to the property concerned;
- (vi) a statement that the deposit is refundable in full in the event that the parties do not enter into any contract;
- (vii) a statement that the purchaser will not be entitled to reimbursement of any expenses incurred should the parties fail to proceed to a formal contract;
- (viii) such further matters as may be prescribed by law. For example, it might be desirable to require the payee to identify those organisations of which he is a member, e.g. the IHBA.

6.07 The obligation to issue a receipt in the required form should be enforced by the criminal sanction deemed appropriate by the Oireachtas.

6.08 The duty should be imposed on the person who actually receives the money, or their employee, and will therefore apply to estate agents and auctioneers as well as to the builder or other vendors acting in the course of business.

6.09 Next, we recommend that legislation be enacted regulating the advertisement of the sale of houses in new housing developments. Such legislation would, *inter alia*, provide for the following matters:

that any advertisement be required to specify the number of houses offered for sale at each price level as well as the period for which these prices are fixed;

that a criminal penalty be imposed on any person who fails to provide the required information, or fails to comply with the terms of the advertisement and dishonours the commitment which it implies.

6.10 Finally, it is recommended that legislation, again backed by criminal penalties for non-observance, be enacted to prevent the taking of booking deposits of more than 0.5% of the purchase price. Secondly, we recommend that legislation be enacted to provide that the entire amount of the booking deposit, without any deduction, be refunded to the purchaser in any case where the parties do not proceed to a contract.

APPENDIX 1

GAZUMPING

A QUESTIONNAIRE FROM THE LAW REFORM COMMISSION

The Attorney General has referred the question of “gazumping” to the Law Reform Commission under section 4 of the *Law Reform Commission Act 1975* for consideration as a possible subject for law reform. The Attorney General’s Reference specifically singles out cases where “booking deposits” in respect of residential property are taken by vendors from prospective purchasers. The reference draws no distinction between new houses (being sold for the first time by or on behalf of the builder or developer) and “old” or second hand houses.

This questionnaire concerns cases where the vendor accepts a booking deposit against a stated price either on the basis of a stipulation, conveyed to the prospective purchaser at the time, that no binding contract for the sale or purchase of the dwelling is thereby created, or without any express stipulation other than a receipt simply acknowledging payment of a “booking deposit”. (A stipulation made at the time that the deposit is taken “subject to contract” may be taken normally to exclude a contract.) “Gazumping” occurs when, in such a case, the “vendor” subsequently either refuses to sell to the prospective purchaser or indicates that he will only sell at an increased price.

Of course, in such cases the prospective purchaser is also free to back out of the transaction and it is the understanding of the Law Reform Commission that in that event the deposit is returned. It is important to keep this in mind in considering possible solutions to the problem cases covered by the Attorney General’s Reference, viz. those where the **vendor** backs out of the transaction (**see question 11(c) below**).

Against this background the Law Reform Commission would be grateful for responses to the following particular questions and for any comments or observations on the matter of gazumping generally which you consider relevant.

Questions upon which The Law Reform Commission wishes to be Informed

This questionnaire is being sent to a wide range of associations and bodies who are considered to have a special interest or competence in this area. In particular it is being sent to associations and bodies for the legal profession, to those involved in consumer protection, including the Director of Consumer Affairs, to bodies

representing builders and developers, auctioneers and estate agents, and to the relevant legal aid bodies. (We have been unable to discover any association specifically representing home buyers.) Some of the questions asked may not pertain to your particular professional or business knowledge, but you are requested to answer the questions as fully as you can on the basis of the knowledge and experience which you (or where appropriate your members and associates) may have.

In the questions which follow:-

“**builder**” includes developer, and any agent (such as a solicitor or estate agent) acting on behalf of the builder or developer

“**depositor**” mean a prospective purchaser who has paid the deposit

“**dwelling**” includes both houses and apartments

“**sale**” includes a long lease in consideration of a lump sum (equivalent to the purchase price) and a small rent

“**vendor**” includes a builder, a developer or a private seller and any agent (such as a solicitor or estate agent) acting on behalf of the builder, developer or private seller.

THE SCOPE AND EXTENT OF THE PROBLEM

Depending on the nature of any solutions which may be envisaged it may be relevant to know the types of case in which gazumping takes place, the kinds of vendor who gazump, the prevalence of gazumping and even the geographical spread of the problem throughout the country.

1. Is gazumping in Ireland confined to the purchase of new dwellings from builders or is it a problem in the second hand dwelling market as well?
2. Where gazumping by **builders** occurs is it most frequent:-
 - (a) by large builders or
 - (b) by smaller builders or
 - (c) equally by large and small builders?

(Please tick one of the above as appropriate)

3. Where gazumping by **builders** occurs is it more frequent:-
 - (a) in respect of dwellings in **housing estates** or
 - (b) in respect of dwellings in **apartment blocks** or

- (c) in respect of **individual dwellings of a “once-off” kind or**
- (d) equally in respect of any two or more of these (if so indicate which please)?

(Please mark the above using numerals 1, 2 and 3 etc. as appropriate to indicate relative frequency if you can; if you cannot, tick the one you consider most frequent)

4. Where gazumping by **builders** occurs, is it more frequent:-

- (a) within 3 months of payment of the deposit or
- (b) between 3 and 6 months from payment of the deposit or
- (c) between 6 and 12 months from the payment of the deposit or
- (d) more than 12 months from the payment of the deposit?

(Please mark the above using numerals 1, 2 and 3 etc. as appropriate to indicate relative frequency if you can; if you cannot, tick the one you consider most frequent)

5. Where gazumping (irrespective of the type of vendor) occurs, does this most often happen:-

- (a) after an approach by the depositor to the vendor seeking to advance progress with the sale, such as by asking for a formal contract, or
- (b) after pre-contract requisitions have been raised by or on behalf of the depositor, or
- (c) without any approach by the depositor to the vendor following payment of the booking deposit?

(Please tick one of the above as appropriate)

6. In your estimation is the percentage of all cases involving booking deposits in which gazumping occurs considered to be:-

- (a) 0% to 5% or
- (b) 5% to 10% or
- (c) 10% to 25% or
- (d) Over 25%?

(Please tick one of the above as appropriate)

7. Is gazumping (irrespective of the type of vendor) more frequent:-

- (a) in Dublin or
- (b) in other large urban centres or
- (c) elsewhere?

(Please mark the above using numerals 1, 2 and 3 as appropriate to indicate relative frequency if you can; if you cannot, tick the one you consider most frequent)

8. In what percentage of cases where a booking deposit has been paid do you estimate that the **depositor** backs out of the transaction?
9. (a) In what percentage of cases where a booking deposit is paid do you estimate that the depositor is seeking to buy the dwelling not for his own private residence but for investment purposes?
- (b) Is gazumping a problem in such cases?
10. Can you furnish examples of as many types of cases as possible, involving different circumstances, in which "gazumping" is believed to have occurred in this country?

THE NATURE OF THE TRANSACTION INVOLVING THE BOOKING DEPOSIT

11. Do you agree that the following are the conditions on which booking deposits are most frequently made by depositors and accepted by vendors in relation to dwellings:-
- (a) that the deposit is made against a stipulated price and accepted on the basis, expressed in writing by the vendor at the time (including in the written receipt for the deposit), that it is "subject to contract" or otherwise in terms that the making and acceptance of the deposit creates no contract for sale of the dwelling concerned and
 - (b) that either party is legally free to back out at any time before a formal written contract is entered into by both parties and
 - (c) that if either the **vendor** or the **depositor** backs out the deposit is repaid to the depositor?

12. (a) If you disagree with 11(a), (b) or (c) please state in what respects you disagree and state what in your view are the normal conditions on which booking deposits are made.
- (b) Does it frequently occur that a booking deposit is made and accepted without any stipulation that it is “subject to contract” or otherwise stating that there is no contract for sale?
- (c) Can you estimate in what percentage of cases this occurs?
13. Do depositors in general **understand** that a booking deposit normally creates no binding contract and that either party is completely free to back out before a formal contract is entered into?
14. (a) Do depositors who have paid deposits “subject to contract” or on a similar basis nonetheless sometimes believe that they have legally binding contracts entitling them to purchase at the stated price?
- (b) If so why do they believe this?
15. (a) Are there cases where depositors who have made deposits on the basis stated above would nonetheless claim that they have entered into definite **oral agreements** in which the vendor and depositor have agreed to sell and buy respectively at the stated price, even though such oral agreements are legally unenforceable for want of a written contract or note or memorandum thereof to satisfy the Statute of Frauds?
- (b) Can examples of such cases, if any, be given?
16. Whose interest (vendor or depositor) do you think is best served by a system of booking deposits not involving the creation of binding contracts?
17. If you think that the booking deposit system is mainly in the interest of the vendor, do you think nonetheless that that system on the whole significantly benefits depositors?
18. Do depositors consider it an advantage from their point of view that booking deposits do not legally bind them (the depositors) to purchase the dwelling?

POSSIBLE SOLUTIONS TO THE PROBLEM

Your answers to the questions asked in this questionnaire are important to enable the Law Reform Commission to deal with the issue of gazumping as constructively as possible. However, it should be understood that the fact that certain possible solutions or approaches are mentioned below does not mean that the Law Reform Commission would favour any of these particular solutions or is even seriously considering them as possible remedies for the gazumping problem.

First Possibility – A “Freeze” until Vendor Provides a Draft Contract Combined with Possible Reference to an Independent Tribunal

19. (a) Would you favour legislation designed to provide a mechanism whereby a vendor who has taken a booking deposit would be prohibited from selling to anyone else without first providing the depositor with a form of written contract on which, if the depositor agreed to it, he was prepared to sell to the depositor at the stipulated price and on other terms which were fair to both parties?
- (b) If the solution at paragraph (a) of this question were adopted it might well be necessary to give the courts jurisdiction to give binding rulings concerning such matters as the content of a fair contract, the amount of the contractual deposit etc or to set up an independent expert tribunal with jurisdiction for this purpose. Would you support such a course?
- (c) If a solution along the lines at paragraphs (a) and (b) of this question were adopted it might also be necessary to give the **vendor** an equal opportunity to compel the **depositor** to enter into a binding contract with a role for the courts, an independent tribunal, in this regard as well. Would you support this?

Second Possibility – A Ban on Booking Deposits

20. Would it be of assistance to purchasers if a law were enacted banning altogether the taking of booking deposits by vendors where no binding contract was entered into?
21. One way to enforce this obligation would be that a vendor and or his agent who violated the ban would be guilty of a criminal offence, punishable by law. Would you support this?

Third Possibility – Limited Civil Compensation for Gazumping

22. Alternatively if the booking deposit system were retained would it suffice if a gazumping vendor were obliged by law, besides returning the deposit, to compensate the depositor for out of pocket expense actually and reasonably incurred on the strength of the deposit before the vendor gazumped (e.g. surveyor's, architect's or legal fees)? (This remedy would not however allow the depositor to recover compensation for the loss of the bargain on the dwelling itself.)

Fourth Possibility – Obligation to Give Notice that No Contract

23. (a) Would it be of significant assistance to depositors if a statutory obligation were imposed on the vendor accepting a deposit to furnish to the depositor a written notice indicating in a prescribed manner that payment of the

deposit did not create a contract to buy or sell the property either at the stated price or at all and that either party was therefore completely free to back out of the transaction with the deposit being returned to the depositor?

- (b) Would you support the enforcement of this obligation through the criminal law?

Fifth Possibility – Codes of Conduct by Builders (Self-Regulation)

24. (a) A leading association of builders of dwellings has just published a Code of Conduct for their members which covers gazumping. They claim that it is possible for members of the public to ascertain whether a particular developer is a member of that association and that members who break the Code will be subject to sanctions. In other words, they propose a system of self-regulation for their members on the basis of their Code of Conduct.

- (b) The Code among other things contains the following provisions:-

- (i) It requires a builder to furnish his draft contract, in the form of the Law Society's standard conditions of sale, to the depositor within four weeks of the deposit.
- (ii) It strictly limits the circumstances in which an increase in the price originally stipulated is to be allowed to increases in VAT and to other increases justified by **legislation** directly affecting the price.
- (iii) It provides expressly that neither the making of the deposit nor the provisions of the Code creates a legally binding contract, but it provides for a procedure for complaints to the association for breach of the Code by the builder which if established may result in the builder being disciplined.

- (c) Do you consider that such a self-regulatory system, if sufficiently widely adopted by the construction industry, might offer a satisfactory solution to the gazumping problem without legislation?

25. Have you any observations or suggestions in this matter which are **not** covered by the above? If so they would be welcome.

26. If you wish to expand on any of your answers, please do so, if necessary on a separate document.

Responses would be appreciated by Monday, 22nd February, 1999

They should be sent to: The Secretary
The Law Reform Commission
First Floor
IPC House
35 –39 Shelbourne Road
Ballsbridge
Dublin 4

January, 1999

APPENDIX 2

LIST OF RESPONDENTS TO QUESTIONNAIRE ON GAZUMPING

The following list is incomplete as not all respondents gave their names.

Mr Ken Murphy, Director General, The Law Society of Ireland

Ms Deirdre Moran, Patrick Tallan & Co, Solicitors, Co Louth

Mr Rory O'Donnell, O'Donnell Sweeney, Solicitors, Dublin 2

Ms Carmel Foley, Director of Consumer Affairs, Office of the Director of Consumer Affairs, Dublin 2.

Mr Terence V. Grant, Terence V. Grant & Co., Co Louth

Mr Patrick O.R. Markey, Patrick C. Markey & Son, Solicitors, Co Louth

Mr Liam Hipwell, Chairman, Wexford Solicitors Association

Mr Donal Kelliher, Chairman, Kerry Law Society

Mr Michael Gleasure, Honorary Secretary, Kerry Law Society

Mr Alan Cooke, Chief Executive, Irish Auctioneers & Valuers Institute, Dublin 2

Mr Brian O'Connor, Honorary Secretary, Roscommon Bar Association

Mr J.A. Canny & Co, Solicitors, Kilkenny,

Mr Michael Greene, Managing Director, Homebond, Construction House, Dublin 6

Feran & Co, Solicitors, Co Louth

Dockrell Farrell, Solicitors, Dublin 4

APPENDIX 3

RECEIPT

(SUBJECT TO CONTRACT)

PREMISES:

RECEIVED FROM

OF

THE SUM OF _____ POUNDS

Being the booking deposit in respect of a proposal to purchase the above premises

NOTE:

This receipt is not an acknowledgement of an existing agreement for the sale of the property. No agreement shall be deemed to be in force or binding until a formal contract has been signed by both parties.

SIGNED:

DATE:

(This Receipt Form is approved by The Irish Auctioneers and Valuers Institute).

APPENDIX 4

PROPOSALS FOR REFORM OF THE STATUTE OF FRAUDS IN OTHER JURISDICTIONS

The *Statute of Frauds*, which deals with the formalities required for contracts for the sale of land, as well as other contracts, was originally enacted in England in 1677. It was subsequently enacted in Ireland, and in the various provinces of Canada. In recent years, the law reform institutions of virtually all of the Canadian provinces have considered whether the Statute should be repealed or amended. The following is a brief account of the recommendations made for reform of the Statute insofar as it relates to contracts for the sale of land, together with detail as to whether those recommendations were implemented and, where this information is available, whether implementation was successful.

1. England and Wales

Section 40 of the *Law of Property Act, 1925* replaced the *Statute of Frauds, 1677*, insofar as it related to contracts for the sale of land.

In 1987, the English Law Commission recommended that in future contracts for the sale or other disposition of an interest in land must be made in writing and signed in order to be valid.¹ In the absence of formalities, those contracts would be void, and not merely unenforceable.

This recommendation was implemented by s. 2 of the *Law of Property (Miscellaneous Provisions) Act, 1989* which provides:-

"(1) A contract for the sale or other disposition of an interest in land can only be made in writing and only incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each.

The terms may be incorporated in a document either by being set out in it or by reference to some other document.

The document incorporating the terms or, where contracts are exchanged, one of the documents incorporating them (but not necessarily the same one) must be signed by or on behalf of each party to the contract."

The section has generated a significant amount of litigation and is subject to continuing criticism.

¹ See Law Com. No. 164, *Transfer of Land: Formalities for Contracts for Sale, etc. of Land*, para 6.1.

2. Canada

British Columbia

The Statute of Frauds was received into the law of British Columbia in 1858, and was eventually re-enacted in chapter 369 of the *Revised Statute of British Columbia, 1960*, which provided that no agreement concerning an interest in land was enforceable by action unless evidenced in writing, signed by the party to be charged or by his agent. The Law Reform Commission of British Columbia recommended in 1977 that the law be amended in a manner which would facilitate enforcement of contracts for the sale of land². Its exact recommendations were implemented by s. 54 (3) (c) of the *Law and Equity Act, 1985* and the implementing provision is now contained in s. 59 of the *Law and Equity Act, R.S.B.C. 1996* which provides, *inter alia*:-

"(3) A contract respecting land or a disposition of land is not enforceable unless

- (a) there is, in a writing signed by the party to be charged or by that party's agent, both an indication that it has been made and a reasonable indication of the subject matter,
- (b) the party to be charged has done an act, or acquiesced in an act of the party alleging the contract or disposition, that indicates that a contract or disposition not inconsistent with that alleged has been made, or
- (c) the person alleging the contract or disposition has, in reasonable reliance on it, so changed the person's position that an inequitable result, having regard to both parties' interest, can be avoided only by enforcing the contract or disposition.

(4) For the purposes of subsection (3) (b), an act of a party alleging a contract or disposition includes a payment or acceptance by that party, or on that party's behalf, of a depositor or part payment of a purchase price."

The British Columbia Law Institute has informed the Commission that it believes that the reform has been a success.

Manitoba

In 1980, the Law Reform Commission of Manitoba recommended that the *Statute of Frauds*, which had been received into the law of the province in 1870, should be repealed.³ Insofar as the Statute relates to contracts concerning interests in land, the Commission recommended that no contract concerning an interest in land should be enforceable unless:

² Law Reform Commission of British Columbia, *Report No. 33: Report on the Statute of Frauds* (1977) at p.73

³ Manitoba Law Reform Commission, *Report No. 41: Report on the Statute of Frauds* (1980), at p.2.

- (a) evidenced by memorandum in writing signed by the party to be charged or by his agent; or
- (b) the defendant acquiesces in acts of the plaintiff (including such acts by the plaintiff as the payment by him of a deposit or a part of the purchase price) which indicated that a contract not inconsistent with that alleged has been made between the parties; or
- (c) there are acts of the defendant from which the court can deduce a contract, not inconsistent with that alleged has been made between the parties; or
- (d) the plaintiff has, in reasonable and *bona fide* reliance on the contract, changed his position so that having regard to the position of both parties an inequitable situation can be avoided only by enforcing the contract."⁴

In fact, the Manitoba legislature repealed the Statute and did not replace it. This development appears to have been a success⁵

Alberta

In 1985, the Institute of Law Research and Reform recommended that a contract for the sale or other disposition of an interest in land not be enforceable unless,

- (a) there is some evidence in writing which indicates that a contract has been made between the parties and reasonably identifies the subject matter of the contract, and which is signed by the party to be charged or his agent;
- (b) the party to be charged acquiesces in conduct of the party seeking to enforce the contract which indicates that a contract consistent with that alleged has been made between the parties;
- (c) the conduct of the party to be charged indicates that a contract consistent with that alleged has been made between the parties;
- (d) either the party to be charged or the party seeking to enforce the contract has made, and the other of the two parties has accepted, a deposit or payment of part of the purchase price; or
- (e) the party seeking to enforce the contract has, in reasonable reliance on the contract, changed his position so that, having regard to the position of both parties, an inequitable result can be avoided only by enforcing the contract⁶

⁴ *Ibid.*, at p.49

⁵ We have been so informed in correspondence from the Manitoba Law Reform Commission. See also Newfoundland Law Reform Commission *Discussion Paper on the Statute of Frauds* (1991) at pp.45-47.

⁶ Alberta Institute of Law Research and Reform, *Report No. 44: the Statute of Frauds and Related*

This recommendation has not been implemented.

Ontario

In 1987, the Ontario Law Reform Commission recommended that the existing writing requirements for contracts relating to land, which were those of the original *Statute of Frauds* as contained in the *Statute of Frauds*, R.S.O. 1980, c. 481, should be repealed, subject to a requirement that a contract concerning land is not enforceable on the evidence of the party alleging the contract unless such evidence is corroborated by some other material evidence.⁷

Newfoundland

The Newfoundland Law Reform Commission endorsed the Ontario recommendation, but only as a compromise solution.⁸ The preferred option was to simply repeal the provision, as had been done in Manitoba⁹

Legislation (1985) at p.20.

⁷ Ontario Law Reform Commission, *Report on Amendment of the Law of Contract* (1987) at p.102.

⁸ Discussion Paper on the Statute of Frauds, 1677 (1991) at p.48.

⁹ *Ibid.*

LIST OF LAW REFORM COMMISSION'S PUBLICATIONS

First Programme for Examination of Certain Branches of the Law with a View to their Reform (Dec 1976) (Prl. 5984) **[out of print] [photocopy available]** [10p Net]

Working Paper No. 1-1977, The Law Relating to the Liability of Builders, Vendors and Lessors for the Quality and Fitness of Premises (June 1977) [£ 1.50 Net]

Working Paper No. 2-1977, The Law Relating to the Age of Majority, the Age for Marriage and Some Connected Subjects (Nov 1977)**[out of print]** [£ 1.00 Net]

Working Paper No. 3-1977, Civil Liability for Animals (Nov 1977) [£ 2.50 Net]

First (Annual) Report (1977) (Prl. 6961) [40p Net]

Working Paper No. 4-1978, The Law Relating to Breach of Promise of Marriage (Nov 1978) [£ 1.00 Net]

Working Paper No. 5-1978, The Law Relating to Criminal Conversation and the Enticement and Harboursing of a Spouse (Dec 1978)**[out of print]** [£ 1.00 Net]

Working Paper No. 6-1979, The Law Relating to Seduction and the Enticement and Harboursing of a Child (Feb 1979) [£ 1.50 Net]

Working Paper No. 7-1979, The Law Relating to Loss of Consortium and Loss of Services of a Child (March 1979) [£ 1.00 Net]

Working Paper No. 8-1979, Judicial Review of Administrative Action: the Problem of Remedies (Dec 1979) [£ 1.50 Net]

Second (Annual) Report (1978/79) (Prl. 8855) [75p Net]

Working Paper No. 9-1980, The Rule Against Hearsay (April 1980) [£ 3.50 Net]

Third (Annual) Report (1980) (Prl. 9733) [75p Net]

First Report on Family Law - Criminal Conversation, Enticement and Harboursing of a Spouse or Child, Loss of Consortium, Personal Injury to a Child, Seduction of a Child, Matrimonial Property and Breach of Promise of Marriage (LRC 1-1981) (March 1981) [£ 2.00 Net]

Working Paper No. 10-1981, Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws (Sep 1981) [£ 1.75 Net]

Fourth (Annual) Report (1981) (Pl. 742) [75p Net]

Report on Civil Liability for Animals (LRC 2-1982) (May 1982) [£ 1.00 Net]

Report on Defective Premises (LRC 3-1982) (May 1982) [£ 1.00 Net]

Report on Illegitimacy (LRC 4-1982) (Sep 1982)	[£ 3.50 Net]
Fifth (<u>Annual</u>) Report (1982) (Pl. 1795)	[75p Net]
Report on the Age of Majority, the Age for Marriage and Some Connected Subjects (LRC 5-1983) (April 1983)	[£ 1.50 Net]
Report on Restitution of Conjugal Rights, Jactitation of Marriage and Related Matters (LRC 6-1983) (Nov 1983)	[£ 1.00 Net]
Report on Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws (LRC 7-1983) (Dec 1983)	[£ 1.50 Net]
Report on Divorce a Mensa et Thoro and Related Matters (LRC 8-1983) (Dec 1983)	[£ 3.00 Net]
Sixth (<u>Annual</u>) Report (1983) (Pl. 2622)	[£ 1.00 Net]
Report on Nullity of Marriage (LRC 9-1984) (Oct 1984)	[£ 3.50 Net]
Working Paper No. 11-1984, Recognition of Foreign Divorces and Legal Separations (Oct 1984)	[£ 2.00 Net]
Seventh (<u>Annual</u>) Report (1984) (Pl. 3313)	[£ 1.00 Net]
Report on Recognition of Foreign Divorces and Legal Separations (LRC 10-1985) (April 1985)	[£ 1.00 Net]
Report on Vagrancy and Related Offences (LRC 11-1985) (June 1985)	[£ 3.00 Net]
Report on the Hague Convention on the Civil Aspects of International Child Abduction and Some Related Matters (LRC 12-1985) (June 1985)	[£ 2.00 Net]
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Report on Jurisdiction in Proceedings for Nullity of Marriage, Recognition of Foreign Nullity Decrees, and the Hague Convention on the Celebration and Recognition of the Validity of Marriages (LRC 20-1985) (Oct 1985)	[£ 2.00 Net]
Eighth (<u>Annual</u>) Report (1985) (Pl. 4281)	[£ 1.00 Net]
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Report on Receiving Stolen Property (LRC 23-1987) (Dec 1987)	[£ 7.00 Net]
Ninth (<u>Annual</u>) Report (1986-1987) (Pl 5625)	[£ 1.50 Net]
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Eleventh (<u>Annual</u>) Report (1989) (PI 7448)	[£ 1.50 Net]
Report on Child Sexual Abuse (September 1990) (LRC 32-1990)	[£ 7.00 Net]
Report on Sexual Offences Against the Mentally Handicapped (September 1990) (LRC 33-1990)	[£ 4.00 Net]
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Consultation Paper on the Civil Law of Defamation (March 1991)	[£20.00 Net]
Report on the Hague Convention on Succession to the Estates of Deceased Persons (LRC 36-1991) (May 1991)	[£ 7.00 Net]
Twelfth (<u>Annual</u>) Report (1990) (PI 8292)	[£ 1.50 Net]
Consultation Paper on Contempt of Court (July 1991)	[£20.00 Net]
Consultation Paper on the Crime of Libel (August 1991)	[£11.00 Net]
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Report on Land Law and Conveyancing Law: (3) The Passing of Risk from Vendor to Purchaser (LRC 39-1991) (December 1991); (4) Service of Completion Notices (LRC 40-1991) (December 1991)	[£ 6.00 Net]
Report on The Crime of Libel (LRC 41-1991) (December 1991)	[£ 4.00 Net]
Report on United Nations (Vienna) Convention on Contracts for the International Sale of Goods 1980 (LRC 42-1992) (May 1992)	[£ 8.00 Net]
Thirteenth (<u>Annual</u>) Report (1991) (PI 9214)	[£ 2.00 Net]
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Land Law and Conveyancing Law: (5) Further General Proposals (LRC 44-1992) (October 1992) [out of print]	[£ 6.00 Net]
Consultation Paper on Sentencing (March 1993) [out of print]	[£20.00 Net]
Consultation Paper on Occupiers' Liability (June 1993) [out of print]	[£10.00 Net]
Fourteenth (<u>Annual</u>) Report (1992) (PN.0051)	[£ 2.00 Net]

Report on Non-Fatal Offences Against The Person (LRC 45-1994) (February 1994)	[£20.00 Net]
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Report on Personal Injuries (LRC 54-1996) (December 1996)	[£10.00 Net]
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