

ASPECTS OF FORMATION OF CONTRACTS
FOR THE SALE OF LAND

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ABSTRACT

In delivering the judgment of the Court of Appeal in *Carruthers v Whitaker*, (1975), 1 N.Z.L.R. 667, Richmond J expressed the view that when parties in negotiation for the sale and purchase of land instruct solicitors and contemplate the preparation of a formal agreement, the ordinary inference to be drawn is that they intend to contract only by means of the formal document signed by them both.

The first part of this dissertation represents an attempt to define the bounds of *Carruthers v Whitaker* by reference to the earlier authorities as they are seen to apply to the situation in which parties who have reached an oral agreement as to terms contemplate the preparation of a formal document. It will be concluded that the Court of Appeal's decision cannot be regarded as an authority on oral contracts generally: that its ambit is confined to those situations in which there has been no agreement as to the terms contained in the formal document or where execution of the formal document is intended by the parties to operate as a condition precedent to the formation of a concluded contract. Subsequent New Zealand decisions, it is submitted, are seen to support this view. *Carruthers v Whitaker*, nevertheless, highlights the need for the plaintiff who seeks to rely on an oral contract to show clear evidence that the parties thereto intended to be bound. Moreover, in the light of recent English decisions it will be increasingly difficult to establish that certain non-contractual writings can amount to a sufficient memorandum to satisfy the statutory requirements.

The latter part of this dissertation is devoted to the authenticated signature fiction, once again within the context of the

situation where a formal agreement is contemplated. It will be argue that *Sturt v McInnes*, (1974) 1 NZLR 729, which is regarded as having established the criteria for the fiction's application in New Zealand, should again be treated as an authority on "written" contracts alone and that to extend its application to post-contract memoranda would be contrary to the earlier authorities within which the doctrine is seen to have emerged.

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INTRODUCTION

Section 2 of the Contracts Enforcement Act 1956 has its origins in the Statute of Frauds 1677¹. The latter was stated in its preamble to be: an act "For prevention of many fraudulent practices which are commonly endeavoured to be upheld by perjury and subornation of perjury." It contained some twenty-five sections dealing with such diverse topics as contract, real property and conveyancing, wills, trusts, administration of deceased estates, creditors' remedies, procedure and the law of succession². The expressed purpose of the statute was carried out by those sections which made written or other adequate evidence necessary for certain transactions, of which those of the widest general application were sections 4 and 17. For ease of reference the provisions of these sections are set out as follows:

Section 4:

No action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person; or to charge any person upon any agreement made upon consideration of marriage; or 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.

¹For a detailed discussion of the background of the New Zealand provision see Article (Anon.) "The Contracts Enforcement Act 1956" 1956 32 N.Z.L.J. 305 and 321.

²For the history of the Statute of Frauds 1677 see W.S. Holdsworth "History of English Law" Vol. 6 369-396.

Section 17:

No contract for the sale of goods, wares or merchandise for the price of 10 (pounds) sterling or upwards shall be allowed to be good except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorised.

Section 17 was later re-enacted in England as Section 4 of the Sale of Goods Act 1893 and subsequently repealed by the Law Reform (Enforcement of Contracts) Act 1954. The provisions of section 4 of the Statute of Frauds, as they related to the sale or other disposition of land, now reappear, in modified form, as section 40 of the Law of Property Act 1925 (UK), which states:

(1) No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto lawfully authorised.

(2) This section applies to contracts whether made before or after the commencement of this Act and does not affect the law relating to part performance, or sales by the court.

In New Zealand, section 17 was modified and re-enacted as section 6 of the Sale of Goods Act 1908, which was subsequently repealed by section 4 of the Contracts Enforcement Act 1956. Section 2 of the Contracts Enforcement Act 1956 was enacted in substitution for section 4 of the Statute of Frauds 1677; the latter section now having ceased to apply to contracts made after 19 October 1956.

Section 2 of the Contracts Enforcement Act 1956, as it relates to contracts for the sale or disposition of land, provides:

Proof of contracts relating to land ... (1) This section applies to -

(a) Every contract for the sale of land:

(b) Every contract to enter into any disposition of land, being a disposition that is required by any enactment to be made by deed or instrument or in writing or to be proved by writing:

(c) Every contract to enter into any mortgage or charge on land:

...

(2) No contract to which this section applies shall be enforceable by action unless the contract or some memorandum or note thereof is in writing and is signed by the party to be charged therewith or by some other person lawfully authorised by him.

(3) Nothing in this section shall -

(a) Apply to any sale of land by order of the High Court or through the Registrar of that Court:

(b) Apply to any alienation of Maori land ...

(c) Affect the operation of the law relating to part performance.

(4) For the purposes of this section, -

'Disposition' includes any conveyance, transfer, grant, partition, exchange, lease, assignment, surrender, disclaimer, appointment, settlement or other assurance ...

'Land' means any estate or interest, whether freehold or chattel, in real property.

...

This dissertation focuses on aspects of the provisions contained in section 2(2) of the Contracts Enforcement Act 1956 as they relate to contracts for the sale of land. In this respect the New Zealand provisions are equivalent to those contained in section 40(1) of the Law of Property Act 1925 (U.K.) and the section's predecessor, section 4 of the Statute of Frauds 1677. As the considerations involved in the application of each section are identical, the writer has felt it unnecessary, in discussing the cases themselves, to identify the relevant provisions separately on the basis that this will be sufficiently indicated by the citations. As the requirements as to writing are expressed in similar terms in section 17 of the Statute of Frauds 1677, the earlier authorities on that

section and its subsequent restatements continue to retain some relevance in this context.

The provisions of section 2(2) of the Contracts Enforcement Act 1956 and their counterparts have given rise to a vast structure of case law, an extensive survey of which would be beyond the ambits of the present dissertation. Conspicuously, no attempt has been made to examine such topics as the contents of the memorandum, the joinder of documents, variation and waiver and the effects of non-compliance with the statutory provisions, as the writer considers that such matters are adequately dealt with in most of the standard texts. Neither has it been sought to examine the merits of the legislation or views to possible reform. In fact this dissertation is primarily concerned with a question which is, in reality, independent of the Act, namely the circumstances in which a "contract" will be found to exist.

Section 2(2) of the Contracts Enforcement Act 1956 provides that no contract to which it applies shall be enforceable unless the contract or some memorandum or note thereof is in writing and is signed by the party to be charged. It is said that the statutory requirement "was not meant to affect contracts in any way, but only the evidence of them"³. While a "written contract" will clearly satisfy the statutory requirements, the section presupposes that the contract sought to be enforced may be an oral contract so long as a sufficient note or memorandum exists and that the writing relied upon in that instance need not be contractual in itself. These principles are so

³Bristol Cardiff & Swansea Aerated Bread Co. v Maggs (1890) 44 Ch.D. 616 per Kay J, 622.

fundamental that it may be thought that they do not warrant restating, however, over recent years the distinction between "oral" and "written" contracts appears to have become somewhat blurred, particularly where, as in most sales of land in New Zealand, negotiations culminate in the preparation of a formal agreement.

The practical difficulty is seen to arise in that while parties in New Zealand may have agreed on the sale and purchase of land; (they may have reached a consensus upon all material terms and may have "shaken hands" upon their bargain) they will invariably instruct solicitors to attend to the conveyancing aspects of the transaction. At this point, if a formal written agreement has not already been prepared, it almost invariably will be (solicitors being aware of the provisions of section 2 of the Contracts Enforcement Act 1956 even if some laymen are not). But at what point and in what manner do the parties intend to become bound? Theoretically, this question should be determined objectively: by enquiring how the reasonable bystander would have understood the parties' words and conduct. However, in 1975 the New Zealand Court of Appeal in Carruthers v Whitaker⁴ expressed the view that "When parties ... act in this way" then the ordinary, indeed the prima facie inference to be drawn is that they do not intend to be bound until the formal written document has been executed by them both⁵. The Court of Appeal later endorsed its decision in Carruthers v Whitaker^{5a} in Concorde Enterprises Ltd v Anthony Motors (Hutt) Ltd⁶.

⁴[1975] 2 N.Z.L.R. 667

⁵id 671 ^{5a}Supra note 4

⁶[1981] 2 N.Z.L.R. 385

Where parties who have reached an oral agreement as to terms contemplate the preparation of a formal document, the preparation and execution of that document may normally be viewed in one of three ways: It may be treated as either a condition precedent to the formation of a concluded agreement, a condition precedent to the contract's performance or, alternatively, as no more than a matter of form⁷. In the first part of this dissertation the writer will endeavour to expand and illustrate this traditional analysis and to provide an indication of the types of factors which will be relevant in determining the particular category into which a given situation will fall. It will become apparent at the outset that it is impossible to lay down any hard and fast rules and that such guidelines as there are, are seen to emerge only by means of an analysis of the cases. Finally, it will be sought to examine the decision in Carruthers v Whitaker⁸ itself and those cases which have followed in its wake. By way of conclusion it will be argued that Carruthers v Whitaker⁹ must be regarded as an authority on written contracts alone; that in fact any wider interpretation of the Court of Appeal's decision can be justified by neither principle nor on the basis of the earlier authorities.

The second part of this dissertation is devoted to what is termed the "authenticated signature fiction" with reference to the

⁷ *Infra* 25, 26

⁸ *Supra* note 4.

⁹ *Supra* note 4.

criteria for the doctrine's application formulated by Wilson J in Sturt v McLnnes¹⁰. The writer will again seek to emphasise that before one can consider the requirements of the Contracts Enforcement Act 1956 at all, it is essential to determine if and at what point a contract can be said to exist. Where parties contemplate the preparation of a formal document, their intention as to the effect of that document remains crucial. The writer will endeavour to illustrate by an analysis of the earlier authorities that while the criteria laid down in Sturt v McLnnes¹¹ may be said to apply where parties intend to be bound by means of a written contract, they cannot be treated as definitive where the writing relied on is in fact a memorandum of an existing agreement.

PART ONE - THE AMBIT OF CARRUTHERS V WHITAKER

I. INTENTION GENERALLY

In Cheshire and Fifoot's "Law of Contract", with reference to what is termed the "phenomenon of agreement", the authors state¹²:

An offer, capable of being converted into an agreement by acceptance, must consist of a definite promise to be bound provided that certain specified terms are accepted. The offeror must have completed his share in the formation of a contract by finally declaring his readiness to undertake an obligation on certain conditions, leaving to the offeree the option of acceptance or refusal. He must not merely have been feeling his way towards an agreement, not merely initiating negotiations from which an agreement might or might not in time result. He must be prepared to implement his promise, if such is the wish of the other party.

The requirements for the formation of a valid contract, therefore, are firstly, that there must be a contractual offer and,

¹⁰ [1974] 1 N.Z.L.R. 729

¹¹ Ibid

¹² Cheshire and Fifoot's "Law of Contract" (6th N.Z. Edition ed J.F. Northey), 26

secondly, an acceptance which is final and unconditional in its terms. In the context of agreements for the sale and purchase of land it is necessary to determine at what point parties cease to be merely in negotiation and intend instead to enter into a contractual relationship. In this respect, the courts will require cogent evidence of an intention to be bound.

In determining the parties' intention, it is well established that the test to be applied is an objective one. Thus, whether an oral contract can be said to exist will depend upon the effect which the parties' conduct and words would have had upon a reasonable bystander. Where it is alleged that a written document constitutes either an offer or an acceptance, the principles remain the same, the test being the effect which the language used by the defendant, on its true construction, might reasonably have had upon the mind of the recipient.

The question of whether a concluded contract resulted from an exchange of correspondence was recently considered by the New Zealand Court of Appeal in Boulder Consolidated Ltd v Tangaere¹³. Cooke J endorsed as the traditional approach that adopted by Lord Diplock in Gibson v Manchester City Council¹⁴ which involved "looking at the ... documents relied on as constituting the contract sued on and seeing whether, on their true construction, there is to be found in them a contractual offer ... to sell ... and an acceptance of that offer"¹⁵. Cooke J found that it was possible to

¹³ [1980] 1 N.Z.L.R. 560

¹⁴ [1979] 1 All E.R. 972

¹⁵ *id.* 974

adopt as an alternative the test whether "viewed as a whole and objectively, the correspondence shows a concluded agreement"¹⁶. This approach he found had been indicated by Lord Wilberforce in New Zealand Shipping Co Ltd v A M Satherwaite & Co Ltd¹⁷ and in Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Australia) Pty Ltd¹⁸ and was sometimes more rewarding than a mechanical analysis in terms of offer and acceptance. However, on either approach "the point of view of the reasonable man in the shoes of the recipient of each letter is of major importance"¹⁹.

Determining the intention of the parties may often prove most difficult in situations where the preparation of a formal agreement is contemplated. In some situations correspondence or other informal writings relied on as constituting either a written contract or a memorandum of an existing oral contract may make express reference to the preparation of a formal document. In other cases, parties may agree verbally on essential terms, but may also agree either that the terms shall be recorded in a formal document or that the matter shall be referred to their solicitors with the effect, if not the expressed intention, that a formal document will afterwards be prepared. In these situations, the question of the parties' "intention" is seen to acquire an additional aspect in so far as it becomes necessary to consider not only whether the parties intend to enter into a contractual relationship in the broad sense but also the time at which

¹⁶Supra note 13 at p 363

¹⁷[1974] 1 N.Z.L.R. 505

¹⁸[1980] 3 All E.R. 257

¹⁹Supra note 16

and the manner in which they intend to be bound. In the words of Lord Greene M R in Eccles v Bryant²⁰ "When parties are proposing to enter into a contract, the manner in which the contract is to be created so as to bind them must be gathered from the intentions of the parties, express or implied."²¹

Although the parties' intention is to be determined upon an objective analysis, regardless of whether a plaintiff seeks to establish an "oral" or a "written" contract, the types of evidence available in aid of the court's enquiry will differ in each case. Where the writing relied on by the plaintiff is alleged to constitute a "written" contract, it must reveal as a matter of construction that the parties thereto intended to be bound. The court's investigation is limited to construing the language which the parties chose to use and parol or other extrinsic evidence will generally²² be inadmissible to assist in the interpretation of the document or to contradict, vary or add to the terms which it contains²³.

²⁰[1948] Ch. 93

²¹*id.* 97

²²This is so regardless of whether the exclusion is seen to result from the provision in section 2(2) of the Contracts Enforcement Act 1956 itself or by virtue of the parol evidence rule.

²³Parol evidence may be admissible in other circumstances, for instance to establish a collateral agreement, variation or discharge of the written agreement or invalidity due to fraud, duress or mistake. In this context, the provisions of the Contractual Mistakes Act 1977 should be noted and the Court of Appeal decision in Conlon v Ozolins, [1984] 1 N.Z.L.R. 489, where the plaintiff was able, in effect, to plead her own subjective error, unknown to the other party, as a ground for relief.

It would now appear to be accepted, however, that in determining the intention which the language in a written contract reveals, or the meaning to be attributed to particular terms, the words used by the parties cannot be viewed in the abstract and regard may also be had to the surrounding circumstances and the factual setting in which they were used²⁴. Moreover, where the language itself or its application to the facts is ambiguous, and this may be particularly so in relation to informal writings, evidence may also be given as to the conduct of the parties preceding the transaction, its relevant background and the facts and objects in the parties' joint contemplation at the time²⁵.

Where the plaintiff seeks to establish an "oral" contract, the writing relied upon as constituting a sufficient memorandum must record all the material terms of the parties' agreement and by virtue of the statute, parol evidence is similarly inadmissible to contradict vary or add to those terms. But although in the case of oral contracts the matter of the parties' intention must again be determined objectively, the court's sphere of enquiry in this context is much less restricted. In addition to the parties' words and conduct and although direct testimony of intention and evidence of

²⁴The approach now adopted in relation to terms appears to be that expounded by Lord Wilberforce in Prenn v Simmonds [1971] 3 All E.R. 237 (H.L.) and Reardon-Smith Line v Hansen-Tangen [1976] 3 All E.R. 570 (H.L.). The same approach should apply in determining the intention which the language reveals. This was the view of the High Court of Australia in Allen v Carbone (1975) 132 C.L.R. 528, 531-532 and of Hardie Boys J in the unreported case of Riley v Jones where he stated "[W]here it is necessary to ascertain the intention of a party to a contract ... the Court must look at the language which is being used ... the language must of course be considered against the relevant factual background".

²⁵"Phipson on Evidence" (13d), 980-982

subsequent conduct ought again, strictly speaking, to be excluded it would seem that virtually any and all other evidence which is relevant will be admissible. Where the parties have not expressed the terms of their agreement in detail, their intention, both as to the time at which and the manner in which a contract will be created so as to bind them, lends itself more readily to determination by inference having regard to the nature of the parties, the nature of the transaction and the background evidence as a whole²⁶.

II. THE "SUBJECT TO CONTRACT" CASES

It is accepted at the outset that the expression "subject to contract" which has become more or less a term of legal art in England is not in common usage in New Zealand. Some reference is made, however, to the large volume of English cases on this topic for three reasons: Firstly, because in New Zealand, in cases concerning the Contracts Enforcement Act 1956 it is frequently sought to draw analogies with the "subject to contract" formula, secondly, because the extent to which the principles surrounding the use of the formula in England have been developed and expanded over recent years has, it is submitted, affected to some extent the attitude of the New Zealand courts and, thirdly, because it is within this context that the English Court of Appeal decision in Tiverton Estates Ltd v Wearwell Ltd²⁷ emerged which must now be seen to affect generally all contracts to which section 2 of the Act applies.

²⁶ Allen v Carbone (1975) 132 C.L.R. 528, 531-533

²⁷ [1975] Ch 146

Where the words "subject to contract" are used by the parties in their negotiations, in a receipt for a deposit or in correspondence passing between them or their solicitors, their effect is that neither party to the arrangement is legally bound until the terms of their agreement have been embodied in a formal contract signed by them both. Winn v Bull²⁸, decided in 1877, is regarded as one of the earliest statements of this principle which has since been consistently applied. In 1948, in the case of Eccles v Bryant²⁹, the principle was endorsed by a strong Court of Appeal (Lord Greene M R, Cohen and Asquith LJJ) and extended, with the effect that in England, where parties enter into an arrangement "subject to contract", the contract is not complete until signed copies of the agreement are "exchanged" in accordance with English conveyancing practice.

It is said that where parties use the "subject to contract" formula they normally do so either because they anticipate that the terms of their arrangement may be later supplemented or modified or simply because they wish to reserve to themselves the right to withdraw up until the time at which formal contracts are signed and exchanged³⁰. With regard to the latter, it is often said³¹ that the "subject to contract" usage initially developed to protect a purchaser from the consequences of entering into an "open contract" (i.e. an

²⁸(1877) 7 Ch.D. 29

²⁹[1948] Ch. 93

³⁰Masters v Cameron (1954) 91 C.L.R. 353, 361; Rossiter v Miller (1878) 3 App. Cas. 1124 per Lord O'Hagan, 1151 and per Lord Blackburn, 1152.

³¹E.g. R.W. Clark "Subject to Contract - 1 English Problems (1984) 48 Conv. (N.S.) 173, 183; Law Commission (U.K.) Report on "Subject to Contract" Agreements (Law Com. No. 65); Mulhall v Haren [1981] I.R. 364, 375.

agreement with respect to parties, subject-matter and price alone). This was, and to some extent still is, fraught with particular risks in England where a large proportion of land remains unregistered and where it is frequently necessary for a purchaser to make enquiries and stipulations as to title.

By the mid 1900's, the meaning of the phrase had become almost incontrovertible³², however, the early 1970's in England saw an unprecedented rise in the value of real property. A vendor who had agreed verbally on the sale of a property was frequently faced with a higher offer within days or even hours and the temptation to resile from an earlier bargain in such cases was strong. The "subject to contract" formula, initially adopted for the protection of the purchaser, often provided the means. It was, therefore, not surprising that attempts were made to escape or restrict its application.

Two cases which drew considerable controversy in England, were the English Court of Appeal decisions in Griffiths v Young³³ and Law v Jones³⁴. The facts in Griffiths v Young³⁵, briefly stated, were as follows:

³²But cf Michael Richards Properties Ltd v St Saviours Parish, Southwark, Corporation of Wardens [1975] 3 All E.R. 416 and more recently, Alpenstow Ltd v Regalian Properties plc [1985] 2 All E.R. 545 where the words "subject to contract" were not accorded their prima facie meaning on the basis that the phrase was wholly inapposite in the context in which it was used. However, in each case it was emphasised that the facts were "strong and exceptional" and that similar situations would be rare. See also the recent Irish decision referred to, *infra*

³³[1970] Ch. 675

³⁴[1974] Ch 112

³⁵Supra note 33

The parties were both substantial land owners and had had business dealings with one another previously. The defendant was temporarily short of funds and approached the plaintiff with a view to the plaintiff's guaranteeing a bank overdraft in the defendant's favour. The plaintiff had for some time wished to acquire a portion of the defendant's lands which the defendant, up until then, had been unwilling to part with. It was agreed that the plaintiff would provide the guarantee and that in return the defendant would sell him the lands. Settlement was not to take place immediately but was to be arranged upon the basis that if the plaintiff were required to honour his obligations under the guarantee he would receive a reduction in the agreed purchase price to the extent of his liability.

The details of the transaction having been discussed and fully agreed upon, both parties approached their solicitors so that the arrangement could be put into effect. The plaintiff's solicitor then wrote to the defendant's solicitor, correctly setting forth the agreement in all its terms, but expressing the purchase price for the lands as being "subject to contract". The parties themselves then discussed the progress of the matter, the defendant re-emphasising his financial plight and expressing some concern as to the time it might take to finalise the transaction. In the words of the plaintiff, the defendant had at that point said to him "we had had a bargain and he couldn't see why I did not get on and sign it". The plaintiff agreed to contact his solicitor to see what could be done and, as a result, the plaintiff's solicitor telephoned the solicitor acting for the defendant. The plaintiff's solicitor's evidence, which was accepted by the Court, was that his object in telephoning was to point out that if the defendant was to have his guarantee at once, there must be a binding contract for sale at once and that his own letter, which

referred to the arrangement as being "subject to contract" must to that extent be treated as amended. The defendant's solicitor consulted his client then wrote to the plaintiff's solicitor, referring to the earlier letter, and confirming the defendant's instructions to sell at the agreed price. The guarantee was subsequently given, but the defendant refused to take steps towards completion.

The Court of Appeal (Russell, Widgery and Cross LJJ) found for the plaintiff on the basis that there was an oral contract and that the second letter, referring as it did to the first, could be read together with it so providing a sufficient memorandum of the terms. It was argued for the defendant that the letters could not constitute a valid memorandum because of the inclusion of the words "subject to contract" which were indicative not of a concluded contract but of "an arrangement not yet blossoming into full contractual status"³⁶. It was argued that the decision in Societe Capa Societe a Responsabilite Limitee v Acatos & Co Ltd (In Voluntary Liquidation)³⁷ in which reference was made to Thirkell v Cambi³⁸, was authority for the proposition that a memorandum must contain not only the terms of the contract, but a recognition that the contract was in fact made. Widgery LJ confessed to having had some difficulty upon the point but concluded that the cases cited by the defendant ought to be distinguished. They were of the "confession and avoidance" type (which frequently arose under the analogous provisions of Section 4 of the Sale of Goods Act 1893) and it was in those cases only, where the memorandum denied liability, that a recognition of the contract

³⁶Supra note 33 at p 683

³⁷[1953] 2 Lloyd's Rep. 185

³⁸[1919] 2 K.B. 590 (C.A.)

itself was required in addition to a recital of its terms. By contrast, the phrase "subject to contract" was merely "a suspensory provision" which on the oral evidence had been waived.

Russell and Cross LJJ found that in the course of the telephone conversation, the plaintiff's solicitor had made on behalf of his client an unconditional offer which was accepted by the subsequent letter written by the defendant's solicitor. The phrase "subject to contract" in the first letter was merely a suspensory provision which existed prior to the formation of the concluded contract. The qualification had been expressly waived and the contract thereby brought into force. The cases referred to by the defendant did not touch this kind of situation at all.

In Law v Jones³⁹, which came before the court some three years later, the parties orally agreed on the sale of the defendant's house property to the plaintiff for a specified price. The parties shook hands upon their agreement. However, in subsequent correspondence with the plaintiff's solicitor, the defendant's solicitor again referred to the arrangement as being "subject to contract". He spoke of the plaintiff's "proposed purchase" from his client and indicated that he would forward a draft contract for approval. Some time later, the parties met again and the defendant managed to extract the plaintiff's agreement to an increased price of. He said at the time "I shall not go back on my word. My word is my bond. It is yours now: carry on and make all your arrangements." Accordingly, the defendant's solicitors wrote again to the plaintiff's solicitors, recording the agreement as to the increased price and asking the plaintiff's solicitors to amend the draft contract by then in

³⁹Supra note 34

their possession. The letter did not contain the words "subject to contract". In the hope of obtaining a higher price still, the defendant subsequently decided to put the property up for auction.

Buckley and Orr LJJ found for the plaintiff, again on the basis of an oral contract of which the correspondence and draft agreement provided a sufficient memorandum. While they were prepared to accept that a document which denied the existence of a contract could not be a sufficient memorandum, the words "subject to contract", on the authority of Griffiths v Young⁴⁰, were not to be treated as a denial but merely as imposing a suspensive condition. The words "proposed purchase" were inconclusive. Both judges held that it was not necessary to find in the memorandum any positive admission of a contract save in cases where the document itself contained a denial of liability which could, but for the admission, be read as embracing a denial of the existence of the alleged contract. In the words of Buckley LJ, "It is not the fact of agreement but the terms agreed upon that must be found recorded in writing"⁴¹. He found support for his view in the fact that it was well established that a written offer would amount to a sufficient memorandum, even if accepted orally. In these cases, the writing clearly could not acknowledge a contract existing at the time of writing. In the instant case, the parties' agreement as to the increased price amounted to an entirely new contract. When the defendant's solicitor wrote to the plaintiff's solicitor requesting the amendment to the contract price, he

⁴⁰Supra note 33

⁴¹Supra note 34 at p 124

thereby acknowledged the new contract which was not expressed to be "subject to contract". Alternatively, if the initial inclusion of the words "subject to contract" was seen as qualifying all the subsequent correspondence, then this qualification was eliminated at the time and by virtue of the new agreement.

Russell LJ on this occasion found himself in the minority. While he accepted the existence of an oral contract for sale at the increased price, he found that the documents relied upon could not constitute a valid memorandum. The language of the first letter referring as it did to "proposed purchase", the preparation of a draft contract and expressing the arrangement to be "subject to contract", clearly negated the existence of a contract and indicated that the parties were merely in negotiation. The subsequent letter was written as part of a chain of writings dependent on the first and could not be treated as indicating anything more than an agreed variation as to price.

Although he found it unnecessary to decide the point, Russell LJ thought that there was much to be said for the proposition that the memorandum after an oral contract should point in some way to the pre-existence of a concluded bargain. He thought that the offer cases were to be explained on the ground "that the writing in its terms envisages a contract, is a proposal of an agreement, is regarded as continuously in existence, and is ultimately simultaneous with the formation of the contract"⁴². Finally, he referred to the fact that the argument for the plaintiff had been based on the decision in Griffiths v Young⁴³. The grounds for that decision,

⁴²Supra note 34 at p 118-121

⁴³Supra note 33

however, clearly demonstrated that it did not assist the plaintiff in the present case.

Some months later, the Court of Appeal was faced with a similar fact situation in Tiverton Estates Ltd v Wearwell Ltd⁴⁴. The court on that occasion (Lord Denning M.R., Stamp and Scarman LJJ) unanimously held that a memorandum to satisfy the statutory requirements, must contain an express or implied recognition that a contract had been entered into.

The facts in the Tiverton Estate⁴⁵ case were that an oral agreement for the sale and purchase of a leasehold property had been reached between directors of the plaintiff - vendor and defendant - purchaser companies. The two directors shook hands with one another at the conclusion of their meeting and agreed to instruct their solicitors to confirm the sale. Once again the correspondence issuing forth from the defendant's solicitor expressed the arrangement to be "subject to contract", referred to "the proposed sale" and requested that the plaintiff's solicitors forward "the draft contract for approval". On the same day, the plaintiff's director telephoned his opposite number and subsequently wrote to the defendant company recording that the defendant had agreed that completion could take place as soon as possible. The plaintiff's solicitors then wrote to the defendant's solicitors referring to the correspondence from the latter and enclosing "draft contract for approval". The plaintiff decided not to proceed with the sale and the defendant lodged a caution in the Land Registry. On an application by the plaintiffs, the caution was cancelled. The defendants appealed.

⁴⁴[1975] Ch. 146

⁴⁵Tiverton Estates Ltd v Wearwell Ltd, Ibid

The Court of Appeal, after embarking upon an analysis of the case law⁴⁶, found that of the cases cited to it, in none of them decided prior to 1970 had it been decided that a memorandum which did not acknowledge that the signatory to it had entered into a contract, was a sufficient memorandum. The confession and avoidance cases decided not that a recognition of the contract was a necessary requirement only because the memorandum denied liability, but rather that provided the memorandum satisfied the statutory requirements, it was irrelevant that for one reason or another, the memorandum denied the liability of the party charged. Furthermore, the necessity for the memorandum to acknowledge a concluded contract was implicit in the judgment in Re Hoyle⁴⁷ which was not a confession and avoidance case.

Their Lordships agreed with Russell LJ's analysis of the offer cases in Law v Jones⁴⁸, Lord Denning adding that a further factor in the emergence of the principles had been that prior to the development of the doctrine of part-performance, written offers were frequently accepted by conduct in situations where it would have been unjust to prevent the offeree from enforcing the contract. Although it was well settled that a written offer, once accepted orally, would amount to a sufficient memorandum, it was equally clear that the offer cases had pushed the literal construction of the statute to a limit beyond which it was not easy to go.

⁴⁶Bailey v Sweeting (1861) 9 C.B.N.S. 843; Wilkinson v Evans (1866) L.R. 1 C.P. 407; Buxton v Rust (1872) L.R. 7 Exch. 279; Thirkell v Cambi [1919] 2 K.B. 590; Societe Capa Societe a Responsabilite Limitee v Acatos & Co Ltd (In Voluntary Liquidation) [1953] 2 Lloyd's Rep. 185; Re Hoyle [1893] 1 Ch. 84

⁴⁷[1893] 1 Ch. 84

⁴⁸Supra note 34

Their Lordships found that the majority in Law v Jones⁴⁹ had relied upon the offer cases as supporting the principle that a memorandum need not record the fact of agreement, but only the terms thereof. They had, therefore, been led to the conclusion that the words "subject to contract" were not to be treated as a denial of the contract but only as imposing a suspensive condition, the waiver of which could be established by oral evidence. The decision, therefore, removed all protection from parties who used the "subject to contract" formula which for more than one hundred years had been held to mean that the matter remained in negotiation until a formal contract was executed.

Lord Denning found it was impossible to distinguish "between a writing which (i) denies there was any contract; (ii) does not admit there was any contract; (iii) says that the parties are in negotiation; or (iv) says that there was an agreement "subject to contract" for that comes to the same thing. The reason why none of these writings satisfies the statute is because none of them contains any recognition or admission of the existence of the contract."⁵⁰

In the instant case, their Lordships found that the writings relied upon clearly denied the existence of a contract. Law v Jones⁵¹ ran contrary to earlier decisions of equal authority as did Griffiths v Young⁵² to the extent to which it was implicit in that decision that a memorandum need not recognise the existence of a contract. It was

⁴⁹ Ibid

⁵⁰ Supra note 44 at p 160

⁵¹ Supra note 34

⁵² Supra note 33

accepted, however, that the decision in Griffiths v Young⁵³ could be justified upon other grounds. Being faced, therefore, with two lines of conflicting authority, the Court was entitled to prefer the earlier cases cited and to decline to follow the decision in Law v Jones⁵⁴.

It should be noted that Buckley and Orr LJJ took the first available opportunity⁵⁵ to reaffirm the views he had expressed in Law v Jones⁵⁶. The conflict between the two Court of Appeal decisions, therefore, remains strictly undecided, however, the courts in England, in subsequent cases, have preferred the decision in Tiverton Estates Ltd v Wearwell Ltd⁵⁷. It now appears to be well settled in England that the memorandum relied upon must expressly or impliedly recognise the existence of a contract and that the presence of the words "subject to contract", even though they are inserted without authority, will almost invariably prevent the writing from satisfying the statutory requirements⁵⁸.

Subsequent English decisions have indicated that even if the "subject to contract" formula is inserted only at the commencement of negotiations, its qualifying effect will usually extend to all subsequent

⁵³ *Ibid*

⁵⁴ *Supra* note 34

⁵⁵ Daulia Ltd v Four Millbank Nominees Ltd [1978] Ch. 231, per Buckley L.J. 249-251, and per Orr L.J. 251

⁵⁶ *Supra* note 34

⁵⁷ *Supra* note 44

⁵⁸ *E.g.* Munton v Greater London Council [1976] 2 All E.R. 815 (C.A.) and Duttons Brewery Ltd v Leeds City Council (1982) 261 E.G. 885 (both concerning agreements as to compulsory purchase); Tevanan v Norman Brett (Builders) Ltd (1972) 223 E.G. 1945; Sherbrooke v Dipple (1980) 255 E.G. 1203 (C.A.) and in Ireland, Mulhall v Haren [1981] I.R. 364

communications between the parties. This will apply even where initial "subject to contract" negotiations have broken down and the parties then discuss and appear to arrive at a fresh agreement after a lapse of some months⁵⁹. All the negotiations will be treated as remaining under the "umbrella" of the "subject to contract" formula unless both parties expressly agree that the qualification should be expunged or such an agreement must necessarily be implied⁶⁰.

There remains to be said one final word regarding Griffiths v Young⁶¹. The Court of Appeal in the Tiverton Estates⁶² case declined to follow the decision to the extent that it held that a memorandum need not recognise the existence of the contract, but found that it could be supported upon other grounds for, as Stamp LJ said, he could "well understand that when, as there, a letter is written which otherwise satisfies the statute and which does unequivocally recognise an unconditional oral contract made that day, you may refer to an earlier letter written "subject to contract" and referred to in the memorandum, for the purposes of ascertaining the terms"⁶³. It will be recalled that in Griffiths v Young⁶⁴ the "second letter" was made in response to the unconditional verbal offer made by the plaintiff's solicitor in the course of the telephone conversation.

⁵⁹Tevanan v Norman Brett (Builders) Ltd (1972) 223 E.G. 1945; Sherbrooke v Dipple 1980 (255) E.G. 1203 (C.A.); Cohen v Nessdale Ltd [1981] 3 All E.R. 118 affirmed on appeal [1982] 2 All E.R. 97

⁶⁰Tevanan v Norman Brett (Builders) Ltd supra note 59

⁶¹Supra note 33

⁶²Tiverton Estates Ltd v Wearwell Ltd [1975] Ch. 146

⁶³id 169

⁶⁴Supra note 33

It amounted to an acceptance of that offer and by so doing, and in recording the defendant's instructions to sell, it clearly admitted and recognised the existence of the oral contract. The distinction, as was pointed out by Russell LJ in Griffiths v Young⁶⁵ and in his dissenting judgment in Law v Jones⁶⁶, is between, on the one hand, a condition which exists prior to the formation of a contract, the waiver or removal of which in itself brings the contract into existence, and, on the other, a condition which is inserted in a post-contract memorandum, thereby denying or pointing away from the existence of a contract.

III. REFERENCE TO THE FORMAL DOCUMENT CONTAINED IN THE WRITING RELIED UPON

1. Introduction

Where parties in negotiation for the sale of land agree upon the preparation of a formal document or where the writing relied upon as constituting a memorandum makes reference to the preparation of a formal document, the parties' words may be interpreted in any one of three ways. One of the earliest expressions of this proposition is again to be found in Winn v Bull where Sir George Jessel M R stated⁶⁷:

⁶⁵Supra note 33 at p 686-687

⁶⁶Supra note 34 at p 121

⁶⁷[1877] 7 Ch. 29, 32

Where you have a proposal or agreement made in writing expressed to be subject to a contract being prepared, it means what it says: it is subject to and 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 on should merely be put into form, or whether they should be subject to a new agreement, the terms of which are not expressed in detail.

The statement envisages that the reference to the formal document may be found to be either a condition precedent to the formation of the contract itself, or a condition precedent to its performance (i.e. a condition subsequent) or an expression of a mere desire as to the final form which the parties' already concluded bargain should ultimately take. More recently, the High Court of Australia in Masters v Cameron restated the proposition in the following way⁶⁸:

Where parties who have been in negotiation reach agreement upon terms of a contractual nature and also agree that the matter of their negotiation shall be dealt with by a formal contract, the case may belong to any one of three classes. It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect. Or, secondly, it may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document. Or, thirdly, the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract.

2. Condition Precedent or Subsequent

The "subject to contract" cases, already discussed, fall automatically into the third category of the Masters v Cameron⁶⁹

⁶⁸(1954) 91 C.L.R. 353, 360

⁶⁹(1954) 91 C.L.R. 353

trichotomy. In fact, as the statement of Jessell MR in Winn v Bull⁷⁰ clearly indicates and as subsequent cases reveal, the fact that the reference to the formal document is worded as a condition is almost invariably conclusive against its being treated as a mere expression of the parties' desire. The use of the words "subject to" is seen to give rise almost to a presumption in favour of the parties remaining in negotiation until the formal agreement is prepared and executed. Where the reference is found to import a condition there is no concluded contract because, as Parker J succinctly stated in Van Hatzfeldt-Wildenburg v Alexander "either the condition is unfulfilled or because the law does not recognise a contract to enter into a contract"⁷¹. In that case the plaintiff sought to establish a written contract consisting of correspondence which had passed between the parties' land agents. The letter alleged to constitute the defendant's acceptance recorded that her agents were instructed to accept the plaintiff's offer, but continued: "This acceptance is subject to the following conditions (1) (2) that Her Serene Highness's solicitors approve the title to, and covenants contained in the lease, the title from the freeholder and the form of contract ...". It was held that the letters did not constitute a binding contract.

A similar result was achieved in Masters v Cameron⁷² itself where the memorandum relied upon contained the words "This agreement is made subject to the preparation of a formal contract of sale ..."

⁷⁰(1877) 7 Ch.D. 29

⁷¹[1912] 1 Ch. 284, 289

⁷²Supra note 69

So too in the subsequent Australian case of Bridle Estates Pty Ltd v Myer Realty Ltd⁷³, the directors of the defendant company had signed a document which was delivered to the plaintiff in which it was stated that the defendant would consider an offer by the plaintiff to purchase certain blocks of land upon specified terms "subject always to preparation and execution of a formal contract of sale". The High Court of Australia (Barwick C.J., Jacobs & Aiken JJ) held that the stipulation governed the parties' negotiations so that the plaintiff's verbal acquiesce to amendments sought by the defendants in a draft agreement could not operate so as to create a contract binding on both parties in the absence of the execution of the formal document. Barwick C.J. and Aiken J expressly stated that their findings were based upon the true construction of the document and that they were uninfluenced by the fact that in Queensland it was usual "to sell or contract to sell land only by a written instrument in a particular form i.e. that approved by the Law Society and Real Estate Institute"⁷⁴.

It is equally true to say in some situations that even though the reference to the formal agreement is not expressed as a condition, the preparation of the formal document may nevertheless be treated as a condition precedent to the formation of a concluded contract. If one again considers that parties commonly intend not to be bound until a formal contract is executed either because they consider that additional terms may need to be negotiated or renegotiated or because they wish to protect themselves from the risks of an "open contract", it would seem to follow that the more detailed the terms of agreement,

⁷³(1977) 15 A.L.R. 423

⁷⁴id. per Barwick C.J. 416, per Aiken J, 426

the less complexity attached to the transaction and the fewer the risks of an open title, the more likely it is that the agreement will be held to be enforceable. This is true to some extent but not invariably. In each case the question will be one of construction, bearing in mind the objective effect of the words used.

An early example of the situation in which the preparation of the formal document was held to be a condition precedent, although the reference was not worded as such is the decision in Chinnock v Ely⁷⁵.

There a real estate agent was authorised to find a buyer for a property belonging to the Marchioness of Ely, but on the basis that he was not to conclude a contract or commit his principal in writing because the property was to be sold subject to conditions as to title and it was, therefore, necessary that a formal agreement be prepared by the Marchioness's solicitors. The agent found a prospective purchaser but adhered to his instructions. Some time later, the Marchioness's solicitors wrote to the intended purchaser concerning the negotiations, stating that they were instructed to proceed with the sale and that a draft contract was being prepared and would be forwarded shortly. It was held that the letter amounted to no more than the solicitors saying that they took the matter up where it had stopped and that they would continue the negotiations with a view to preparing a contract, the terms of which were acceptable to both parties. The stipulation as to the formal contract was a term of the assent and there was no agreement independent of that stipulation.

⁷⁵₄ De G.J. and S. 638

A recent illustration of the principle is provided by the unreported New Zealand decision in Walker v Bower⁷⁶. The plaintiffs had negotiated for the sale to them by the defendants of a section being part of an area of land not yet subdivided. The plaintiffs decided that they wished to purchase the section, the price and the deposit were agreed and the plaintiffs then tendered to the defendants a document, which was essentially a receipt, which the defendant signed. The document contained the names of the parties, a description of the property and the price, but also the words "... deposit ... to be held pending formal contract being drawn up by vendor's solicitor upon normal terms and such contract being acceptable to purchaser's solicitor and subject to the purchasers within seven days being unconditionally satisfied as to the building rights on the section."

Wilson J, in giving judgment for the defendants, found that the word "pending" gave the impression that the deposit was to be held in suspense until a contract had been drawn up in acceptable form. He concluded "the use of the word 'pending' followed by the conditions, leaves me satisfied that there was no contract binding on the defendants or on the plaintiffs until the vendor's solicitor had drawn a document on normal terms, and in a form acceptable to the purchaser's solicitor."

A similar result was achieved in Edgewater Development Co v Bailey⁷⁷, where the document relied on by the plaintiff was in the following terms:

⁷⁶High Court, Auckland, 13.2.75 (A 574/74) Wilson J

⁷⁷(1974) 230 E.G. 971 (C.A.)

The below-mentioned parties hereby agree that the property consisting of six cottages and adjoining land at Carlow Road ... shall be sold by Mrs Bailey of 26 Roseberry Street, Kettering, to the Edgewater Development Company, Burton Latimer, on the following conditions:

- (a) The purchase price to be 4,000 (pounds) payable ten percent deposit upon receipt of contracts, balance of purchase price on completion (time to be set by vendor's solicitors); and
- (b) The Edgewater Development Company are to bear all legal costs for both the purchaser and the vendor in this transaction.

The Court of Appeal, Denning MR, Cairns & James LJJ, held that the document did not constitute a binding written contract as it clearly indicated, that there were various terms which were not settled and that the parties were leaving these to be arranged and agreed at the time when the actual contract was signed. The sentence regarding completion and stating "Time to be set by vendor's solicitors" plainly meant that the vendor's solicitors were to insert the date at the time contracts were exchanged. There was also no agreement as to the time at which possession was to be given and whether it should be "vacant" possession. Although there was authority for the proposition that in the absence of express terms, there was an implied term that vacant possession should be given on completion, it was not possible to read such an implication into the document in the instant case having regard to the surrounding circumstances and given that the property comprised six cottages all of which were individually let. Finally, it was the Court's view that a deposit was normally paid either before or at the time of the contract but not after the contract.

Walker v Bower⁷⁸ and the Edgewater Development Co⁷⁹ case may be contrasted with the decision of the High Court of Australia in Niesmann v Collingridge⁸⁰ which was referred to in Masters v Cameron⁸¹ as an example of a case in which the reference to the formal document was held to be a condition subsequent. There the defendant, for a small consideration, gave the plaintiff a written document which purported to give to the plaintiff "the firm offer" of a specified property at a specified price, part of which was to be payable "on the signing of a contract" a further part three months afterwards and the remainder three years afterwards. The High Court (Knox CJ, Rich & Starke JJ) unanimously held that upon the plaintiff's acceptance of the offer, a binding contract for the sale of the property was constituted. Rich and Starke JJ stated:⁸²

The provision for payment of the purchase monies on the signing of the contract was not, however, in our opinion, a mere expression of the desire of the parties as to the manner in which the transaction already agreed to would in fact go through ... nor was it a condition of agreement. It was a "term of the bargain". Thus, the purchaser could not be compelled to pay the purchase money unless the contract was signed. It was a condition of the obligation to pay ... (As) the parties made the signing of a contract a term of their bargain, there is no difficulty ... in decreeing specific performance of the agreement, and so compelling the performance of a stipulation of the agreement necessary to its carrying out and due completion."

Niesmann v Collingridge⁸³ was applied in Godecke v Kirwan⁸⁴.

⁷⁸Supra note 76

⁷⁹Edgewater Development Co v Bailey supra note 77

⁸⁰(1921) 29 C.L.R. 177

⁸¹Supra note 69

⁸²Supra note 80, at p 184-185

⁸³Supra note 80

⁸⁴(1973) 129 C.L.R. 629

Both parties had signed a formal document entitled "Offer and Acceptance" which comprehensively recorded the terms of sale in no less than eleven clauses with added "special conditions". A provision to the effect that possession should be given and a further instalment of the purchase monies paid "upon signing and execution of a formal contract of sale within 28 days of acceptance of this offer" was held by the High Court of Australia not to amount to a condition precedent to the existence of a concluded contract but to "a condition of the performance of one or more of the terms of an agreement by which the parties are immediately bound"⁸⁵ and thus to belong to the second of the three classes described in Masters v Cameron⁸⁶.

3. Expression of Mere Desire as to Form

Where parties have reached a detailed agreement as to terms it is more difficult to infer that they should intend the preparation of the formal document to operate as a condition precedent to the existence of a concluded contract. In this context, the facts as they appeared in Chinnock v Ely⁸⁷ may be contrasted with those later considered by the House of Lords in Rossiter v Miller⁸⁸. For present purposes, these were that the vendors sought to dispose of a large area of land which had been divided into lots. They had prepared a plan on which the lots were shown together with a number of printed conditions of sale. The conditions related to price, title, various

⁸⁵id 641

⁸⁶Supra note 69

⁸⁷Supra note 75

⁸⁸(1878) 3 App. Cas. 1124

building line restrictions, roads and bridges and the use to which the land was to be put and they concluded with the stipulation

Each purchaser will be required to sign a contract embodying the foregoing conditions and providing for the payment of a deposit at the rate of ten percent on the amount of the purchase money, and for the completion of the purchase at the expiration of, not exceeding two months from the date of the contract. The costs of such contract will be included in the fixed charge for the conveyance provided for by the first stipulation.

The defendant approached the vendors' agent with regard to certain lots and was expressly informed that he must purchase subject to the conditions stated on the plan. He subsequently offered to purchase some of the lots for a price which he named. The agent said that he would refer the offer to the vendors and subsequently he wrote to the defendant advising him that the vendors had accepted the offer, subject to the conditions on the plan, and that their solicitors would shortly forward to him an agreement for purchase. The defendant replied raising a query as to the time at which he should start to build, but otherwise restating his original offer. The vendors' agent wrote confirming that the vendors required no undertaking as to when building work should commence. The vendors' solicitors later sent to the defendant the agreement for sale, but the defendant refused to sign the agreement or to complete the purchase.

The House of Lords held that the correspondence constituted a written contract and granted the vendors specific performance, Lord Blackburn stating⁸⁹:

I quite agree ... that ... it is a necessary part of the plaintiff's case to show that the two parties had come to a final and complete agreement, for, if not there was no contract. So long as they are only in negotiation either party may retract; and

⁸⁹id 1151

though the parties may have agreed on all the cardinal points of the intended contract, yet, if some particulars essential to the agreement still remain to be settled afterwards, there is no contract. The parties, in such a case, are still only in negotiation. But the mere fact that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared, embodying the terms, which shall be signed by the parties does not, by itself, show that they continue merely in negotiation. It is a matter to be taken into account in construing the evidence and determining whether the parties have really come to a final agreement or not. But as soon as the fact is established of the final mutual assent of the parties so that those who draw up the formal agreement have not the power to vary the terms already settled, I think the contract is completed.

The reference to the formal agreement was held to amount to no more than an expression of a mere desire to put into a more formal or professional shape the contract which the two parties, with unity of purpose, had completely formed. The contract which the defendant was required to sign

... will not be a contract at the arbitrium of the vendors, not a contract the terms of which they do not know, not a contract the provisions of which they will see for the first time when it is offered to them to sign, but a contract to which the vendors are content, beforehand, to bind and oblige themselves that it will assume the shape of these stipulations, and no other shape.⁹⁰

A similar decision was reached in New Zealand in Smith v Matheson⁹¹. The parties were both tradesmen and had been negotiating the sale to the plaintiff of the defendant's business premises together with a vacant section. The plaintiff ultimately travelled to visit the defendant, spending the night at the defendant's home. During the course of the evening, all the terms of the transaction had been fully discussed and agreed. The following day the parties attended at the offices of the defendant's accountant who was instructed to prepare a memorandum recording the parties'

⁹⁰id 1132

⁹¹[1945] N.Z.L.R. 291

agreement. This the accountant did, in the presence of the parties, and the defendant later wrote to the plaintiff enclosing a copy of the memorandum. The memorandum accurately recorded the names of the parties, the price and the subject matter. It also recorded in some detail the stock and book debts to be included in the sale, the name under which the plaintiff was to trade, the fact that the vendor was to be employed as manager for a specified duration and at a specified wage, the fact that ownership of the premises was to be retained by the vendor the purchaser leasing the premises on specified terms and at all times having the option to purchase the premises for a specified price, the manner in which the purchase monies for the business and town section were to be paid and the interest rate payable on unpaid instalments.

Northcroft J found on the evidence that the parties had expressly discussed and agreed that a formal document should be drawn up by a solicitor embodying the terms of the contract. He held, however, that this fact did not of itself prevent the agreement already reached from being regarded as a concluded contract even if express reference to the formal document had been made in the memorandum itself. It was evident that the parties had reached agreement as to all essential terms and it was not open to the defendant to claim that there had been no agreement merely because he was subsequently able to call to mind terms which he desired to have included but which were not in fact included in the agreement made between the parties.

Similarly, in the Canadian case of Lake Ontario Cement Co v Golden Eagle Oil Co Ltd⁹² a reference to a formal contract in an

⁹²(1974) 46 D.L.R. (3d) 639

exchange of correspondence was found not to be inconsistent with the immediate formation of a binding agreement at the time of the exchange.

The plaintiff manufactured cement and concrete products and had entered into negotiations with the defendant for the supply of fuel oil to its production plant. The defendant submitted a detailed and comprehensive proposal for the supply of oil for a five year period and the plaintiff replied expressing its assent to the proposals but requesting that consideration be given to the inclusion of certain other specified provisions. The letter concluded "Please be advised that if this is acceptable to Golden Eagle then we would like to enter into an agreement ... on the basis of a formal contract ... as soon as possible." The manager of the defendant's refinery sales telephoned the plaintiff to advise that the counter-proposals had been accepted by the defendant. He confirmed the telephone conversation in a subsequent letter to the plaintiff, stating that a draft contract would be prepared in accordance with the agreed terms.

The plaintiff then began to arrange for the installation of storage tanks and pipes and it commenced negotiations with a shipping company for transportation of the oil. Representatives of the defendant company were invited to attend, and did attend, a meeting with the shipping company so as to provide confirmation of the agreement for supply. However, as time elapsed and despite repeated assurances from the defendant the draft contract did not materialise. After a delay of some six months, during which time the prices for oil had increased dramatically, the defendant informed the plaintiff that it could not afford to supply the oil on the original basis. It was suggested that the plaintiff should take oil at the current refining cost without profit to the defendant but the plaintiff

declined to renegotiate on the basis that the increased price would result in it too incurring major losses.

Parker J, in the Ontario High Court, held that an agreement had been reached at the time the plaintiff's counter-proposals were accepted by the defendant. Both parties, by their words and conduct, had clearly evinced an intention that the agreement should be final and binding and there remained nothing which could be the subject of further negotiation or clarification. The reference to the formal document was not a condition "but an expression that the terms agreed upon be put into a formal document"⁹³.

A case which can be regarded as an example of a situation in which the risks of an "open contract" were somewhat reduced is the Irish decision in Law v Robert Roberts & Co.⁹⁴ There the defendant, a limited company, offered leasehold premises for sale through a firm of land agents. The plaintiff and his solicitor viewed the premises with an employee of the firm of land agents who provided the plaintiff's solicitor with a copy of the lease for the premises. The plaintiff's solicitor subsequently communicated a verbal offer to the agents. The agents in turn referred the offer to the defendant's managing director who, after consultation with the company's other directors, ultimately advised the agents that the offer had been accepted. The agents then wrote to the plaintiff's solicitor confirming that his offer in the named amount had been accepted by the defendant and in conclusion stating that the defendant's solicitors would be asked to forward a contract immediately. On the same day

⁹³id 673

⁹⁴[1974] I.R. 292 (High Court and Supreme Court judgments reported together)

the agents wrote a corresponding letter to the defendant's managing director confirming that the plaintiff had agreed to purchase and requesting that the company's solicitors be instructed to forward a contract directly to the plaintiff's solicitor. The defendant's managing director wrote to the company's solicitor stating "We have today sold the above premises" and instructing them accordingly.

Kenny J held at first instance that the communications between the parties and the agents had resulted in a concluded oral contract. The parties and the property were identified and the price and completion date agreed. While taking judicial notice of the fact that there was a written contract prepared and signed by both parties in most of the sales of property in Dublin, he found that the agents were authorised to conclude an oral contract binding upon the defendants. The agreement made contained no stipulation as to title and was, therefore, an "open contract" the result of which being that the plaintiff would not be entitled to call for the title to the freehold and the title to be shown by the defendant would start with the defendant's lease.

Having cited with approval the decisions in Rossiter v Miller^{94a} and Van Hatzfeldt Wildenburg v Alexander^{94b}, Kenny J found that the letters constituted a sufficient memorandum of the oral contract and, as a matter of construction, did not make the execution of a further contract a condition of the bargain. The decision was unanimously upheld by the Supreme Court (O'Dalaigh CJ, Lavery & Haugh JJ) the Court merely expressing its concurrence with the decision of Kenny J upon all points.

At first instance Kenny J made express reference to the fact that the plaintiff's solicitor had formerly been employed by the firm of solicitors who acted for the owner of the freehold. He was,

^{94a}Supra note 88

^{94b}[1912] 1 Ch. 284

therefore, personally aware that her title was good and he had already had the opportunity to peruse the existing lease to the premises. The existence of these factors and the manner in which the transaction proceeded tended to point away from an intention on his part that his client should be bound only by a formal agreement.

IV. CARRUTHERS v WHITAKER

In the cases hitherto discussed, the parties have either expressly agreed that the terms of their bargain shall be made the subject of a formal agreement or, alternatively, reference to a formal agreement has been contained in the writing relied on as constituting either the contract or the memorandum. What is the situation, however, where parties who have reached a certain stage in their negotiations simply refer the matter to their solicitors with the intention, or at least the effect, that a formal agreement will be afterwards prepared? Does execution of the formal document then become a condition precedent to the existence of a contract or is it a mere formality, the intention of the parties being merely to record in a more formal or precise manner the terms which have already been agreed? In theory, the same considerations, already discussed, should apply. As will become apparent, however, it is essential at the outset to distinguish between a "written contract" and an oral contract, where the writing is relied upon as a memorandum of the terms.

The starting point for the discussion in this area in New Zealand is the Court of Appeal decision in Carruthers v Whitaker⁹⁵. The facts, briefly stated, were that the plaintiff entered into oral negotiations with the defendant for the purchase of the defendant's farm. The latter indicated that he would be prepared to sell the farm as a going concern for a specified price. There was some discussion, in general terms, as to what should be included in the price and the following day the plaintiff contacted the defendant and indicated that he wished to purchase the property. The parties later instructed their respective solicitors. The defendant's solicitor drafted an agreement for sale and purchase and, after obtaining his client's approval as to its terms, forwarded it to the plaintiff's solicitor for perusal and signature. The plaintiff duly attended at the offices of his own solicitor whereupon he signed the agreement, completed a landless declaration and handed over the deposit monies. The agreement and the deposit were later forwarded to the defendant's solicitor who in turn sent the plaintiff's solicitor a receipt. The defendant subsequently refused to proceed with the sale on the grounds that his doctor had advised him that to leave the farm would be detrimental to his health.

The plaintiff sought an order for specific performance on the basis that the parties had concluded an oral agreement of which the draft contract and the receipt were a sufficient memorandum or, in the alternative, that the letter forwarded by the vendor's solicitor, enclosing the draft agreement, amounted to an offer to sell on the terms contained in the draft agreement which offer was accepted by

⁹⁵ [1975] 2 N.Z.L.R. 667

the plaintiff when the agreement was signed and it was returned to the vendor's solicitor. It was argued for the defendant that the intention of the parties was that neither should be bound until a formal document had been executed by them both, that event, therefore amounting to a condition precedent to the existence of a concluded contract. In support of this contention, the defendant placed reliance on the "subject to contract" cases and their analysis in Masters v Cameron⁹⁶.

At first instance⁹⁷, Wilson J found that the negotiations which took place on the farm had not resulted in a concluded oral contract because they were carried out subject to the preparation of a formal document. But the parties' intention didn't extend as far as actual execution of the document but only as to approval of its terms and, once this condition had been satisfied, there was a binding contract between them. Wilson J accepted the plaintiff's contention that this had occurred when the draft agreement, the terms of which were approved by the defendant, was forwarded to the plaintiff's solicitor under cover of the defendant's solicitor's letter and the offer therein contained had been accepted by the plaintiff's signature and the agreement's return.

Pausing here it is submitted, with respect, that if what was relied upon was in fact a written contract (there being no oral contract) then it is somewhat artificial to assert that the parties intended not that the agreement be "signed" but only that it be "approved". At this point one might consider whether it was possible

⁹⁶(1954) 91 C.L.R. 353

⁹⁷Whitaker v Carruthers [1975] 1 N.Z.L.R. 372

to say instead that the preparation and execution of the formal document was not a condition at all, but merely the means to be adopted to record the agreement already concluded. In other words, that the situation fell within the first category of the Masters v Cameron⁹⁸ analysis. However, Wilson J went on to give a further reason as to why the case was not within the "subject to contract" rules, in the technical sense, this being that "the contract signed by the plaintiffs was not a more formal record of the terms discussed but a new and significantly different contract"⁹⁹ in so far as it was expressed to be "subject to finance" and contained alternative provisions to those discussed regarding the quantity of hay which the defendant was to leave on the farm. Remaining with the offer and acceptance analysis, Wilson J concluded that the signature of the defendant's solicitor was sufficient to bind the defendant, he having approved the draft agreement and thereby having authorised his solicitor to convey the "offer" to the plaintiff. Accordingly, Wilson J gave judgment for the plaintiff and ordered that the agreement be specifically performed.

The defendant appealed against the judge's findings both that there was a concluded contract and that there was a sufficient memorandum to satisfy the statute¹⁰⁰. The appeal was allowed, the Court of Appeal (McCarthy P, Richmond and Woodhouse JJ) having held that the parties intended to enter into a binding contract only by way of the formal agreement executed on both sides and that the vendor's solicitor's letter and enclosed draft amounted only to an

⁹⁸Supra note 96

⁹⁹Supra note 97 at p 378

¹⁰⁰[1975] 2 N.Z.L.R. 667

invitation to treat. The judgment of the Court of Appeal was delivered by Richmond J who stated¹⁰¹

It is established by the evidence ... that at the time when the parties instructed their respective solicitors they all had in mind only one form of contract which would govern the sale and purchase of the farm, namely, a formal agreement in writing to be prepared and approved by the solicitors. When parties in negotiation for the sale and purchase of property act in this way, then the ordinary inference from their conduct is that they have in mind and intend to contract by a document which each will be required to sign. It is unreasonable to suppose that either party would contemplate that anything short of the signing of the document by both parties would bring finality to their negotiations. Furthermore, both parties would expect their solicitors to handle the transaction in a way which would give them proper protection from the legal point of view. There is no evidence in the present case to rebut this prima facie inference.

Richmond J relied strongly upon the judgment of Lord Greene M R in Eccles v Bryant¹⁰² having found that although the arrangement there was expressed to be "subject to contract" there was nevertheless a marked similarity between the two cases. He cited with approval the passage from Lord Greene's judgment where, after reaffirming that the manner in which a binding contract is to be created is dependent on the intention of the parties, Lord Greene continued¹⁰³

In such a contract as this, there is a well-known, common and customary method of dealing; namely, by exchange, and anyone who contemplates that method of dealing cannot contemplate the coming into existence of a binding contract before the exchange takes place.

Richmond J considered that in New Zealand the common practice was to obtain the signature of both vendor and purchaser to both copies of the agreement. He went on to refer to the decision in

¹⁰¹id 671

¹⁰²[1948] Ch. 93

¹⁰³id. 99

Storer v Manchester City Council¹⁰⁴, where the English Court of Appeal had found that the contract came into existence prior to exchange, but concluded that the case turned on special facts of which Lawton L J had said¹⁰⁵

(they were) enough to rebut the inferences which are normally to be drawn as to the intention of the parties when there are negotiations for a contract of sale carried out between solicitors - the inferences that should be drawn in the kind of situation with which Eccles v Bryant was concerned.

Finally, Richmond J held that whereas in Eccles v Bryant¹⁰⁶ the intention to be bound only by formal contract emerged from the words "subject to contract" and from the circumstances that the transaction was in the hands of solicitors, in the instant case it emerged from the parties' conversation and the solicitors' letters all of which led to the further inference that the manner of becoming bound should be the ordinary and customary method.

It should be remembered, however, that when Lord Greene M R in Eccles v Bryant¹⁰⁷ spoke of "a contract such as this" he was referring to negotiations which were expressly "subject to contract" where "for over a hundred years the courts have held that the effect of the words ... is that the matter remains in negotiation" until a formal contract is concluded¹⁰⁸. Eccles v Bryant¹⁰⁹ merely took the initial proposition a stage further by

¹⁰⁴[1974] 3 All E.R. 824

¹⁰⁵*id.* 829

¹⁰⁶Supra note 102

¹⁰⁷Supra note 102

¹⁰⁸Tiverton Estates Ltd v Wearwell Ltd [1975] Ch. 146 per Lord Denning 159-160

¹⁰⁹Supra note 102

declaring that in England a formal contract is not "concluded" until, in addition to the documents having been executed, they are also "exchanged".

In Storer v Manchester City Council¹¹⁰ the English Court of Appeal found that the contract, for the sale to the plaintiff of the council house in which he lived, was concluded when the Council made an "offer" in the form of the draft agreement forwarded with its accompanying letter, which was "accepted" when the plaintiff signed and returned the agreement. The parties' correspondence was not expressed to be "subject to contract" and the Town Clerk's letter, under cover of which the agreement was forwarded, was unequivocal in its terms. It referred to the "agreement for sale" as opposed to a draft agreement and stated "If you will sign the agreement and return it to me I will send you the agreement signed on behalf of the Corporation in exchange." Moreover, the transaction proceeded against the background of the Council's stated policy which was to dispense with the full legal formalities in allowing tenants to purchase their houses. There was to be no investigation as to title and the document devised by the Council was intended as "a simple form of agreement which could be entered into to enable the sale to take effect at the earliest possible date".

Arguably, when Lawton L J spoke of the "inferences which are normally drawn ... when there are negotiations ... carried out between solicitors - the inferences which should be drawn in the kind of situation with which Eccles v Bryant was concerned"¹¹¹ he was merely emphasising that in the normal course of events, a transaction

¹¹⁰Supra note 104

¹¹¹Storer v Manchester City Council supra note 104 at p 829

proceeding with the full legal formalities and conducted by English solicitors would be expressly "subject to contract" and not, therefore, binding until exchange. Lawton L J found that the Council's intention was that when the tenant fully signed, the house was his and the language of the Town Clerk's letter was consistent with that intention. This view is seen to be supported by the judgment of Lord Denning M R in which he stated "where there is no agreement 'subject to contract' the only question is whether a contract has been concluded"¹¹².

But in Carruthers v Whitaker¹¹³, Wilson J's finding that the document included terms which differed from those orally discussed precluded the Court of Appeal from holding that the parties intended to be bound by anything other than the formal document. Leaving aside for the meantime the application of the authenticated signature fiction, it was almost impossible to conceive that a written contract could be concluded by anything less than the signature of both parties to the document.

It is, therefore, possible to reconcile Carruthers v Whitaker¹¹⁴ with earlier New Zealand decisions, for example, the decision in Saunderson v Purchase¹¹⁵, when at first glance the position might appear otherwise. In Saunderson v Purchase, Finlay J found that the parties had reached an oral agreement as to all essential terms.

¹¹²*id.* 827

¹¹³*Supra* note 100

¹¹⁴*Ibid*

¹¹⁵[1958] N.Z.L.R. 588. Also Smith v Matheson [1945] N.Z.L.R. 291

The solicitor acting for the defendant-vendor subsequently prepared a formal agreement which was given to the plaintiff-purchaser. The plaintiff signed the agreement, paying a deposit to the land agent who had been authorised by the defendant to conclude the sale of the property. The agent signed and gave to the plaintiff a receipt. Later the defendant purported to sell the property to a third party at an increased price.

Finlay J found that the defendant's solicitor had been authorised to prepare the formal agreement and that in doing so he had correctly stated the terms of the parties' oral contract. The signature to the receipt was affixed by the agent, once again with the defendant's authority and, on the basis of the decision in Timmins v Morland Street Property Co Ltd^{116a}, the two documents could be read together thereby constituting a sufficient memorandum of the concluded oral contract.

Almost contemporaneously with the decision in Carruthers v Whitaker^{116b}, a similar result was achieved by the High Court of Australia in Allen v Carbone¹¹⁷. The plaintiff-purchaser sought to rely on an oral agreement as evidenced by an authority given by the defendant to a real estate agent, who was also the plaintiff's brother, in the following terms:

I authorise and direct you to sell my property [then described] to [the plaintiff] for [a specified price] ... You are authorised to accept a deposit of 10 percent of the purchase price and I will enter into a Contract for Sale in the form approved by the Real Estate Institute of New South Wales.

Particular consideration was given to the practice of drawing

^{116a}[1958] Ch. 110

^{116b}Supra note 100

¹¹⁷(1975) 132 C.L.R. 528

"inferences", it having been argued for the plaintiff on appeal that the trial judge should have confined himself to construing the language used by the parties in the course of the conversation in which it was said a concluded agreement had been reached. The High Court (Stephen, Mason and Murphy JJ) stated:¹¹⁸

No doubt it is right to say that the intention of the parties to a contract wholly in writing is to be gathered from the four corners of the instrument. The same may be said when parties have brought into existence a document intended to comprehensively record the terms of an agreement thus far reached, notwithstanding that it makes provision for the subsequent execution of a more formal contract which may contain terms not yet agreed. But even in these cases it is legitimate in the course of construing the document to have regard, when appropriate, to subject matter and surrounding circumstances. Here, however, we are concerned not with the construction of a written contract or document in the senses already discussed, but with an informal agreement arising out of an oral conversation In resolving this dispute it is legitimate to ascertain the terms of the agreement then made by the parties, that is to say what the parties relevantly intended, by drawing inferences from their words and their conduct in the making of that agreement. Where parties reach an agreement which is expressed informally ... the terms of their bargain are not ordinarily recorded in meticulous detail ... To ascertain their intention it is often necessary to resort to inference, a process for which there is little or no scope when the parties have taken care to comprehensively record the terms of their agreement in written form.

The Court concluded that the trial judge had had ample material from which to infer as he did, that the parties mutually contemplated that the contract should come into existence only on the signing and exchange of the formal document. The first consideration in this respect was that the usual method of selling real estate in New South Wales was by means of the signing and exchange of contracts. Secondly, it appeared that no departure from the usual method was intended because there had been no discussion of the terms (other than price) which one would expect to find in a binding

¹¹⁸id. 531-532

contract for the sale of real estate. Thirdly, and most importantly, the agent's written authority made it plain that the parties were to enter into a formal contract containing additional terms and the agent had acted in conformity with the parties' intention in instructing the defendant's solicitor to prepare a draft contract to be forwarded to the plaintiff.

V. THE SUBSEQUENT CASES

The Court of Appeal subsequently applied its decision in Carruthers v Whitaker¹¹⁹ in Concorde Enterprises Ltd v Anthony Motors (Hutt) Ltd¹²⁰. The alleged agreement in that case did not relate to the sale and purchase of land but rather to the manufacture of supplies of an emulsion producing gun by the plaintiff, Concorde Enterprises, and their purchase and distribution in Australia by the defendant, Anthony Motors.

The plaintiff alleged that a written agreement had been concluded in the course of the exchange of correspondence between the parties' solicitors. The evidence showed that the defendant's solicitor had requested the plaintiff's solicitor to prepare a draft agreement containing proposed terms which were initially outlined to him under some thirteen separate heads. The parties themselves later met at the defendant's business premises and further negotiations took place. The plaintiff's solicitor prepared and forwarded a draft agreement which included several alterations to the proposed terms and in the course of a subsequent telephone conversation, the defendant's solicitor suggested yet additional amendments which were

¹¹⁹[1975] 2 N.Z.L.R. 667

¹²⁰[1981] 2 N.Z.L.R. 385

agreed to by the plaintiff's solicitor. The defendant's solicitor was to confirm that his client consented to the additional amendments and he later did so by letter addressed to the plaintiff's solicitor. The plaintiff's solicitor replied, recording his client's agreement also and advising that he would have the agreement retyped and forwarded to the defendant's solicitor for execution. The plaintiff contended that a contract had been concluded by the defendant's solicitor's letter or alternatively that the letter amounted to an offer which had been accepted by the plaintiff's solicitor's letter.

The judgment of the Court of Appeal (consisting of Cooke, Richardson & Somers JJ) was delivered by Cooke J who reaffirmed that the test to be applied to determine the existence of a contract was an objective one regardless of whether the classical analysis of offer and acceptance was adopted or the wider approach referred to in Boulder Consolidated Ltd v Tangaere¹²¹. The Court found that the negotiations had been conducted partly between the solicitors, with reference back to their respective clients, and partly between the parties directly but that the purpose of the negotiations was to have prepared by the manufacturer's solicitors and executed by both parties an important commercial agreement of some complexity. Cooke J referred to the decision in Carruthers v Whitaker¹²² citing with approval passages in the judgment delivered by Richmond J. He held that although in the field of commercial contracts there was no need for signed writing as evidence yet the inference, that parties who have in mind a formal agreement in writing to be prepared and approved by solicitors intend to contract by a document which each

¹²¹ [1980] 1 N.Z.L.R. 560

¹²² Supra note 119

will be required to sign, was the same in the absence of factors to the contrary. In the instant case there was nothing to displace the natural inference at the time the negotiations began and while it was possible that the parties might subsequently have become "ad idem" and might have then intended to be bound in the absence of signature, such a new turn in their intentions could not be unilateral. Applying the objective approach, Cooke J held that it was impossible to extract or construct from the correspondence, or from the negotiations as a whole, any agreement that the contract was to be treated as made in the absence of execution.

Given the facts as they existed in the Concorde Enterprises¹²³ case, it is difficult to envisage that a contrary result could have been achieved. This was not a situation where the parties had reached a concluded agreement, later deciding to reduce it to written form but rather a case where the preparation, approval and execution of a formal agreement had been contemplated from the outset. The negotiations had taken place throughout with express reference to the formal agreement which was in turn redrafted in the light of each subsequent amendment. The parties intended to contract by means of the formal document and, as in Carruthers v Whitaker¹²⁴ it was virtually impossible to infer in these circumstances that they should intend to be bound upon mere approval of the terms included in the document rather than upon execution of the document itself.

A similar situation arose in the unreported case of Strack v

¹²³Concorde Enterprises Ltd v Anthony Motors (Hutt) Ltd
Supra note 120

¹²⁴Supra note 119

Alpers Motel Limited¹²⁵. The plaintiff who resided in Christchurch had been interested for some time in purchasing the motel business of the defendant company in Auckland. The parties had at one stage entered into a conditional agreement for the sale and purchase of the business, but this had ultimately lapsed. Some time later, the plaintiff was approached by a real estate agent who agreed to act as the plaintiff's agent with a view to securing his purchase of the motels. The agent was subsequently authorised by the defendants to sell the motels. After making certain enquiries as to the defendant company's books, the plaintiff decided to submit a further offer and an agreement for sale and purchase was prepared by the agent and forwarded to the plaintiff for perusal and signature. The plaintiff's solicitors made certain amendments to the agreement and it was then signed by the plaintiff and returned to the agent for submission to the defendant. However, the two directors of the defendant company, a Mrs Morton and a Mr Page, were not happy with the agreement and requested two further amendments. The agent telephoned the plaintiff regarding the amendments and the plaintiff later sent the agent a telegram advising that the amendments were acceptable. The agreement and the telegram were delivered to the directors who took the documents to their solicitors. Mr Page ultimately signed the agreement and advised the agent that he had done so but Mrs Morton refused to proceed further with the transaction.

It was argued for the plaintiff that by signing the agreement initially and returning it to the agent the plaintiff had made an offer and that thereafter the two amendments requested by the defendant

¹²⁵High Court, Auckland, 29.11.82 (A 97/81), Wallace J.

amounted to a counter-offer which was accepted by the plaintiff's telegram. It was submitted that the contract had thereby been concluded and that the agreement subsequently signed by Mr Page satisfied the requirements of the Contracts Enforcement Act, 1956. Alternatively, it was contended that a contract was concluded when Mr Page signed the agreement and advised the agent of his acceptance, his signature being sufficient to bind the company in terms of the company's articles and section 42(1)(b) of the Companies Act, 1955.

Wallace J rejected the plaintiff's first argument and held that it was impossible to construe the alterations sought by the defendant as a counter-offer which had been accepted by the plaintiff. This had not been the view of the defendant company's directors and it was, moreover, insupportable against the whole background to the transaction. The situation clearly fell within the bounds of the decisions in Carruthers v Whitaker¹²⁶ and Concorde Enterprises Ltd v Anthony Motors (Hutt) Ltd¹²⁷ in so far as it was one of those occasions where the vendor, to the knowledge of the plaintiff's agent, was to be bound only on the execution of a formal contract. Wallace J found that the plaintiff was also unable to succeed on the basis of the alternative argument put forward. Mr Page's telephone communication to the agent, when viewed objectively, could not be treated as a communication of the defendant company's acceptance because Mr Page had said no more than that he himself had signed the agreement and had left Mrs Morton with their solicitor. Mr Page

¹²⁶Supra note 119

¹²⁷Supra note 120

had at all times made it clear that Mrs Morton's agreement to the sale was crucial and this had been well understood by the plaintiff's agent.

Despite the Court of Appeal's decision in Carruthers v Whitaker¹²⁸ and its subsequent endorsement in Concorde Enterprises Ltd v Anthony Motors (Hutt) Ltd¹²⁹, there remain a number of instances where the High Court in New Zealand has found in favour of an oral contract although the parties have placed their transaction in the hands of solicitors and have contemplated the preparation of a formal agreement.

Of the post Carruthers v Whitaker¹³⁰ decisions, the first in which the "ordinary inferences" were found to be displaced was the case of Newton King v Wilkinson¹³¹. There the vendor wished to dispose of a one fifth acre section which was part of a larger area of land, at the time unsubdivided. He instructed a real estate agent in relation to the sale who later introduced the plaintiff as a prospective purchaser. The parties, who as it happened were both consulting engineers, met on the site and viewed it together. The defendant pointed out the boundaries, advised the plaintiff that there was to be a building line restriction and indicated where it was to run. There was no discussion as to price but the plaintiff took this matter up with the defendant's agent who advised him of the amount of the deposit required and of the purchase price sought by the defendant. The plaintiff later telephoned the agent and told him that he would

¹²⁸Supra note 119

¹²⁹Supra note 120

¹³⁰Supra note 119

¹³¹[1976] 2 N.Z.L.R. 321

like to buy the property and was prepared to pay the quoted price. The agent relayed the plaintiff's offer to the defendant who telephoned the agent the following day and informed him that the offer would be accepted. The plaintiff then paid the deposit to the agent and received the agent's receipt. The defendant's solicitors subsequently wrote to the plaintiff's solicitors regarding the sale. The letter recorded all the material terms of the transaction stating in conclusion that the defendant's solicitors were awaiting the subdivisional plan and that when it was obtained they would forward an agreement for signature. In the meantime the sale sign had been removed from the property, the plaintiff showed the section to several of his friends and visited the surveyors and the defendant, whose offices were in the same building, on one or two occasions to enquire as to the progress of the subdivision.

At the time the plan was deposited, the defendant's solicitor wrote to the plaintiff's solicitor requesting the transfer document. The plaintiff's solicitors replied that they had not received a copy of "the agreement" and asked for a further copy. The defendant's solicitors then realised that there was no agreement in writing and sought the plaintiff's solicitor's comments. In the interim the defendant received a higher offer for the section and subsequently refused to complete.

Beattie J accepted the plaintiff's evidence that he considered that after the payment of his deposit it was only a matter of formality that some process of law would have to be carried through. He was relying on his own solicitor to prepare what was necessary after the plans had been prepared and the survey completed and there was no doubt in his mind that the defendant would not carry out that to which he had agreed. In cross-examination the plaintiff had conceded

that he expected to sign some document setting out the terms discussed but none hand come to hand. According to the plaintiff "there was usually some sort of formality or signing to be done in nearly every deal of this nature" but he considered himself bound to purchase as soon as he had paid the deposit.

Beattie J found on the evidence that the parties' discussions with each other and with the defendant's agent had resulted in a clearly defined oral contract as to the identity of the parties, the identity of the property, the price and the date of settlement and the question of the area and dimensions of the section and the height restriction that was to apply. Moreover, he was absolutely satisfied that the parties had always thought that there was an agreement between them. There being a concluded oral contract, the case was distinguishable from Carruthers v Whitaker¹³² which, for the same reasons, was not at variance with the decision in Smith v Matheson¹³³.

Beattie J then turned to consider whether the oral agreement was evidenced by a sufficient memorandum in writing. He found that the decision in Tiverton Estates Ltd v Wearwell Ltd¹³⁴ had established that to satisfy the statute the writing relied upon had to contain an express or implied recognition that the contract had been entered into in addition to its terms. While the contents of the receipt alone were not sufficient to decide the issue, the letter from the defendant's solicitor was. It contained the words "a purchase" and "purchaser", instead of referring to a proposed sale, and stated "there is to be a

¹³²Supra note 119

¹³³[1945] N.Z.L.R. 291

¹³⁴[1975] Ch. 146

building line restriction". It was not a "subject to contract" letter as had been the letter in the Tiverton Estates¹³⁵ case and the writing in the New Zealand decision in Walker v Bower¹³⁶.

It was argued for the defendant that the existence or otherwise of a prior oral contract was immaterial to the ratio in Carruthers v Whitaker¹³⁷ the test being merely whether it was part of the negotiations, expressly or impliedly, that the transaction should be perfected in writing. Beattie J rejected this argument and in so doing stated:¹³⁸

As I read Carruthers v Whitaker, Wilson J ... found against an oral contract. The case proceeded on the basis of a contract in writing. Accordingly, the decision in my view is not an authority on a sufficient memorandum of an existing contract ... Richmond J ... explicitly makes it clear that the parties had in mind a written contract ... whereas here, the defendant's solicitors asked for a transfer when the only writing was a receipt and two letters. This is indicative ... that the parties never intended their transaction should be suspended until an agreement was signed ... At the time the writing started there was already an oral contract in existence, which situation, in my opinion, excludes the customary and common method of dealing as the only one contemplated by the parties.

Whether the outcome in Newton King v Wilkinson¹³⁹ would have been the same had the vendor's solicitor in fact forwarded a draft agreement is a matter for speculation. The ordinary "conveyancer in the street" might well be tempted to conclude that the vendor's solicitors, given that there was a delay of some months before the plan was deposited, had merely forgotten to forward the agreement or else had assumed that the agreement had been prepared by the

¹³⁵Tiverton Estates Ltd v Wearwell Ltd Ibid

¹³⁶High Court, Auckland, 13.2.75 (A 574/74) Wilson J.

¹³⁷Supra note 119

¹³⁸Supra note 131 at p. 326

¹³⁹Supra note 131

vendor's real estate agent. As regards the parties own expectations, it might also be fairly assumed that of all people consulting engineers would have a fairer idea than most of "the sort of formality or signing to be done in nearly every deal of this nature". But be that as it may, the parties had clearly reached an agreement as to terms in some detail. They were not dealing with one another at arm's length, as was the case for example in Strack v Alpers Motel Ltd¹⁴⁰, and were presumably aware of the practical aspects involved in the subdivision of land, and to be considered when purchasing hill sections suitable for building, even if they were not fully aware of the legal aspects involved.

Once a concluded oral contract is found to exist which is found not to be conditional upon the preparation and execution of a formal document, then it should be irrelevant whether the proceedings are instituted before or after the formal document comes into existence. However, where parties have instructed solicitors and proceedings are brought prior to the preparation of the formal agreement it is open to question whether the parties in fact intended the preparation of a formal agreement at all. So long as a sufficient memorandum of the oral contract exists, parties will not necessarily intend the preparation of a formal document. In fact it is possible to envisage a situation in which a party's legal adviser, perceiving that his client has secured a good bargain or that the other party may be tempted to resile, chooses to rely solely on the oral contract as evidenced in writing, or the informal written agreement, in an attempt to specifically exclude the argument that the "ordinary inferences"

¹⁴⁰Supra note 125

should apply. Such a situation may appear to have occurred in the unreported case of Riley v Jones¹⁴¹.

In the Riley¹⁴² case the plaintiffs were trustees of a family trust established for the benefit of the wife and children of a Mr C Fifield, the brother of the second trustee. Mr Fifield lived next door to the defendant who had separated from his wife some years earlier. The departure of his wife and children from the home had caused the defendant a great deal of emotional stress. He had taken to drinking heavily and had become depressed and even suicidal. Eventually he had tried to burn his house down with the result that although the house was not completely destroyed it was rendered uninhabitable. For some time the defendant then lived in a sleep-out behind the garage before moving to a motor camp. He had no resources with which to reinstate the house and no incentive to keep the grounds in order. Mr Fifield and his wife decided that if they could they would purchase the property partly because they wished to extend their own property and partly because they wished to remove the "eyesore" which the derelict house had become. Mr Fifield, deciding that it would not be wise at the outset to reveal his identity to the defendant, made two offers for the property via agents both of which were rejected. Mr Fifield then approached the defendant personally asking him whether he wished to sell the property and, if so, for how much. The defendant replied that he was prepared to sell and named a price which Mr Fifield said he would pay. The defendant then accompanied Mr Fifield to the latter's home "so that an agreement

¹⁴¹ High Court, Christchurch, 17.11.83 (A 224/81)
Hardie Boys J.

¹⁴² Riley v Jones Ibid

could be made up". Mr Fifield's wife wrote out two notes which were dictated by her husband with the defendant present. The first was headed with the name and address of the defendant and the date and read "I will sell the property (then described) for (the specified price) cash to the Fifield family. Possession date 11.9.81." The name of the defendant's solicitor was recorded at the foot of the note and it was then signed by the defendant. The second note was similarly headed with the name and address of Mr Fifield and the date and read "We will buy the property (then described) for (the specified price) cash. Mr Fifield's solicitor was named at the foot of the note which was signed by Mr Fifield "as agent". Mr Fifield explained that he had signed as agent because he envisaged that the property might be registered in the name of the family trust.

Mr Fifield kept the note which the defendant had signed and sent it to his solicitor and the defendant did likewise. Mr Fifield's solicitor then wrote to the defendant's solicitor with reference to "the contract" and enclosing a memorandum of transfer for execution by the defendant. The defendant refused to proceed with the sale. Although the defendant had at no time discussed his intentions with the Fifields, he had planned to use the proceeds of sale to buy a caravan in which to live and had arrived at the asking price by adding to the cost of the caravan what he thought to be the total value of the encumbrances against the property. However, in so doing, the defendant had miscalculated and had failed to take account of a registered mortgage in favour of his wife on account of her share in the equity of the home. Prior to the hearing, it also transpired that the defendant's family had responded to his plight and there was a possibility that they might provide funds with which to reinstate the building.

The first argument advanced for the defendant was that at the time the notes were signed, the defendant lacked the requisite contractual capacity. *Hardie Boys J* found, however, that the defendant had been well able to think and make decisions in a rational way at the time the discussions took place. The *Fifields* had not known that the defendant was in any way mentally unbalanced nor ought they to have known. Moreover, it was impossible to regard the purchase price as "unfair" to the defendant because it was considerably in excess of the market value as assessed by two independent valuers. The defendant's alternative ground of defence was that the contract notes were signed in the absence of any intention to enter into a legal relationship. Nowhere did they contain words such as "contract", "agreement", "offer" or "accept". The defendant's evidence was that he did not believe that he was entering into a document of legal efficacy at all and the notes should be construed as no more than mutual invitations to treat.

Hardie Boys J found that:

As in any other instance where it is necessary to ascertain the intention of a party to a contract or in a contractual situation, the Court must look at the language which is being used and not at what the party may subsequently say his intention really was. The language used must of course be considered against the relevant factual background, but what the Court is required to ascertain is the effect which, looking at the language which the defendant chose to use, it might reasonably be expected to have upon the mind of the person to whom it was addressed.

While it was an important factor in determining the parties' intention that an offeror had reserved a material term for further negotiation and agreement, this was not the situation in the instant case where agreement had been reached not only as to parties, price and subject-matter, but also as to possession date and as to payment in cash.

Applying the principles as they were expressed in Boulder Consolidated Ltd v Tangaere¹⁴³ and Gibson v Manchester City Council¹⁴⁴ to the facts of the case, Hardie Boys J had no doubt that whatever the defendant's true intention may have been, the contract notes were so expressed as to create a binding contract. This was so regardless of whether they were to be regarded as an offer by the defendant and an acceptance by Mr Fifield or vice versa. They clearly showed a meeting of minds as to the sale and purchase and as to the essential terms thereof. They went far beyond an invitation to treat and showed a concluded contract.

Hardie Boys J went on to hold that he was unable to read into the mere inclusion in the notes of the solicitors names any contractual intention that the contract should be subject to solicitor's approval. Even if he had found otherwise, the Court of Appeal in Provost Developments Ltd v Collingwood Towers Ltd¹⁴⁵ had established that where there was a condition subsequent to this effect the discretion conferred upon the solicitor extended to the "conveyancing aspects" only and not to a consideration of the adequacy of the price. Finally, in regard to the defendant's final submission, Hardie Boys J held that Mr Fifield had sufficiently designated the principal on whose behalf he was entering into the contract.

An example of a situation in which the Court found in favour of a concluded oral contract although the formal document had been

¹⁴³ [1980] 1 N.Z.L.R. 560

¹⁴⁴ [1979] 1 All E.R. 972

¹⁴⁵ [1980] 2 N.Z.L.R. 205

prepared is provided by the recent unreported decision in Anae v Lambert¹⁴⁶. The plaintiff in that case had responded to the defendant's advertisement for the sale of a block of three shops. The plaintiff's husband was familiar with the property which was close to his own business premises and the property and the price met with his and his wife's requirements. The plaintiff's husband, feeling that in the past he had missed out on certain properties because he had been "too slow", telephoned his wife and told her to buy the property and she in turn then arranged to view the property with one of the two defendant vendors, a Mr Lambert. The plaintiff and her husband had had some experience in buying properties and, after inspecting the foundations, the plaintiff offered to purchase the shops for the advertised price which Mr Lambert accepted on behalf of himself and his co-owner, a Mrs Power. Settlement date was agreed and the plaintiff gave Mr Lambert a cheque for a substantial deposit for which he gave her a receipt. The plaintiff then announced " I have got it" and indicated that she was pleased that she had been able to secure the property. Both parties agreed that forms of agreement would be written out so that their solicitors could "process" the sale. Mr Lambert was also experienced in the buying and selling of property and Mrs Power, with whom he lived, worked as a real estate agent. Mr Lambert had already come equipped with a standard form agreement but because he had only brought one copy and it was desirable that the parties should have one each, they agreed that the plaintiff should call at Mr Lambert's home that evening to collect a second copy. The plaintiff duly called at the appointed hour and was

¹⁴⁶High Court, Auckland 11.7.85 (A 1348/84) Hillyer J.

given an agreement for sale and purchase on which the parties' names, the address of the property, the purchase price and the amount of the deposit had been filled in. There was little discussion at the time because the defendants had dinner guests and the plaintiff left with the agreement saying that she and her husband would sign it and return it the following day. However, when the plaintiff contacted Mr Lambert the next day she was told that he and Mrs Power had decided to withdraw the property from the market. The defendants had in fact received a higher offer from a third party.

Hillyer J found that Mr Lambert was authorised to conclude a sale on behalf of both vendors and that the parties' discussion had resulted in an oral agreement as to all essential terms. On the evidence, he concluded "This is not, in my view, a case such as Carruthers v Whitaker ... where the parties did not intend to be bound until a document was signed by both vendor and purchaser." Having found in favour of a binding oral agreement it remained to be considered whether there was a sufficient memorandum to satisfy the statute. However, Hillyer J found that even if the receipt and the agreement could be read together which he doubted, there being insufficient reference in the one to the other, there was a flaw in the alleged memorandum in so far as the documents failed to record the settlement date for the transaction. Although in the absence of agreement the Court could imply that settlement should take place at a reasonable date, this course was precluded where a specific date had in fact been expressly agreed. The date then became a material term of the contract, the absence of which in the memorandum was fatal. In the end result, however, Hillyer J was able to find

sufficient acts of part performance to render the contract capable of enforcement.

There is one further category of case in which the "ordinary inferences" referred to in Carruthers v Whitaker¹⁴⁷ are seen to be rebutted. There is now some authority to suggest that oral or executory agreements to lease¹⁴⁸ will be enforceable despite the fact that a formal lease is to be prepared by solicitors and executed by the parties. That such a result might be achieved is implicit in the judgement of Mahon J in Boutique Balmoral Ltd v Retail Holdings Limited¹⁴⁹, a post Carruthers v Whitaker¹⁵⁰ decision. There the plaintiff had negotiated with the defendant to procure from the defendant a lease of shop premises. After stating the facts, the following passage in Mahon J's judgment appears:¹⁵¹

I find on the evidence Mr Staples and Mrs Ritchie came to an agreement on behalf of their respective companies that, in consideration of a payment by the plaintiff of \$1,500 the defendant would procure a new lease from its own lessors in favour of the plaintiff for a term of five years ... with a right of renewal for five years at a rental of \$36 per week for a period of two and a half years, with a review of the rent to operate as from that time. In addition, the plaintiff was to take over the existing fixtures ... the fixtures in question having been identified and agreed ... Mr Staples, in evidence, strongly denied that any agreement had been reached and contended that the terms and conditions arising out of the negotiations were to

¹⁴⁷Supra note 119

¹⁴⁸Section 2 of the Contracts Enforcement Act 1956 applies to all types of tenancies, with the exception of statutory tenancies. It will also apply to all contracts to enter into a lease of Land Transfer land for a term of not less than three years which, by virtue of the Land Transfer Act 1952 S115, are required to be in writing. For a discussion of the application of section 2 of the Contracts Enforcement Act 1956 to leases and agreements to lease, see Hinde McMorland and Sim "Land Law" Vol. 1 pp 449-452, Vol 2 pp 1017-1018.

¹⁴⁹[1976] 2 N.Z.L.R. 222

¹⁵⁰Supra note 119

¹⁵¹Supra note 149

be set forth in a formal written offer to be sent to the defendant by the plaintiff's solicitors. But I am satisfied on the evidence that a final oral agreement was made in the terms just referred to ... Mr Staples and other directors of the defendant company are businessmen. They were all aware that an agreement of this kind needs to be in writing. They obviously considered that they would not be bound by the verbal arrangement until they had accepted the terms of the written offer to be conveyed by the plaintiff's solicitors. But there was in fact, as I have held, an oral agreement to procure the grant of the lease to the plaintiff in the terms already mentioned and I am satisfied that ... when the fixtures were identified, the oral agreement was complete.

In the Boutique Balmoral¹⁵² case, no writing had passed between the parties. The plaintiff had sought, instead, to rely on acts of part performance which, in the end result, were found to be insufficient. It appears to have been accepted, however, that the oral contract was not subject to a condition precedent as to the execution of a formal agreement. The case also illustrates the point that there are situations in which the parties may be very well aware that agreements for the disposition of land are not enforceable in the absence of writing. They may well intend the preparation of a formal document precisely so as to satisfy the statutory requirements. In such a case the reference to the formal document will not operate as a condition precedent and provided there is a concluded oral contract as to all essential terms it may be enforced so long as some sufficient writing or acts of part performance are found to exist. Similarly in Rossiter v Miller¹⁵³ Lord Cairns L C regarded the plaintiff's stipulation that the purchaser should sign a formal contract as "obvious and natural" because until that point, there being no offer in writing, the purchaser was in no way bound.¹⁵⁴ The purchaser

¹⁵²Boutique Balmoral Ltd v Retail Holdings Ltd, supra note 149

¹⁵³(1878) 3 App. Cas. 1124

¹⁵⁴id 1132

knew and had agreed to all the terms to be incorporated in the formal document and the parties' agreement, therefore, was not to be in any way suspended until the formal document was prepared. That being the case, the fact that the purchaser had not signed the agreement could not avail him when there was other writing sufficient to satisfy the statute.

In a subsequent case, Coachman Properties Ltd v Panmure Video Club Ltd¹⁵⁵, the defendant company had approached the plaintiff company with a view to obtaining an assignment of a lease of premises which were owned by the plaintiff. Negotiations took place between two directors of the respective companies, the plaintiff's director eventually agreeing that if the plaintiff could obtain a surrender of the lease from the existing lessee, it would be prepared to grant a new lease to the defendant company, on specified terms, and on payment by the defendant company of \$3,000 "key money". The defendant acceded to the plaintiff's terms and at the request of the director of the plaintiff company both directors executed a form headed "Memorandum of Agreement to Lease". The form contained all the essential terms of the parties' agreement but included a term "The Lessees will enter into a formal lease with the Lessor to be prepared by the Lessor's solicitors at the cost of the Lessee. Such lease to be in the form usually adopted by the solicitor for the Lessor". The defendant company paid over the "key money" but later decided not to proceed and thereafter stopped its cheque. The plaintiff, having since obtained a surrender of the lease from its current lessee, issued a bill writ in respect of the dishonoured cheque and the defendant company applied for leave to defend.

¹⁵⁵[1984] 2 N.Z.L.R. 200

At the hearing the defendant submitted that, at best, the arrangement at which the parties had arrived was subject to the preparation and approval of a formal lease and, therefore, amounted to no more than "an agreement to agree". Prichard J acknowledged that where parties to an agreement contemplated the preparation of a formal document they might nevertheless intend that their contract should be binding from its inception or, alternatively, they might intend the preparation and execution of the formal document to operate as a condition. It was often difficult to decide into which category a given situation fell and especially so in the case of executory agreements to lease which by their very nature always contemplated performance by the subsequent execution of a lease which would contain other terms not explicitly set out in the document which the parties signed. However, Prichard J found that there was a line of cases¹⁵⁶ which supported the view that it was sufficient to constitute a binding agreement to lease if the terms of the lease (other than those set out in the executory agreement) could be determined by an objective test so that the Court could, if required, determine what provisions the lease should contain. He referred to the decision of the English Court of Appeal in Sweet and Maxwell Ltd v Universal News Services Ltd¹⁵⁷ where the executory agreement had provided that the parties should enter into a lease containing "such other covenants and conditions as shall be reasonably required by (the plaintiff company)". Pearson LJ had said of the clause:¹⁵⁸

¹⁵⁶Eddie v Addison (1882) 52 L.J. Ch. 80; Chipperfield v Carter (1895) 72 L.T. 487; Tooth & Co. Ltd v Bryen (No. 2) (1922) 22 S.R. (N.S.W.) 541

¹⁵⁷[1964] 3 All E.R. 30

¹⁵⁸*id* 42

A formula such as that used ... is a convenient and effective means of dealing with the position where the parties have agreed on the main points, but have not yet settled the details, and wish to make a binding agreement immediately. By using a formula such as this, introducing the objective test of reasonableness, the parties avoid making a mere agreement to agree, which would be unenforceable.

Prichard J found that it was of course necessary to distinguish the cases cited from those in which the executory agreement leaves all the terms of the lease to be subsequently negotiated or uses words such as "subject to" a lease to be prepared. But in the present case the agreement contained no similar expression. Rather, it stated that the defendant "will execute a lease". The most important terms of the lease were set out in the agreement and the remainder were ascertainable by reference to the form usually adopted by the solicitor for the lessor who was named in the document. There was thus provided an objective test by which the Court could, if necessary, determine the additional terms to be included.

Finally, Prichard J considered the effect of the provision that the lease was to be approved by the lessee's solicitors. The cases already referred to indicated that such a term meant nothing more than that the solicitor should be satisfied that the lease contained the proper or usual conditions. It was analogous to "solicitor's approval" clauses found in agreements for sale and purchase of land which did not prevent the formation of a binding contract and were generally held to be subject to constraints.

Coachman Properties Ltd v Panmure Video Club Ltd¹⁵⁹ was applied in the unreported decision of Tompkins J in Langdon v McAllister¹⁶⁰. There the plaintiff sought specific performance,

¹⁵⁹Supra note 155

¹⁶⁰High Court, Auckland 26.7.85 (A 91/83) Tompkins J

in respect of an alleged agreement between the parties for a new lease of office premises to the plaintiff. Tompkins J approached the matter in a way which is found to differ slightly from the traditional Winn v Bull¹⁶¹, Masters v Cameron¹⁶² analysis. He defined the issues for determination as:

- (1) Whether any agreement had been reached at the parties' discussions;
- (2) If so, whether that agreement was sufficiently precise to be enforceable;
- (3) If so, whether the parties intended to be bound by that agreement;
- (4) If so, whether the Contracts Enforcement Act 1956 rendered the contract unenforceable.

Tompkins J found that the parties had reached an oral agreement to lease (although not at the rental contended for by the plaintiff) which was sufficiently precise in its terms. The plaintiff, a firm of solicitors, had for some time previously occupied a part of the premises which were sublet to it by a firm of accountants which in turn leased the whole of the premises from the defendant. Apart from the terms expressly agreed, it was accepted by the parties that the lease itself should contain terms similar to those provided for in the lease formerly held by the accountants. These additional terms could, therefore, be ascertained on an objective test similar to that applied by Prichard J in Coachman Properties Ltd v Panmure Video Club Limited¹⁶³. Tompkins J found that both parties intended to be

¹⁶¹(1877) 7 Ch.D. 29

¹⁶²(1954) 91 C.L.R. 353

¹⁶³Supra note 155

bound by the agreement they had reached although they were both aware that it would not be enforceable in the absence of a sufficient memorandum in writing. With reference to Carruthers v Whitaker¹⁶⁴ and Concorde Enterprises Ltd v Anthony Motors (Hutt) Ltd,¹⁶⁵ Tompkins J stated:

In ascertaining whether parties to an agreement to enter into a lease intend to be contractually bound, different considerations apply from a sale and purchase agreement. In the case of a lease, I do not consider that it would be considered common practice in New Zealand for parties not to be bound until a formal lease has been signed. On the contrary, it is commonplace for prospective landlords and tenants to enter into an agreement to lease on the basis that the important terms are agreed, and the balance of the terms are to be those normally inserted in leases of the kind involved. The parties then regard themselves as bound by the agreement they have reached.

The plaintiff had relied on a series of letters which had passed between the parties as constituting a sufficient memorandum of the oral agreement, however, Tompkins J found that the correspondence failed to record a material term of the parties' agreement, in that it failed to refer to the plaintiff's right of renewal. There being no sufficient acts of part performance, the contract, in the final result, was held to be unenforceable.

VI. CONCLUSION

An English article¹⁶⁶ published shortly after the decision in Tiverton Estates Ltd v Wearwell Ltd¹⁶⁷ puts the proposition that Law v Jones¹⁶⁸ was entirely out of line with authority, not in finding that

¹⁶⁴Supra note 119

¹⁶⁵Supra note 120

¹⁶⁶Article (Anon.) (1975) 39 Conv. (N.S.) 229

¹⁶⁷[1975] Ch. 146

¹⁶⁸[1974] Ch. 112

the letters relied upon constituted a sufficient memorandum, but in finding that a binding oral agreement existed at all. The author's contention is that both before and certainly after the decision in Law v Jones¹⁶⁹, not only have there been occasions where the courts have, in effect, discerned the parties' contractual intent or lack of it from a perusal of subsequent correspondence passing between solicitors but they have also been prepared to find, in some instances, that the parties negotiated on a "subject to contract" basis although the formula itself appears never to have been actually used. The author takes the view that an analysis of many of the recent English decisions reveals that the courts have moved away from an objective determination of the parties intention and have treated a "subject to contract" qualification as having been implied. He concludes:¹⁷⁰

that a new category should be added to the contract books under the old head: 'Intention to Create Legal Relations'. Oral agreements for the sale of land, like social family and domestic arrangements and unlike other commercial matters, now call for the requisite intent to be proved, its absence seemingly being presumed.

The author refers to a number of cases¹⁷¹ in support of his proposition although lacking as they do any intrinsic cross-citation it is impossible to regard them as amounting to a line of authority. It must also be conceded that in many of the cases referred to, the "subject to contract" aspect was not directly in issue, however, the

¹⁶⁹ ibid

¹⁷⁰ Supra note 166 at p.235

¹⁷¹ Smith v Mansi [1962] 3 All E.R. 857; Heywood v B.D.C. Properties Ltd [1963] 2 All E.R. 1063; Goldsmith (F) (Sicklesmere) Ltd v Baxter [1970] Ch. 85; Beck v Box (1973) 231 E.G. 1295; Jones v Morgan "The Times" December 11, 1973, Brightman J; Pateman v Pay (1974) 232 E.G. 457; Damm v Herrtage (1974) 234 E.G. 365.

implication, from the cases taken together, nevertheless appears plain. For present purposes it is perhaps sufficient to illustrate the argument by reference to passages from the judgment of Pennycuik V C in Damm v Herrtage¹⁷² which is one of the most recent of the cases cited. The plaintiff relied on an oral contract as evidenced by a receipt and a series of correspondence which had passed between the parties' solicitors. The parties had not stipulated that the arrangement should be "subject to contract" and the formula did not appear in any of the documents relied on. In finding for the defendant it was nevertheless stated:¹⁷³

A lay vendor and purchaser normally discuss terms in the expectation that if they reach agreement in principle, the terms will be incorporated in a written document with a number of other terms, and that they will not be contractually bound until that written document is signed. It is, of course, possible for them to bind themselves orally, and the purchaser may make it clear to the vendor that that is what he is proposing, but bearing in mind the normal practice in this connection, there is obviously room for misunderstanding, and worse, in this transaction at an oral interview from discussion to binding contract.

The passage above quoted might well sound familiar as it appears to echo the sentiments expressed by Richmond J in Carruthers v Whitaker¹⁷⁴ when he referred to the "ordinary inferences" to be drawn where parties instruct solicitors and have in mind a formal agreement. Carruthers v Whitaker¹⁷⁵ was decided shortly after the English Court of Appeal decision in Tiverton Estates Ltd v Wearwell Ltd¹⁷⁶ and it may be seen to reflect the English

¹⁷²(1974) 234 E.G. 365

¹⁷³id 369

¹⁷⁴[1975] 2 N.Z.L.R. 667

¹⁷⁵ibid

¹⁷⁶Supra note 167

attitudes prevailing at the time. In discussing the decision, the present writer has sought to point out that the Court of Appeal was necessarily required to determine the existence or otherwise of a "written contract", the possibility of a pre-existing oral contract having been expressly excluded by the factual finding of Wilson J at first instance with which the Court of Appeal never sought to disagree. Similarly, it is impossible to take issue with the Court of Appeal's finding in Concorde Enterprises Ltd v Anthony Motor (Hutt) Ltd¹⁷⁷ in which Carruthers v Whitaker¹⁷⁸ was affirmed, as a written contract and nothing but a written contract was expressly contemplated from start to finish.

Taken at face value, however, Carruthers v Whitaker¹⁷⁹ is capable of a much wider interpretation. It is by no means universally accepted that the case is an authority on written contracts alone¹⁸⁰ and it can be argued that the case establishes that the "ordinary inferences" will apply regardless of whether or not the parties could otherwise be said to have reached a pre-existing oral agreement.

As against this wider interpretation of Carruthers v Whitaker¹⁸¹ there remain the numerous authorities, of which the cases previously referred to are but a few, which make it clear that the mere fact that parties instruct solicitors with a view to the preparation of a formal document does not of itself prevent the courts

¹⁷⁷ [1981] 2 N.Z.L.R. 385

¹⁷⁸ Supra note 174

¹⁷⁹ Ibid

¹⁸⁰ E.g. P Blanchard "A Handbook on Agreements for Sale and Purchase of Land" (3d), 210; Hinde McMorland and Sim "Land Law" Vol. 2 p 992.

¹⁸¹ Supra note 174

from finding that the parties have concluded a binding agreement.

At this point it is appropriate to refer to the most recent Privy Council decision in respect of statutory provisions equivalent to those contained in Section 2 of the Contracts Enforcement Act 1956, that of Elias v George Sahely & Co (Barbados) Ltd¹⁸², an appeal from a decision of the Court of Appeal in Barbados. There the parties had reached an oral agreement for the sale to the plaintiff of commercial premises owned by the defendant. The plaintiff's solicitor later wrote to the defendant's solicitor enclosing a cheque for the agreed deposit. The letter set forth all the terms of the oral bargain and requested the defendant's solicitor to hold the deposit as stakeholder "pending completion of the contract for sale" and to forward "the agreement for sale" to be signed by the plaintiff. The defendant's solicitor did not reply to the letter but forwarded to the plaintiff's solicitor a signed receipt in respect of the deposit.

The trial judge found that the discussions which took place between the plaintiff and a director of the defendant company resulted in a concluded oral contract for the sale of the premises together with fixtures and fittings. Nothing had been left to further negotiation or agreement and as the plaintiff had leased the premises from the defendant company for the past fifteen years, there was no difficulty as to identification of the fixtures and fittings. The parties had arrived at an "open contract" to which effect could be given upon the usual terms prevailing in Barbados. The judge rejected the defendant's argument that the letter showed that the arrangement was

¹⁸²[1982] 3 All E.R. 801

"subject to contract". The letter, as a matter of construction, could not be read as indicating that there was no binding agreement prior to the formal contract being drawn up and signed.

Both the trial judge's findings were upheld by the Privy Council (Lord Scarman, Lord Simon of Glaisdale, Lord Edmund-Davies, Lord Bridge of Harwich and Lord Brandon of Oakbrook). Lord Scarman, in delivering the Privy Council decision, held that the receipt signed by the defendant's solicitor could be read together with the letter from plaintiff's solicitor thereby providing a sufficient memorandum of the oral contract. He expressly emphasised:¹⁸³

In seeking a sufficient memorandum it is not necessary to shoulder the further burden of searching for a written contract. Evidence is what the statute requires. For, as Steadman v Steadman ... emphasised, an oral contract for the sale of land is not void but only, in the absence of evidence in writing or part performance, unenforceable.

Interestingly enough, the Privy Council in Elias v George Sahely & Co (Barbados) Ltd¹⁸⁴ made no reference to the requirement that the memorandum should also recognise the existence of a contract. The letter, however, was unequivocal in its terms. It referred to "the purchase ... from your client ... to (the plaintiff)" and contained nothing which could be said to detract from the existence of a concluded agreement. The facts in the case bear a strong resemblance to those in Bigg v Boyd Gibbins Ltd¹⁸⁵ where a similar decision was reached by the English Court of Appeal.

¹⁸³ *id.* 187

¹⁸⁴ *Supra* note 182

¹⁸⁵ [1971] 2 All E.R. 185

In Carruthers v Whitaker¹⁸⁶, Richmond J placed considerable reliance on the "subject to contract" cases, however, it is important not to lose sight of the fact that there are fundamental differences between New Zealand and English conveyancing practices and that the "subject to contract" usage emerged in England to protect the purchaser from the risks of an open contract which there were infinitely greater. As a result, the formula in New Zealand is rarely, if ever, used. Moreover, its closest approximation in this country, the "solicitor's approval" clause is generally regarded as imposing a condition subsequent only and not as preventing the formation of a concluded contract¹⁸⁷. The strongest denunciation of the trend in New Zealand to draw analogies with the "subject to contract" decisions in cases arising under the Contracts Enforcement Act 1956, is found in the words of Prichard J in Coachman Properties Ltd v Panmure Video Club Ltd¹⁸⁸ where, after referring to the "exchange of contracts" procedure in England and the customary practice of inserting the "subject to contract" formula in all correspondence leading up to the formal exchange, he stated:¹⁸⁹

But in this country a different system prevails; contracts for sale and purchase are normally concluded at a much earlier stage in the negotiations with no more professional assistance than that provided by a real estate agent equipped with a form of contract approved by the Law Society and a selection of paste-on conditions for use as required. In consequence, it is common in this country for an agreement to be expressly 'subject to solicitor's approval', but 'subject to contract' is virtually never used In determining the intention of the parties as it is to

¹⁸⁶Supra note 174

¹⁸⁷Provost Development Ltd v Collingwood Towers Ltd [1980] 2 N.Z.L.R. 205

¹⁸⁸[1984] 2 N.Z.L.R. 200

¹⁸⁹id 204

be gathered from the words of the instrument and the surrounding circumstances, the English judgments on 'subject to contract' are of no assistance. 'Subject to contract' is not a formula used in this country Nor are the New Zealand cases on 'subject to solicitor's approval' ... directly in point.

Those of the post Carruthers v Whitaker¹⁹⁰ decisions in New Zealand in which the ordinary inferences in a sale and purchase transaction have been seen to be rebutted lend strong support to the narrower interpretation of the decision. In both Newton King v Wilkinson¹⁹¹ and the unreported case of Anae v Lambert¹⁹² the court found in favour of a binding oral contract despite the fact that the preparation of a formal document was contemplated. In Newton King v Wilkinson¹⁹³, Beattie J expressly rejected the argument that the existence or otherwise of a prior oral contract was immaterial to the ratio in Carruthers v Whitaker¹⁹⁴. In his view, Carruthers v Whitaker¹⁹⁵ had proceeded on the basis of a written contract and was not, therefore, an authority on a sufficient memorandum of an existing oral contract.

As regards executory agreements to lease, Tompkins J in Langdon v McAllister¹⁹⁶ found that different considerations applied in so far as it was not common practice in New Zealand for parties to intend to be bound only on the execution of a formal lease. With respect, the distinction would appear somewhat illogical, particularly

¹⁹⁰Supra note 174

¹⁹¹[1976] 2 N.Z.L.R. 321

¹⁹²High Court, Auckland, 11.7.85 (A 1348/84), Hillyer J

¹⁹³Supra note 191

¹⁹⁴Supra note 174

¹⁹⁵Ibid

¹⁹⁶High Court, Auckland 26.7.85 (91/83) Tompkins J

in the case of commercial transactions. If the rationale is seen to be that the "other terms" are to be those normally inserted in leases of the kind and, therefore, ascertainable by an objective test it is at least arguable that the same considerations should apply to oral agreements for the sale and purchase of residential property. There would normally be little difficulty in enforcing an open contract on the usual terms. Furthermore, the formal agreement usually contemplated would be none other than "the form of contract approved by the Law Society".

In the Australian case of Godecke v Kirwan¹⁹⁷, already discussed, the provision as to the giving of possession upon the "signing ... of a formal contract of sale" was held to amount to a condition subsequent, however, further on in the document there appeared a clause which stated "If required by the Vendor/s I/we shall execute a further agreement ... containing the foregoing and such other covenants and conditions as they may reasonably require". Walsh J held that the clause did not in fact relate to a "second" or "separate" agreement and that its terms were consistent with the view which he had already expressed that the existence of a concluded contract was not itself conditional upon the signing of the formal document. After referring to cases dealing with executory agreements to lease, Walsh J concluded that the additional terms to be incorporated in the formal document were not, upon the true construction of the clause, to be left solely to the vendor's discretion but were to be "reasonable" in an objective sense so that in the case of dispute the matter could be determined by the court.

¹⁹⁷(1973) 129 C.L.R. 429

In the Canadian case of Bill Robbins Drilling Ltd v Sinclair Canada Oil Co¹⁹⁸, Moore J in the Alberta Supreme Court held that the parties had concluded a binding agreement for the drilling of certain oil wells by the plaintiff at the time the defendant accepted verbally the plaintiff's tender for the wells and despite the fact that the execution of a formal document was contemplated. Because of the time involved in relocating men and equipment, it was standard practice within the industry for contractors to act upon the verbal acceptance of their tenders. Furthermore, it was common ground that the terms to be included in the formal document should be none other than those comprised in the plaintiff's "bid sheet" and the defendant's "Master Drilling Contract" which had been forwarded to the plaintiff for its reference and the terms of which had already been approved.

As yet there has been no subsequent case in New Zealand in which the unsigned agreement accompanied by solicitor's letter (the documents relied upon in Carruthers v Whitaker¹⁹⁹) has been held to constitute a sufficient memorandum of a pre-existing oral contract although there would seem no reason in principle why the same considerations should not apply. The difficulty, however, that a plaintiff is likely to encounter in this sort of situation is not that an oral contract cannot be found to exist but that the memorandum cannot be seen to contain "an express or implied recognition that the contract has been entered into".

In Tiverton Estates Ltd v Wearwell Ltd²⁰⁰, Lord Denning M R

¹⁹⁸(1973) 33 D.L.R. (3d) 701

¹⁹⁹Supra note 174

²⁰⁰Supra note 167

said that Law v Jones²⁰¹ had "sounded an alarm bell in the offices of every solicitor in the land"²⁰². This was so, because in Law v Jones²⁰³ it was held that the "subject to contract" stipulation normally inserted in all correspondence between solicitors could be impliedly waived. The result of this was that where a party reached an arrangement which he did not intend to be binding or, put in another way, which he intended to be subject to a condition precedent as to the execution of a formal document, he might, nevertheless, find himself bound when his solicitor, in the course of proceeding with the transaction in the normal way and in preparing and forwarding a draft contract, inadvertently provided a sufficient memorandum thereby enabling the other party to seek enforcement. The solution to the solicitors' dilemma was provided in Tiverton Estates Ltd v Wearwell Ltd²⁰⁴ and its insistence that the memorandum must recognise or acknowledge the contract. Regardless of whether or not the analysis of the earlier authorities by the Court of Appeal in the Tiverton²⁰⁵ case is to be preferred to that of Buckley and Orr LJJ in Law v Jones²⁰⁶, there remains the fact that the members of the Court of Appeal in the Tiverton²⁰⁷ case were strongly influenced by considerations of policy and the "farical conduct" which might

²⁰¹Supra note 168

²⁰²Supra note 167 at p 159

²⁰³Supra note 168

²⁰⁴Supra note 167

²⁰⁵Tiverton Estates Ltd v Wearwell Ltd, supra note 167

²⁰⁶Supra note 168

²⁰⁷Tiverton Estates Ltd v Wearwell Ltd, supra note 167

otherwise result²⁰⁸. Once again, it can be argued that the difficulties presented by Law v Jones²⁰⁹ pose less of a risk in New Zealand given the fact that here the "subject to contract" formula is neither needed nor used to the same extent and that different conveyancing practices apply. Be that as it may, however, the decision in Tiverton Estates Ltd v Wearwell Ltd²¹⁰ has since been consistently applied in England and will no doubt be applied in New Zealand²¹¹ also.

Adhering to the principle that the memorandum must expressly or impliedly recognise the existence of the contract it nevertheless remains difficult to accept that it can and does have the effect that the parties intention is determined on the basis of correspondence passing between their solicitors and not on the words and conduct of the parties themselves. This is particularly so where the insertion of the "subject to contract" qualification is found to be unauthorised. In Law v Jones²¹², Buckley LJ was at pains to point out that the parties "shook hands to indicate that a deal had been made" and there was no intention that the agreement should be "subject to contract". He found that while oral agreements for the sale of land were not common they certainly were not unknown and that:²¹³

²⁰⁸Supra note 167 at p 184 (per Lord Denning M R) and at p 188-189 (per Stamp L J)

²⁰⁹Supra note 168

²¹⁰Supra note 167

²¹¹As it was in Newton King v Wilkinson, supra note 191

²¹²Supra note 168

²¹³Supra note 168 at p 213

Where laymen have entered into such an agreement it would be natural for them to expect that, when the matter had been put into the hands of their legal advisers, the contract would be given a more formal written embodiment. This is what appears to have happened in the present case.

The view of the layman taken by Buckley LJ may be contrasted with that expressed by Pennycuik VC in Damm v Herrtage²¹⁴, referred to previously. It is perhaps best seen as an example of the way in which judgments may often appear to be coloured by the nature of the transaction and the parties. In Damm v Herrtage²¹⁵, the vendor was the proverbial "little old lady" allegedly induced to agree to sell her home while her husband, on whom she relied in all business matters, was seriously ill in hospital.

Before leaving the matter of Law v Jones²¹⁶ and Tiverton Estates Ltd v Wearwell Ltd²¹⁷ it should be noted that several recent Irish decisions²¹⁸ have shown a marked departure from the English trend both in holding that a defendant cannot shelter behind a "subject to contract" stipulation added after the bargain has been struck²¹⁹ and that the phrase is open to a process of construction

²¹⁴Supra note 172

²¹⁵Supra note 172

²¹⁶Supra note 168

²¹⁷Supra note 167

²¹⁸R.W. Clark "Subject to Contract - 2 Irish Solutions" (1984) 48 Conv. (N.S.) 251

²¹⁹Casey v Irish Intercontinental Bank [1979] I.R. 364; Usitravel v Fryer unreported High Court (Ireland) judgment of Finlay J, delivered 29.10.73 (supra note 218 at p 254)

where a concluded agreement would otherwise appear to have been reached.²²⁰

On the basis of Tiverton Estates Ltd v Wearwell Ltd²²¹ it is evident that where a plaintiff in New Zealand relies on an unsigned agreement accompanied by correspondence, he must establish both the existence of a concluded oral contract and that the documents recognise the existence of that contract. Where such words as "proposed sale" and "draft contract" are used, they may be treated by the courts as equivocal or as pointing away from the existence of a concluded agreement. It is of course open to the parties' solicitors to state expressly that the matter remains in negotiation and is not binding until the agreement is signed. The fact that this is seldom done may indicate that disputes in this connection arise less frequently than might be thought or that in New Zealand it is indeed more common, at least so far as residential properties are concerned, for the formal agreement to be prepared by a party's real estate agent.

Finally, perhaps the strongest argument against the wider interpretation of Carruthers v Whitaker²²², that the "ordinary inferences" apply wherever preparation of a formal document is contemplated, is that taken to its logical conclusion it would lead to a presumption that parties always intend to be bound only upon execution of a formal agreement or that contracts for the sale of land

²²⁰Kelly v Park Hall School Ltd (1979) 113 I.L.T.R. 9; O'Flaherty v Arvan Pt unreported High Court (Ireland) judgment of McWilliam J, delivered 3.11.76, later reversed by the Supreme Court but on another point (supra note 218 at p 257). But cf. Mulhall v Haren [1981] I.R. 364

²²¹Supra note 167

²²²Supra note 174

will not usually be enforceable unless they are written contracts. This is clearly contrary to both the express wording and the intention of the Act and would facilitate the fraud which the statute was designed to prevent. When a party to all outwards appearances manifests an intention to be bound and "shakes hands on the deal" he should not be permitted to resile from his obligations with impunity thereby defeating the other party's reasonable expectations.

It is ironic to consider that in 1885 Sir James Fitzjames Stephen J stated, with reference to the analogous provisions contained in section 17 of the Statute of Frauds 1677, "The cases in which a man of honour would condescend to avail himself of (the section), must, I think, be very rare indeed."²²³

The fact remains, however, that where a plaintiff seeks to rely upon an oral contract, or an informal "written" contract, the courts will require cogent evidence of an intention to be bound and perhaps even more so in the light of the Court of Appeal decisions. The cases discussed would indicate that the requisite intent is more likely to be found in cases where the parties may be seen to have reached a comprehensive and detailed agreement as to terms. Strictly speaking, in such instances the courts' sphere of enquiry is confined to construing objectively the words which the parties have used and the need to resort to "inference" is accordingly reduced. In other cases, relevant considerations would appear to be whether the parties have dealt closely with one another, as opposed to having dealt through intermediaries, and the extent to which parties have knowledge of the nature of the transaction and of the subject matter with which they are dealing.

²²³₁ L.Q.R. 1

PART TWO - THE AUTHENTICATED SIGNATURE FICTION

I. INTRODUCTION

Section 2 of the Contracts Enforcement Act 1956 provides that the contract or the memorandum thereof must be "signed by the party to be charged therewith or by some other person lawfully authorised by him". The requirement, therefore, is that the memorandum need only be signed by the defendant.

In his book "Statute of Frauds, Section Four, in the Light of its Judicial Interpretation", Dr James Williams has stated:²²⁴

A signature (giving the word its ordinary meaning) inscribed on a document serves the following purposes:

- (1) It indicates that the signatory by the very act of inscribing his name admits the authenticity of the document in question. In its particular reference to contracts under the Statute, this means that the signatory, by inscribing his name on the writing, manifests an intention that the writing shall be treated as a true exposition of the contract.
- (2) Being placed at the foot or more rarely at the head of the document, and outside the text, it performs this function with regard to the whole of the document.

In the cases considered up until now, the writing in which the terms of the contract were contained had been signed by the defendant or an authorised agent (frequently a solicitor or a real estate agent) or else could be read together with another writing which had been so signed, the two documents together constituting the memorandum. The "authenticated signature fiction", which will now be considered, was developed by the courts to meet the situation where no signature, in the normal sense in which the word is used,

²²⁴J Williams "The Statute of Frauds, Section IV, in the Light of its Judicial Interpretation", 82

is found to exist. Once again it is difficult to express the rationale and effect of the fiction in clearer terms than those of Dr Williams:²²⁵

A party may, of course, show quite convincingly by means other than signing that he recognises a writing as a true exposition of his contract. But the Statute says he must sign. Where, however, there has existed a writing setting forth the whole contract, and the party to be charged has clearly shown by his conduct that he recognises that writing to be a correct exposition of his contract, the courts have been loathe to allow such party to shelter under the Statute, and to meet such cases they have gradually developed what may be called the 'authenticated signature fiction'. Provided the writing contains the name or initials of the party, the courts are willing to hold that it is duly signed; but they must first be satisfied that the party has shown that he recognises the writing as truly expressing the contract. They then quite fictitiously restrict this general recognition to the name or initials and say that the party by recognising or "authenticating" his name or initials thereby converts such name or initials into a signature, and this signature authenticates the writing. In this manner, justice is done without open violation of the words of the Statute. But although the courts have succeeded in enabling the first-mentioned function of a signature to be discharged by other means than a regular signing they have at all times been tender of the forms, and accordingly, even where there is no real signature, they continue to insist on the name (or initials) being in such a position in the writing that were it a genuine signature it would authenticate and apply to the whole of the writing.

II. STURT v MCINNES - THE THREE CRITERIA

The requirements for the application of the authenticated signature fiction in New Zealand are commonly accepted to be those laid down by Wilson J in Sturt v McInnes²²⁶. The facts in that case, as stated in the judgment, were that the plaintiff had entered into negotiations with the defendants, who were trustees of an estate, for the sale by the defendants to the plaintiff of a house property comprised in the estate. The parties agreed orally as to terms and the plaintiff then asked the defendants' real estate agent to prepare

²²⁵id 82-83

²²⁶[1974] 1 N.Z.L.R. 729

an appropriate agreement. The agent did so, and the plaintiff uplifted the agreement so that it could be signed by himself and his wife. It then being a Friday, he arranged with the agent to return the agreement the following Monday for execution by the defendants. Over the weekend, the defendants decided not to proceed with the sale.

Wilson J held that the agreement not having been signed by the defendants, it was impossible for the plaintiff to succeed. He rejected the plaintiff's argument based on the authenticated signature fiction finding that the case law in England had established that the principle could only apply if three conditions were satisfied. These were:²²⁷

- (1) The contract, or a memorandum containing the terms of contract, must have been prepared by the party sought to be charged, or by his agent duly authorised in that behalf, and must have that party's name written or printed on it.
- (2) It must be handed or sent by that party, or his authorised agent, to the other party for that other party to sign.
- (3) It must be shown, either from the form of document or from the surrounding circumstances, that it [is] not intended to be signed by anyone other than the party to whom it is sent and that, when signed by him, it shall constitute a complete and binding contract between the parties.

However, Wilson J went on to state that even if he were wrong in his findings with regard to the plaintiff's argument, there was a further reason why the case could not succeed, that being that "the parties were never 'ad idem' on the sale"²²⁸ in so far as the

²²⁷ id 733-734

²²⁸ id 736

agreement was expressed to be "subject to finance", a term which had been neither discussed with nor approved by the defendants.

Given Wilson J's finding that the parties never in fact reached a consensus, it is submitted that as in Carruthers v Whitaker²²⁹, the decision must be confined to the situations in which either there has been no prior agreement as to the terms contained in the formal document or the execution of the formal document is intended by the parties to act as a condition precedent to the formation of a concluded and binding agreement. Treated as such, the decision is entirely defensible as it is once again difficult to envisage that a "written contract" could be found to exist in the absence of the signatures of the parties or of the three conditions specified above. However, the present writer submits that Wilson J's criteria are not applicable to memoranda of pre-existing oral contracts and, moreover, that a contrary conclusion cannot be supported by the earlier authorities nor on a logical basis. The New Zealand cases which have followed in the wake of Sturt v McInnes²³⁰ serve to highlight the difficulties that failure to distinguish between oral and written contracts can produce.

III. THE INTENTION OF THE SIGNATORY

Leaving aside for the moment the question of the sufficiency of the signature and returning instead to more basic principles, it is fundamental to the application of Section 2 of the Contracts Enforcement Act, 1956, and its predecessor, Section 4 of the Statute of Frauds, that the contract relied upon does not have to be a "written contract" and may be an oral contract so long as a sufficient memorandum

²²⁹ [1975] 2 N.Z.L.R. 667

²³⁰ Supra note 226

thereof is found to exist. Where a document is relied upon as constituting a written contract it must reveal as a matter of construction that the parties thereto intended to be bound. But where there is already a concluded agreement, the memorandum relied upon does not have to be itself contractual and the intention on the part of those who prepare it is entirely irrelevant.²³¹

If we now return to the case where the writing relied upon bears no "signature" in the normal sense, it is submitted that exactly the same principles should apply. Where a party seeks to establish a written contract, it is undoubtedly true that in the absence of signature "it must be shown, either from the form of the document or from the surrounding circumstances that the document is intended to constitute a complete and binding contract between the parties".²³² In the case of a written contract a signature serves not merely as an acknowledgement of the terms therein contained but also as a mark of assent to those terms. However, in the case of a post-contract memorandum which is not of itself contractual, it is superfluous to talk of the intention on the part of those by whom it was prepared. The memorandum must contain the names of the parties, the subject-matter, the consideration and the terms of the agreement but

²³¹This is illustrated by the many cases in which writings have been held to be sufficient although it was clearly not intended by the signatory that the writing should operate as a memorandum of the contract or that it should satisfy the statutory requirements. In *Re Hoyle*, [1893] 1 Ch 84, 98, Lindley L.J. said of the memorandum "the idea of agreement need not be present in the mind of the person signing". In that case a recital in a will was held to constitute a sufficient memorandum. Other examples include *Leroux v Brown* 12 C.B. 818 (a letter to a third party); *Clerk v Wright* 1 Atk. 12 (a letter to the defendant's own agent); *Lucas v Dixon* (1889) 22 Q.B.D. 357 (an affidavit); *Daniels v Trefusis* [1914] 1 Ch. 788 (briefs of evidence); and *Farr Smith & Co v Messers Ltd* [1928] 1 K.B. 397 (a statement of defence in an earlier action).

²³²Wilson J's third criterion, *Sturt v McInnes*, supra note 226

the purpose of the signature is merely to authenticate, to ratify or to recognise the document as a true expression of the contract which it purports to record.

Just as the intention of the party in preparing a post-contract memorandum is irrelevant, it is also unnecessary, in order that the authenticated signature fiction should apply that the printed name or initials should be intended to operate as a signature. In fact, the situation will invariably be the reverse. However, as Dr Williams points out²³³, although the courts have moved away from a literal construction of the term "signature" they nevertheless insist on the printed name being placed in such a position that were it a genuine signature it would authenticate the whole of the document. In this context the word "intention" still finds a place in the language of the judges. Where a party has shown by means other than signing that he recognises the writing as a true expression of the contract the element of fiction is introduced when, to preserve the outer shell of the statutory formality, the courts artificially restrict this recognition to the printed name or initials. As it is said, therefore, that by recognising or authenticating his printed name or initials, a party converts such name or initials into a genuine signature so it is also said that the position of the printed name or initials must be such as to show that it was intended to govern and to apply to the whole of the writing. In the words of Dr Williams:²³⁴

In actual fact, this talk of intention seems to be nothing more than the authenticated signature fiction in another dress. A name appears in the text of a writing - that name lacks authenticating force; that is to say, it was not intended for a signature at all, but only to identify one of the contracting parties. When, therefore, the law attributes to that name an

²³³ p 88 ante

²³⁴ Supra note 224 at p. 99

authenticating power which in reality it never had or could have, it is the same thing as attributing to the party to be charged an intention that the name should be a signature. Just as the tradition of the signature which must of itself authenticate has left its traces on the language of the courts, so likewise do references to the necessity for the signature to be intended as such appear from time to time in judgments dealing with cases under the Statute.

THE BASIS OF THE FICTION - THE EARLIER AUTHORITIES

1. Written Offers and Informal Writings

An examination of the earlier authorities reveals, it is submitted, that those cases in which the authenticated signature fiction has been found to apply, fall into only two categories - those in which the writing amounts to a contractual offer (which upon acceptance will suffice for the purposes of the statute as a "written contract") and those in which the writing qualifies as a post-contract memorandum. That the fiction could have any application at all in situations where the writing is, in itself, the contract appears to have been considered only recently. Dr Williams²³⁵ in his clear and thorough exposition of the topic would appear not to have averted to the possibility. In fact his definition of the term "signature" has, it is submitted, direct application only to offers and post-contract memoranda, reference to the use of the signature for the purposes of signifying "assent" being completely lacking.

Of the cases which illustrate the application of the authenticated signature fiction to writings which upon their construction amount to contractual offers, one of the earliest is the decision in Touret v Cripps²³⁶, an action for specific performance of

²³⁵Supra note 224

²³⁶(1879) 48 L.J. Ch. 567

an agreement by the defendant, R L Cripps, to grant to the plaintiff a lease. The defendant had written to the plaintiff a letter containing an offer to lease and sufficiently stating the terms. The letter was not signed but had been handwritten on a sheet of notepaper headed "From Richard L Cripps" with his address. In giving judgment for the plaintiff, Hall V C stated that the principle had been shown to be:²³⁷

that when a party desiring to sell ... sends to a party desiring to buy, a document containing the name of the former party, though it may be in print, yet in such a way as to show that the sender recognised it to be his own name, and the document contains the terms of a contract, that is a sufficient note in writing to charge the sender.

A similar situation arose a few years later in Evans v Hoare²³⁸, an action for specific performance of a contract of employment. (A contract not to be performed within a year.²³⁹) The plaintiff there was approached by an agent of his employer, the defendant, who acting with the employer's authority presented to the plaintiff a document setting forth proposed terms for the plaintiff's future employment. The plaintiff approved the terms and then signed the document at the agent's request. The document was headed with the employer's printed name together with his address and continued in the following terms:²⁴⁰

Gentlemen - In consideration of your advancing my salary to the sum of 130 (pounds) per annum, I herely agree to continue my employment in your office for three years, from and commencing January 1, 1890, at a salary at the rate of 130 (pounds) per annum aforesaid payable monthly as hitherto.

Yours obediently
George E Evans

²³⁷ Ibid

²³⁸ [1892] 1 Q.B. 593

²³⁹ Section 4 of the Statute of Frauds 1677

²⁴⁰ Supra note 238

It was held that the employer, in instructing his agent to lay before the plaintiff the document containing his name in full, had announced to the plaintiff that he was offering him certain terms if the plaintiff would accept them in writing. The Court had no difficulty in finding an intention on the part of the employer that the document should constitute a contract binding on both parties as soon as it was signed by the plaintiff.

Schneider v Norris²⁴¹, the case to which the emergence of the authenticated signature fiction is attributed can be seen, it is submitted, as a case in which the writing was found to be a memorandum of an existing contract. The case concerned an action for non-delivery of cotton yarn. It appears from the judgments that the plaintiff agreed to purchase the goods from the defendant who later sent to the plaintiff a bill of parcels, the form of which was similar to an invoice. At its head it contained the name of the defendant in print beside which had been written the name of the plaintiff as buyer and underneath a list of the articles sold with particulars quantity and prices. The Court of Kings Bench held that the defendant, by filling up the bill of parcels and inserting the name of the plaintiff as buyer, had shown that he recognised the document as an authentic expression of the contract and had ratified the sale to the plaintiff Lord Ellenborough CJ said:²⁴²

But here there is a signing by the party to be charged by words recognising the printed name as much as if he had subscribed his mark to it, which is strictly the meaning of signing, and by that the party has incorporated and avowed the thing printed to be his; and it is the same in substance, as if he had written Norris and Co with his own hand. He has by his handwriting in effect said, I acknowledge what I have written to be for the purpose of exhibiting my recognition of the written contract.

²⁴¹ (1814) 2 M & S 286

²⁴² *id* 288

A similar situation arose in Johnson v Dodgson²⁴³. There the parties were both hop merchants. The plaintiff's traveller, a Mr Morse, had called on the defendant with some hop samples and the defendant agreed to buy thirty-one 'pockets' of hops in accordance with the samples. The defendant then wrote a note in his sample book which he asked the plaintiff's traveller to sign. The note read:

Leeds, 19th October, 1836

Sold John Dodgson,
27 pockets Playsted, 1836, Sussex, at 103s
The bulk to answer the sample
4 pockets Selme, Beckley's, at 95s
Samples and invoice to be sent per Rockingham Coach.
Payment in bankers' at two months.
Signed for Johnson, Johnson & Co
D Morse

The defendant subsequently wrote to the plaintiff regarding arrangements for the delivery and collection of the hops but upon delivery he refused to accept them maintaining that they did not in fact comply with the samples. On this point the jury found for the plaintiff.

The Court of Exchequer held that although there was some doubt as to the recognition of the contract by the letter, the note in the defendant's sample book was a sufficient memorandum to allow the contract to be enforced. As Parke B stated:²⁴⁴

Here the entry was written by the defendant himself, and required by him to be signed by the plaintiff's agent. That is amply sufficient to show that he meant it to be a memorandum of contract between the parties.

As the note was written in the defendant's sample book, which he retained in his own possession, it seems clear that it was never

²⁴³ (1837) 2 M & W 653

²⁴⁴ *id* 660

intended to operate as a written contract, although it was meant no doubt to bind the defendant.

A clearer illustration of the distinction made between the contract and the memorandum thereof appears in a series of auction cases of which the first is the Irish decision in Dyas v Stafford²⁴⁵. The defendant had authorised an auctioneer to offer for sale his property at auction. The plaintiff was the highest bidder and after the auction the auctioneer obtained the plaintiff's signature to a memorandum of agreement which was annexed to the particulars and conditions of sale. It commenced:

I do hereby acknowledge that I have this day purchased from Mr Stafford, the vendor, by public auction, subject to this approval, the premises mentioned in the annexed particulars for the sum of subject to the conditions of sale

The memorandum was not signed by either the auctioneer or the vendor and it in fact made no provision for such signature. However, the printed name of the vendor appeared not only in the memorandum but also in the annexed particulars of sale. The defendant subsequently refused to complete on the basis that the particulars of sale had contained a misdescription of the property and included a portion of land which the defendant had not wished to dispose of.

Chatterton V C found in favour of the plaintiff and in so doing he clearly recognised that the writing itself did not need to be contractual:²⁴⁶

In the case of sales by auction, the actual agreement is constituted by the bidding on the one part, and acceptance of it by the auctioneer on the other; and the writing necessary to satisfy the requirements of the statute is, therefore, a memorandum or note of the agreement so made.

²⁴⁵(1881) 7 L.R. Ir 590

²⁴⁶id 599

He went on to hold that the auctioneer was authorised to insert the vendor's name in both the particulars of sale and the memorandum of agreement and that the name was, therefore, to be regarded as if it had been written by the defendant himself. The name of the defendant inserted as vendor amounted to an admission by him that he had made the particular sale and that he had inserted his name to identify himself with the purchase by the plaintiff on the terms and conditions therein stated. Moreover, the signature, appearing at the beginning, was so placed as to relate and refer to every part of the instrument. The Vice Chancellor concluded:²⁴⁷

It seems to me to be no objection to this, that the primary object of the instrument may have been to bind the purchaser. If at the same time it amounts to a statement, under the signature of the vendor, of the fact and terms of the agreement, it is, in my opinion, a sufficient compliance with the requirements of the statute.

The decision of the Vice Chancellor was reversed on appeal²⁴⁸ but not upon the basis that the printed name could not suffice as a signature. Instead the Court of Appeal held that the words "subject to (the vendor's) approval", contained in the memorandum, operated to prevent the transaction from amounting to more than an offer by the plaintiff to purchase the premises if the vendor chose to accept such offer within a reasonable time. In the words of Law C:²⁴⁹

There can be no real controversy as to the effect of the authorities In all of them, however, the point for decision was, whether there was or was not a sufficient note in writing of the contract. But here, in my opinion, there was at the time no contract at all; everything was subject to the approval of the vendor.

²⁴⁷id 604

²⁴⁸(1882) 9 L.R. Ir. 520

²⁴⁹id 324

In Cohen v Roche²⁵⁰ the plaintiff was the highest bidder for a lot consisting of antique furniture which was owned by the defendant who was also the auctioneer. Before the sale, the defendant had circulated a printed catalogue, the front page of which contained the statement "The South Kensington Auction Gallery, 147A Fulham Road, S.W. 3 Messrs Roche & Roche (G.W. Roche F.A.L.P.A. Proprietor) will sell at the above gallery on (the date and the time) 300 lots of antiques and modern furniture" The other pages of the catalogue set forth the lots to be sold. At the time of the auction the defendant had in front of him an auctioneer's book consisting of large sheets of paper, on every page of which was pasted a leaf of the catalogue, a large ruled margin being left on either side; one of which was for the auctioneer's notes and the other for recording the price and the purchaser of each lot. The book did not contain the defendant's name but incorporated the front page of the printed catalogue.

After the particular lot was knocked down to the plaintiff, the defendant wrote in the auctioneer's book against the lot the trade name of the plaintiff and the price for which the furniture had been sold. On the other side of the page he wrote "G.W.R. Re Walworth" "G.W.R." being the defendant's initials and "Re Walworth" indicating that he had himself acquired the furniture from the Walworth estate.

In an action brought by the plaintiff under Section 4 of the Sale of Goods Act 1893 (the terms of which were equivalent to those contained in Section 17 of the Statute of Frauds, 1677) McCardie J held that the auctioneer's book contained a sufficient memorandum of the contract and that the defendant's printed name on the front page

²⁵⁰ [1927] 1 K.B. 169

of the catalogue, which was incorporated in the book, constituted a sufficient signature within the statute. He stated:²⁵¹

It is, of course, clear that a printed name in the body of an instrument, in order to operate as a signature, must be authenticated by the person to be charged In the case now before me there was ample authentication in that the defendant himself wrote down in his auctioneer's book the price realised by lot 145, and also entered the names of the purchasers. He thus recognised the bargain and his own printed signature.

It would seem plain in this case that the auctioneer's "note" was never intended to operate as a "contract" or to bind either party. It was intended purely as a "record" of the transaction to be retained by the auctioneer for his purposes alone. However, it also set forth all the relevant particulars of the transaction and the defendant, by his very act in recording, had recognised or authenticated the note as a correct expression of the contract which was again concluded by the fall of the hammer.

2. Formal Writings

The application of the authenticated signature fiction, in the cases so far discussed, has been relatively straight forward. However, the situation becomes more complicated when the writing relied on is a formal document which by its very nature envisages and provides for signature by both parties. Here, it is submitted, it becomes crucial to distinguish between an oral and a written contract or, to put it in another way, between the contract itself and the memorandum thereof. Once again it is submitted that where there is already an existing contract, so that the writing is relied upon merely as a memorandum thereof, it is sufficient in the absence of signature, firstly, if the party to be charged has shown in some other way that

²⁵¹id 176

he recognises the writing as correctly expressing the contract and, secondly, if the printed name appears in such a position that were it a genuine signature it would authenticate and apply to the whole of the document.

One of the earliest cases to consider the position where the writing relied on was a formal document was the decision of The Court of Common Pleas in Hubert v Treherne²⁵². The defendant was an unincorporated company which had accepted a tender from the plaintiff for the transportation of its coal. Draft articles of agreement were prepared by order of the directors of the company and a minute of a subsequent directors' meeting recorded that the agreement had been read and approved with a direction that a copy thereof be sent to the plaintiff. The agreement contained the names of the parties and the terms of a contract (which was not to be performed within a year²⁵³) and concluded "As witness our hands". The agreement was not signed by either the plaintiff or the defendant. For some eighteen months the terms contained in the agreement were acted upon by both sides but then the company was able to arrange for the free transportation of its coal by its shipper and ceased to employ the plaintiff.

The Court of Common Pleas held that there was no agreement which was binding within the statute. The names of the parties necessarily appeared in the body of the instrument which would otherwise be unintelligible and to hold that the mere introduction of the names of the parties was sufficient would be almost to repeal the

²⁵²(1842) 3 Man. & G. 743

²⁵³Section 4 of the Statute of Frauds 1677

statute. The Court found that the form of the agreement which concluded "As witness our hands" clearly showed "that the names of the contracting parties were meant to be subscribed, and that it was not intended that the insertion of the names in the body of the instrument should operate by way of signature."²⁵⁴ This agreement "amounted to no more than if it had been said by A.B. that he 'would' sign a particular paper".²⁵⁵

In Hubert v Treherne²⁵⁶ the agreement had been signed by neither of the parties and it is difficult to discern from the judgments as to just how it came to be relied on by the plaintiff; Coltman J at one stage stating that it was not certain that the plaintiff had even seen it.²⁵⁷ However, it would seem from the other judgments that the agreement, or at least its existence, was brought to the plaintiff's attention by the company's secretary but without the express authority of the directors. Nevertheless, all the judges appear to have recognised that had there in fact been some act of acknowledgement or recognition on the part of the directors, the result would not necessarily have been the same. In the words of Tindal C J "In this case there is no sufficient original signature and there is no subsequent recognition".²⁵⁸ Erskine J stated: "I am not, however, prepared to say that if it had been shown that there was authority to give out the fair copy of the articles, the names

²⁵⁴Supra note 252 per Tindal C.J., at p. 753-754

²⁵⁵Supra note 252 per Maule J, at p 756

²⁵⁶Supra note 252

²⁵⁷Supra note 252 at p 754

²⁵⁸Ibid

inserted at the commencement of the instrument, would not have been sufficient."²⁵⁹

Coltman and Maule J expressed similar sentiments as to the lack of any outside evidence.²⁶⁰

The decision in Hubert v Treherne²⁶¹, it is submitted, is susceptible to at least two interpretations. The first is that of Dr Williams, already referred to, that when the courts speak of the "intention" of the parties in the matter of signature they are doing no more than re-emphasising, firstly, that a printed name will not suffice as a signature in the absence of some other recognition which the court accepts and, secondly, that because the fiction operates to convert the printed name into a genuine signature, the courts will insist that it be placed, not so as merely to make the writing intelligible, but so as to authenticate and govern the whole of the document. A second interpretation is expressed by O'Connor L J in Halley v O'Brien²⁶² where, with reference to Hubert v Treherne²⁶³, he stated:²⁶⁴

I think these cases are explained by this: that there was no complete agreement at all; that there was, according to the intention of the parties, a locus poenitentiae, unless and until both parties signed; in truth, there was a memorandum of an offer, and not a memorandum of a contract.

²⁵⁹Supra note 252 at p 755

²⁶⁰Supra note 252 per Coltman J at p 754, per Maule J at p 756

²⁶¹Supra note 252

²⁶²[1920] 1 I.R. 330

²⁶³Supra note 252

²⁶⁴Supra note 262 at p 341

Hubert v Treherne²⁶⁵ was cited with approval in Leeman v Stocks²⁶⁶. The latter was once again an "auction" case, the defendant having instructed an auctioneer to offer his property for sale. By the time bidding was due to commence neither the defendant nor his solicitor had arrived and the auctioneer thereupon borrowed from another solicitor present a printed form of agreement, which in fact was applicable to a sale by private treaty, in which he inserted the defendant's name as vendor together with the date fixed for completion. The plaintiff was ultimately the highest bidder for the property and the auctioneer then affixed a sixpenny stamp to the agreement and asked the plaintiff to place his signature across the stamp. The defendant expressed no dissatisfaction when he was told of the sale but subsequently he refused to complete.

At the trial it was argued for the defendant that the authenticated signature fiction could not be invoked where, as in the instant case, the document in its own terms contemplated signature by both parties. However, this argument was rejected by Roxburgh J who stated:²⁶⁷

This is true if the document is regarded in isolation but it is equally certain that, when the auctioneer obtained the purchaser's signature thereto, neither the purchaser nor the auctioneer, acting on behalf of the vendor, ever intended any other signature to be added to that document. It was the intention both of the purchaser and of the vendor's agent, the auctioneer, that this should be the final record of the contract.

Roxburgh J continued:²⁶⁸

²⁶⁵Supra note 252

²⁶⁶[1951] 1 All E.R. 1042

²⁶⁷id 1047

²⁶⁸id 1048

I think there is no doubt that *Hubert v Treherne* is authority for the proposition that ... while the form of agreement is a matter of such importance that, in the absence of any other evidence, a document in this form would not be held to be a sufficient memorandum to satisfy the Statute of Frauds, nevertheless, the fact that the document per se contemplated signature by both parties would not be treated as conclusive, or, indeed as paramount evidence of the fact that the signature of both parties was actually required, if there is evidence to the contrary which the Court accepts It is open to the Court to investigate the circumstances to see whether the document came into being as a perfect agreement, and, if the Court on the evidence finds that it did then the Court is not prevented from so holding by any impediment in law.

It would seem that Roxburgh J was not referred to the other auction cases in this context and, with respect, it is submitted that his consideration of the parties' intention appears to have become somewhat confused. Once again, a contract was concluded by the fall of the hammer (and Roxburgh J expressly recognised that this was so²⁶⁹). The auctioneer naturally knew that the contract would be unenforceable in the absence of writing and he stated in evidence that he had asked the plaintiff to sign the agreement "in order that (he) should be bound". However, given that a contract already existed it was unnecessary that the writing should be a "contractual document" or that in it the parties should have revealed an intention to be bound. The intention of the auctioneer in preparing the agreement (and for that matter, the intention of the plaintiff in signing it) were entirely irrelevant and the requirements of the fiction were satisfied when the auctioneer recognised the document, which contained the defendant's printed name, as an authentic expression of the contract by presenting it to the plaintiff for him to sign. The printed name thereby having been converted into a genuine signature, it was in keeping with traditional expression,

²⁶⁹id 1047

albeit not strictly accurate, to consider whether the printed name was so placed as to show "an intention that it should apply to the whole of the document". On the basis of the earlier authorities, this requirement was satisfied by the printed name appearing at the head of the document. In this context it is interesting to note that Roxburgh J's somewhat misleading reference to a "perfect agreement" appears to have been derived from the judgments in Hubert v Treherne²⁷⁰. There the expression was used with reference to the writing in Saunderson v Jackson²⁷¹ which once again consisted of a "bill of parcels" which was prepared following an oral agreement for the sale and purchase of goods and in respect of which Lord Eldon Ch.J. stated "This bill of parcels, though not the contract itself, may amount to a note or memorandum of the contract within the meaning of the statute."²⁷²

A final reference is made to the Irish case of Halley v O'Brien²⁷³ which was again an auction case. The facts closely resembled those in Dyas v Stafford²⁷⁴ except that the "memorandum of agreement" annexed to the particulars and conditions of sale was not expressed to be "subject to approval" and made provision for the

²⁷⁰Supra note 252

²⁷¹(1800) 2 Bos. & P. 238

²⁷²id 239. The bill of parcels which contained the defendant's name in print was held to be a sufficient memorandum of the terms of the oral contract although it is difficult to discern from the reports whether the decision in fact involved the application of the authenticated signature fiction at all or whether it was found that the bill of parcels could be read with a letter from the defendant which contained a genuine signature.

²⁷³Supra note 262

²⁷⁴Supra note 245

signature of the vendor or his agent. No such signature was affixed as a result of an oversight on the part of the defendant's solicitor. The Court of Appeal (Sir J Campbell C, Ronan & O'Connor LJ) held that the "memorandum of the agreement", which contained the defendant's full name in print, was sufficient to satisfy the statutory requirements. O'Connor LJ stated:²⁷⁵ "Not always, I think, is it sufficiently remembered that the statute does not require the signature to be to the contract itself; it is sufficient if there is a signed note or memorandum of the contract."

O'Connor LJ then proceeded to outline the steps which the Court's enquiry should follow in a manner which, it is submitted, is particularly instructive. He continued:²⁷⁶

What I have said is so well settled as to be elementary; but I do think that a clear grasp of these elementary matters solves any difficulty that may arise. I now come to apply those considerations to the facts of this case. First, I ask myself was there a complete contract? There evidently was, for the contract was complete the moment the auctioneer's hammer fell. Second, is the document a memorandum of it? It obviously is, for it contains all the essential terms of the contract. Third, is the memorandum signed? The name of the vendor is in it; it is put there by the vendor's agent with the vendor's authority. It is true that it is not at the end of the document; but that as I have shown, is not essential. Does it authenticate the memorandum? It obviously does so, for I fail altogether to follow the argument that the signature is not a good signature because it was put to the document before the contract was completed. When the memorandum was filled up and given to the purchaser to sign, it was authenticated by the name of the vendor, then it is, quite as effectively as if it were put in afterwards. It is quite true that a more formal signature seems to have been intended; but it seems to me and it has been held that that does not affect the matter here there was an absolute contract, unenforceable under the statute, no doubt, for want of the proper evidence of it; the memorandum was of that contract, and for the reasons I have stated, the memorandum was sufficiently signed.

²⁷⁵Supra note 262 at p 1340

²⁷⁶Ibid

V. THE "ORAL" AND THE "WRITTEN" CONTRACT

In formulating the three criteria for the application of the authenticated signature fiction, Wilson J in Sturt v McInnes²⁷⁷ placed substantial reliance on the early decision in Touret v Cripps²⁷⁸, Evans v Hoare²⁷⁹ and Leeman v Stocks²⁸⁰. As has been shown, in Touret v Cripps²⁸¹ and Evans v Hoare²⁸² the writing relied on in fact amounted to a contractual offer which revealed as a matter of construction an intention on the part of the defendant that the parties should be bound upon the plaintiff's acceptance. Leeman v Stocks²⁸³ was decided without reference to the earlier auction cases and although the decision itself is undoubtedly correct, Roxburgh J's reference to the parties' "intention", particularly when viewed out of context and bearing in mind that the document was a post-contract memorandum appear, it is submitted, to be somewhat misleading. However, the fact remains that in view of Wilson J's finding, in Sturt v McInnes²⁸⁴, that the formal document contained terms which had neither been discussed nor agreed previously, it was impossible to regard the document as a memorandum of an existing contract. If it were to take effect it could only do so as a written contract and it was difficult to infer that the parties should intend to be bound by

²⁷⁷ [1974] 1 N.Z.L.R. 729

²⁷⁸ (1879) 48 L.J. Ch. 567

²⁷⁹ [1892] 1 Q.B. 593

²⁸⁰ [1951] 1 All E.R. 1042

²⁸¹ Supra note 278

²⁸² Supra note 279

²⁸³ Supra note 280

²⁸⁴ Supra note 277

its terms in the absence of signature by them both. That the authenticated signature fiction was traditionally thought to have any application at all to "written contracts" is a proposition that remains doubtful at best. Although it is no doubt possible that parties might intend a document to operate as a written contract between them in the absence of signature (the situation postulated by Wilson J's third criterion) such a situation must indeed be rare.

Sturt v McInnes²⁸⁵, it is again submitted, must be regarded as an authority on written contracts alone. Where there is a sufficient memorandum of an existing contract, the intention on the part of those who prepared it should be irrelevant and, in the absence of signature, it should be sufficient to establish that the party to be charged has by some other means shown that he recognises the document as a true expression of the contract. To say of a post-contract memorandum that "It must be shown ... that it (is) not intended to be signed by anyone other than the party to whom it is sent and that, when signed by him, it shall constitute a complete and binding contract between the parties"²⁸⁶ is clearly a contradiction in terms. Moreover, the earlier cases show that it is often equally unnecessary for the document to be "handed or sent by (the party to be charged), or his authorised agent, to the other party for that other party to sign".²⁸⁷

However, as has been discussed in the first part of this paper, the cases which pose the greatest difficulty in the application

²⁸⁵ Ibid

²⁸⁶ Wilson J's "third criterion", Sturt v McInnes, supra note 277

²⁸⁷ Wilson J's "second criterion", Sturt v McInnes, supra note 277

of Section 2 of the Contracts Enforcement Act, 1956 as a whole are those in which parties who have reached an oral agreement as to terms later instruct solicitors with a view to the preparation of a formal contract. Where parties have reached a concluded agreement and intend the terms thereof to be restated in a form which is fuller or more precise, but not different in effect, it is submitted that in the absence of the defendant's signature to the formal document, the authenticated signature fiction can still operate so long as the defendant has in some other way recognised that he regards the document as a true expression of the parties' agreement. But within this context, it is again always open to the Court to find that the parties never intended to be bound other than by means of the formal document, the preparation and execution of which will therefore operate as a condition precedent to the formation of a concluded contract.

VI. THE NEW ZEALAND CASES BEFORE AND AFTER

STURT V MCINNES

One of the earliest cases in New Zealand to apply the authenticated signature fiction was Bisland v Terry²⁸⁸, an action for specific performance of an oral agreement for the sale of a farm. Negotiations took place at the farm and it was agreed that the plaintiff would purchase the property from the defendants for a specified price, part of which the defendants were to leave in on second mortgage, the balance to be provided by a first mortgage in favour of the Rural Bank and the plaintiff's own cash contribution.

²⁸⁸[1972] N.Z.L.R. 43

Both parties instructed their solicitors and the defendants' solicitor prepared and forwarded to the plaintiff's solicitor a formal agreement for perusal. The plaintiff discussed the agreement with his solicitor when three points were found to require attention. The first was the basis upon which interest was to be charged on the second mortgage to be given back to the defendants, the second related to the rate at which capital repayments under the second mortgage were to be made, and the third related to the obtaining of consents to certain water rights affecting the property.

The third point was resolved immediately when the plaintiff's solicitor telephoned the defendants' solicitor who agreed to the incorporation of an additional clause which became clause fourteen. The other points were not resolved but the plaintiff signed the agreement instructing his solicitor to retain it at least until the defendants had agreed to a reduced interest rate. The defendants later acceded to the plaintiff's request regarding the interest rate and the agreement was accordingly returned. The question of the rate of capital repayments was not resolved and neither was a further question which arose regarding the value of an irrigation plant and certain chattels which were included in the purchase price. The plaintiff later confirmed finance in accordance with the terms of the agreement but the defendants elected not to proceed with the sale.

At the trial, Quilliam J found that the parties had reached a concluded oral agreement as to all essential terms by the time the defendants' solicitor forwarded the draft agreement for perusal. The agreement contained the defendants' full names and identified them as vendors and the plaintiff argued that the action of the defendants' solicitor, acting upon his client's instructions, in preparing the agreement for sale and purchase and in tendering it to the plaintiff's

solicitor amounted to a "sufficient signing" for the purposes of the Act. After referring to the earlier authorities²⁸⁹, Quilliam J accepted this submission, stating:²⁹⁰

In the present case, then, is there evidence that the agreement sent by (the defendants' solicitor) to (the plaintiff's solicitor) was to be regarded by the parties as complete in itself? I think it must be acknowledged that there is. As I have already held, by the time the agreement was forwarded to (the plaintiff's solicitor) all the terms had been agreed upon. The document did not accurately record that agreement with regard to the interest on the 2nd mortgage, but this was acknowledged to have been in error, and was rectified. The addition of cl. 14 was not made by (the defendants' solicitor), but was agreed to by him. At the worst from the plaintiff's point of view it should be deleted.

Quilliam J gave judgment for the plaintiff and granted the order sought. At the trial the plaintiff had also produced in evidence a receipt given by the defendants' solicitor for the deposit but Wilson J found that it was unnecessary for the plaintiff to rely on this because the agreement had been concluded and evidenced in writing before it was given.

The decision in Bisland v Terry²⁹¹ was cited with approval shortly afterwards in Short v Graeme Marsh Ltd²⁹². The plaintiff there had been negotiating for some time with a Mr Marsh, the director of the defendant farming company for the sale to him by the defendant of some thirty-eight acres of farm land which the plaintiff had occupied as a sharemilker for the past three years. The area of land in question was part of a larger area of land which Mr Marsh had subdivided. Mr Marsh's mortgage liabilities were such as to make

²⁸⁹ Scheider v Norris (1814) 2 M & S 286; Evans v Hoare [1892] 1 Q.B. 593 and Leeman v Stocks [1975] 1 All E.R. 1042

²⁹⁰ *Supra* note 288 at p 50

²⁹¹ *Supra* note 288

²⁹² [1974] 1 N.Z.L.R. 722

it desirable for him to dispose of the thirty-eight acres and the other lots as closely in time as possible and he had therefore wished to defer the sale to the plaintiff until prospective purchasers for other parts of the land could be found. When it appeared that other sections would in fact be sold, the plaintiff again approached Mr Marsh and brought up the subject of the thirty-eight acres.

They told each other who their solicitors were and then the defendant said 'Now this is unconditional'. The plaintiff said 'Yes'. The defendant repeated his words and the plaintiff again agreed ... and said he wanted to be in by 1 June, a crucial date in farming in the district.

The price had been discussed and agreed previously and the plaintiff had already arranged his finance. Both parties saw their solicitors and Mr Marsh's solicitor wrote to the plaintiff's solicitor stating "We enclose an agreement for execution if in order. Will you please advise us whether your client can make a declaration". The agreement contained the printed names of the parties at its head and was in standard form, however, on the last page there appeared the typed words "The vendor is not bound by this agreement until it has signed the same and the deposit has been paid". The plaintiff paid the deposit and signed the agreement and returned it to Mr Marsh's solicitor, however, before the agreement was executed by the defendant company it became apparent that one or more of the other sales would not take place and Mr Marsh refused to proceed.

Haslam J found that the parties had reached a concluded oral agreement of which the draft agreement and the defendant's solicitor's letter provided a sufficient memorandum. He held that the words printed at the bottom of the draft contract could not be read as a denial of a pre-existing contract. They had been introduced without the plaintiff's authority and "At the very most, all I could read into those words would be something equivalent in effect to the term

'subject to contract' in the particular context in which it was canvassed and construed by their Lordships in the Court of Appeal in England in Law v Jones²⁹³. This was sufficient to dispose of the case but Haslam J went on to state:²⁹⁴

If I were compelled to do so, I should also be prepared to find that the typed words in this memorandum of agreement, 'Graeme Marsh Ltd of Cambridge', appearing at the beginning and at the end of the form submitted, be sufficient signature to comply with the Contracts Enforcement Act 1956 and I rely again upon the principle that was repeated in the Bisland case and treat those words as they appear in typescript as falling within the rule known as authenticated signature fiction.

Haslam J's obiter comments, above, and the decision in Bisland v Terry²⁹⁵ have since been much maligned. Wilson J in Sturt v McInnes²⁹⁶ said of Quilliam J's judgment in the Bisland²⁹⁷ case:²⁹⁸

He does not refer to any circumstances showing that it was intended that the contract would not be signed by the defendant. With respect, I think that when Roxburgh J referred to a document being a perfect agreement he meant that it was perfect without the vendor's signature. That conclusion appears inescapable from the extract from his judgment already quoted by me. If Quilliam J held otherwise I must respectfully disagree and decline to follow him in that regard.

Wilson J found that, according to his researches, the Bisland²⁹⁹ case was the first ever to dispense with the "third condition" and that this fact had not been drawn to the attention of

²⁹³id 727

²⁹⁴ibid

²⁹⁵Supra note 288

²⁹⁶Supra note 177

²⁹⁷Bisland v Terry supra note 288

²⁹⁸Supra note 277 at p 734-735

²⁹⁹Bisland v Terry supra note 288

Haslam J in Short v Graeme March Ltd³⁰⁰ "so that it is impossible to predicate that his assent to the decision in Bisland v Terry was a considered one".³⁰¹

Given the fact that in both Bisland v Terry³⁰² and Short v Graeme Marsh Ltd³⁰³ the document was a post-contract memorandum, the writer would again argue that whether or not "it was intended that the contract would not be signed by the defendant" was beside the point. The objection to the Bisland³⁰⁴ case is, it is submitted, more in the finding that there was a concluded oral contract at all. Although it cannot be said that Quilliam J's finding in this regard was insupportable, it seems doubtful that a similar case would go the same way today. While there may have been agreement as to the essential terms there was clearly not with regard to the collateral ones and further negotiation with respect to these took place in the context of the formal agreement which was altered and amended accordingly. It would seem that a Court now faced with similar facts might well hold that the parties only intended to be bound upon the execution of the formal agreement by both parties. This would at any rate seem to have been the intention of the defendant when he specifically instructed his solicitor not to release the contract until further alterations had been agreed to.

The facts in Bisland v Terry³⁰⁵ can be usefully contrasted

³⁰⁰ Supra note 292

³⁰¹ Supra note 277 at p 735

³⁰² Supra note 288

³⁰³ Supra note 292

³⁰⁴ Bisland v Terry supra note 288

³⁰⁵ Supra note 288

with those appearing in Short v Graeme Marsh Ltd³⁰⁶. In the latter case as Haslam J stated:³⁰⁷

There were no other material terms to the bargain between these two. Parties, price, date of possession, and subject-matter of the contract were all agreed upon in a complete consensus. Because the plaintiff was himself in occupancy of this block as a sharemilker, there was no necessity for the customary covenants from a vendor about good husbandry ...

Haslam J went on to point out³⁰⁸ "Let it be remembered at this juncture that it is common ground that a memorandum to satisfy the statute ... does not have to be itself a contractual document". However, Short's³⁰⁹ case was decided prior to the decision of the English Court of Appeal in Tiverton Estates Ltd v Wearwell Ltd³¹⁰ and in view of the stipulation typed at the bottom of the formal agreement it again seems clear that a similar result would not be achieved today.

Sturt v McInnes³¹¹ was followed in Van der Veecken v Watsons Farm (Pukepoto) Ltd³¹². Negotiations for the sale of farm property again took place between the plaintiff-purchaser and a Mr Watson, the director of the defendant company. The parties reached agreement as to price and other essential terms but the plaintiff later offered to pay an increased price if he could purchase the farm as a going concern. Mr Watson indicated that he would accept the specified

³⁰⁶Supra note 292

³⁰⁷Supra note 292 at p 725

³⁰⁸id 727

³⁰⁹Supra note 292

³¹⁰[1975] Ch 146

³¹¹Supra note 288

³¹²[1974] 2 N.Z.L.R. 146

price and it was agreed that his real estate agent would prepare a formal agreement. When the plaintiff received the agreement by post it was accompanied by a letter from Mr Watson's agent advising that Mr Watson sought amendments to the agreement which it was suggested should be made by the plaintiff's solicitor. The amendments sought included yet a further increase as to price and the remainder related to the price for stock, the purchase price of a rotary hoe, a smaller number of hay bales to pass on sale and a recommendation that the plaintiff should take a better tractor. The letter concluded: "Should you wish to discuss the contract, please call me. If we can get the documents to Mr Watson within the next 10 days, I am sure he will stand by his word and sign up."

At about the same time the real estate agent telephoned the plaintiff and suggested that the plaintiff might also like to amend the deposit clause so that only part of the deposit should be payable immediately and the balance some two months later. The plaintiff then consulted his solicitor who made the appropriate amendments and the plaintiff then signed the agreement which was returned to the real estate agent. Mr Watson subsequently refused to sign maintaining that he had not seen the agreement before it was forwarded to the plaintiff and had not agreed to the delayed payment of the deposit.

In an action by the plaintiff for specific performance, Beattie J found that it was not possible to read the agent's letter with the draft agreement because, on the evidence, the agent had not been authorised by the defendant to conclude a sale. If the plaintiff was to succeed he had therefore to rely on the authenticated signature fiction. It was not contended by the plaintiff that the parties had reached a concluded oral agreement and Beattie J found that this

immediately distinguished the case from Bisland v Terry³¹³. However, he went on to state that Quilliam J, in Bisland v Terry³¹⁴, had not -³¹⁵

expressly posed the question of whether another signature was required in that case. If Bisland was decided on some basis other than a complete document, then, like Wilson J ... I respectfully disagree. I say this because Quilliam J makes no reference to the third criterion of Wilson J that it was intended that the contract would not be signed by the defendant.

Beattie J affirmed that Sturt v McInnes³¹⁶ correctly stated the principles for the application of the authenticated signature fiction and found that in the instant case, the plaintiff had failed to establish the third criterion. He concluded "It is my opinion that neither side intended to contract otherwise than by the execution of the instrument by the parties to it".³¹⁷

Once again, given the factual findings made by Beattie J, the decision in the Van der Veeken³¹⁸ case is undoubtedly correct. It is possible, it is submitted, to view the decision in either of two ways - either there was no oral agreement, in which case the formal document could only operate as a "written contract" or there was an oral agreement as to essential terms which was subject to a condition precedent that a formal document should be prepared and executed. If the true position was in fact the latter, then strictly speaking it was unnecessary to consider the provisions of Section 2 of the

³¹³Supra note 288

³¹⁴Ibid

³¹⁵Supra note 312 at p 153

³¹⁶Supra note 277

³¹⁷Supra note 312 at p 154

³¹⁸Van der Veeken v Watsons Farm (Pukepoto) Ltd supra note

Contracts Enforcement Act 1956, there being no "contract" on which the action could legitimately be brought. This point was emphasised in the decision of the High Court of Australia (Dixon C J, Williams, Webb, Fullagar and Taylor JJ) in Neill v Hewens³¹⁹ (which was cited with approval in the Van der Veeken case³²⁰) where it was stated:³²¹

At the threshold of this case lies the question whether any contract was in fact made. From the facts that have already been stated it seems to be perfectly clear that neither party entered into any anterior contract containing the terms and conditions expressed in the written contract. There was certainly no contract of which that document was intended only to be a subsequent note or memorandum. Neither side intended to contract otherwise than by means of the very instrument. It is equally clear that when the written contract was drawn up by the solicitors and explained to the parties it was intended as an instrument to be converted into a contract by the execution by all parties thereto On the facts, therefore, the plaintiffs must fail on the simple ground that they are unable to establish the actual making by the defendants of the contract on which they sue ... As it denies the making of the contract, it leaves no room for the question whether the Statute of Frauds has been satisfied.

That the courts are often seen to embark upon a consideration of the statutory requirements, and of the authenticated signature fiction, before determining if and at what point a contract can be said to exist at all is illustrated, it is submitted, by the most recent New Zealand case on the topic, Van Eyk v Marshall.³²²

The defendants in the Van Eyk³²³ case were husband and wife and the registered proprietors, as tenants in common, of a farm property. On the same day that a separation agreement was drawn

³¹⁹(1953) 89 C.L.R. 1

³²⁰Van der Veeken v Watsons Farm (Pukepoto) Ltd supra note
312

³²¹Supra note 319 at p.13

³²²₁ N.Z.C.P.R. 537

³²³Van Eyk v Marshall, Ibid

up between them, they entered into a conditional agreement for the sale of the farm to the plaintiff, however, the plaintiff was unable to satisfy the conditions by the due date and the agreement thereupon became void. Shortly afterwards, but while Mrs Marshall was overseas, a second agreement was prepared subject only to the requirements of the Land Settlement Promotion and Land Acquisition Act 1952. This agreement provided for payment of a slightly higher deposit but the purchase price remained unchanged. The second agreement was signed by the plaintiff and by Mr Marshall but on her return Mrs Marshall refused to consent to the sale.

The evidence given by Mrs Marshall, which the Court accepted, was that while she was overseas she had had second thoughts about the sale on the basis that when her son was older he might himself wish to carry on the farm. She was, therefore, relieved when she returned to New Zealand to find that the original sale to the plaintiff had fallen through. Bisson J was not prepared to find that Mrs Marshall was aware of the new proposals, prior to the time at which the second agreement was prepared, or that she had ever approved them.

Given that the parties' original agreement had been avoided one might at this point be tempted to assume that Mrs Marshall's evidence had disposed of the matter. Not only had she refused to sign the second agreement, but more importantly she had also never approved of its terms. In these circumstances, it is difficult to envisage how she could possibly have become bound by the second agreement, however, Bisson J went on to consider the provisions of the Contracts Enforcement Act, 1956 and in particular, whether it was possible for the plaintiff to succeed on the basis of the authenticated signature fiction. He found it was not. Having found that the

principles were correctly stated by Wilson J in Sturt v McInnes³²⁴ he concluded that judgment should be given for the defendants as the plaintiff had again failed to satisfy the third criterion.

VII. CONCLUSION

In the latter part of this paper, the writer has sought to argue that the requirements for the authenticated signature fiction formulated in Sturt v McInnes³²⁵ are far from immutable and are inapplicable where the writing relied upon can be said to constitute a post-contract memorandum. The anomalies which are seen to appear in many of the decided cases arise, it is submitted, from an initial failure to determine the time at which and the manner in which parties in negotiation for the sale of land may have intended that each should be bound. This question presents particular difficulties where parties who have reached an oral agreement as to terms have also contemplated the preparation of a formal written agreement.

Before the requirements of the Contracts Enforcement Act 1956 can be considered, quite apart from the application of the authenticated signature fiction, it is essential that there be a "contract". Where there has been no agreement as to the terms contained in the formal document or where parties who have otherwise reached an agreement as to terms intend that they shall not be bound until the formal document is executed, the authenticated signature fiction cannot operate so as to charge a party when in fact no contract existed.

³²⁴Supra note 277

³²⁵Ibid

Where, however, parties who have reached a concluded bargain intend the preparation of a written agreement purely as a matter of form, then as the cases discussed in the first part of this paper clearly indicate, the statutory requirements are satisfied, despite the fact that the formal agreement has not been signed, so long as there are other sufficient writings which bear the defendant's signature. Just as a letter or a receipt may be read with the written document, in its unexecuted form, there would seem to be no reason in principle why writings such as these should not equally suffice if they should contain in place of a genuine signature, the defendant's name in print. Logically, there should be no reason why the defendant's printed name appearing in the document itself cannot suffice although in these circumstances, and without more, it may prove difficult to establish that there has been on the part of the defendant a sufficient recognition or acknowledgement both that the contract has been made and that the formal document is an accurate expression of its terms. Whether in subsequent cases there can be found an opportunity to distinguish Sturt v McInnes³²⁶ is something that remains to be seen.

³²⁶ Ibid

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