Neutral Citation No.: [2008] NICh 16 | *Ref:* **DEE7305**

Judgment: approved by the Court for handing down | *Delivered:* **26/11/08**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

_____

2007 No. 122780

BONNER PROPERTIES LIMITED

-v-

McGURRAN CONSTRUCTION LIMITED

_____

DEENY J

[1] This case is about the use of language and, in particular the extent of the effect of the phrase 'Subject to Contract' emblazoned on a solicitor's letter. The plaintiff company herein is engaged in property development. It seeks a declaration that there is a binding contract for the sale of land between it and the defendant, which is a company engaged in house building, relating to land situate at Derrygonnelly and comprised in Folios FE85889 and FE86244 of County Fermanagh. The plaintiff seeks specific performance of the asserted contract on which the defendant has refused to complete. Mr Horner QC who appears for the plaintiff with Ms Jacqueline Simpson, submits that an important question of conveyancing law and practice is involved in the decision of the court. I had helpful written and oral submissions from counsel for the plaintiff and also from counsel for the defendant, Mr Brian Fee QC and Mr Donal Lunny.

[2] The land in question is on the edge of the village of Derrygonnelly and circa 4.78 acres in extent. In 2007 the plaintiffs were in the process of obtaining planning permission to build 40 dwelling houses upon it. Agents acting for the vendors (who were then described as Mayne Developments) agreed with the plaintiff the purchase price of £3.2m. The matter was then passed to Messrs Carson and McDowell as solicitors for the vendors and Messrs Murnaghan Fee as solicitors for the purchaser. The latter wrote to the former on 18 April 2007 inviting receipt of the contract, title and replies to standard pre-contract enquiries as soon as possible. That was in accordance with the practice prevailing in this jurisdiction. Likewise the letter was

marked "Subject to Contract" as is also the practice. All the subsequent correspondence between the solicitors until 7 September was similarly marked but a dispute arises, inter alia, as to the meaning of those words when attached to an exchange of letters between the solicitors later in the year.

[3] On 30 April the vendor's solicitors sent searches and other material but not a draft contract. This was sent by them on 9 May although the attached letter raised an issue about a third party having a right of way. The draft contract of sale set out Special Conditions in a form which that firm of solicitors thought appropriate for a transaction of this kind with the addition of a fourth special condition relating to the third party right of way. Messrs Murnaghan and Fee replied on 8 June dealing with several matters and correspondence between the solicitors followed on 14 June 2007 when the vendor's solicitors sent a revised form of contract. This revised form of contract, like the previous one, consisted of a memorandum of sale which proposed to sell the property subject to, inter alia, "the within conditions". Those included not only the Special Conditions but the General Conditions of Sale, 3rd edition 2nd revision, of the Law Society of Northern Ireland. Neither of the vendor's memoranda of sale were signed, as is customary. There was further correspondence between the solicitors culminating in a letter, important in this case, of 26 July 2007 from the purchaser's solicitors to the vendor's solicitors. As with all other letters (before 7 Sept.) it was stated to be subject to contract. However it included an amended contract signed on behalf of the defendant "for acceptance by your client" i.e. the vendor. The contract sent by Mr Donal Fee of Murnaghan Fee amended the former special condition 4 of the vendor's solicitors and added a new special condition 5. The former related to the long stop date for the contract coming into effect if planning permission was not granted by 1 October 2007. The latter, 5th special condition read as follows:

> "The vendor shall procure (at its own expense) and transfer to the purchaser all easements including sight lines necessary to satisfy road service requirements attached to the planning permission referred to at 4. above."

Mr Fee looked forward "to hearing from you as soon as possible with a copy of the accepted contract".

[4] Some uncertainty about the significance of these words had arisen in certain decisions of the Court of Appeal in England: Law v Jones [1973] 2 All ER 437; Griffiths v Young [1970] 3 All ER 601, [1970] Ch 675. However these uncertainties were put to rest, finally as it transpired, by a further decision of the Court of Appeal (Lord Denning MR, Stamp and Scarman LJJ) in Tiverton Estates Limited v Wearwell Limited[1974] 1 All ER 209; [1974] 2 WLR 176. The court held that in order to satisfy the requirements of Section 40(1)of the

Law of Property Act 1925 (the approximate equivalent of Section 2 of the Statute of Frauds (Ireland) 1695) it was necessary for the note or memorandum relied on to contain not only the terms of the contract but also an express or implied recognition that a contract had in fact been entered into. A document setting out the terms of the alleged contract which was expressed to be, or form part of correspondence expressed to be, "subject to contract" did not therefore constitute a sufficient memorandum. In Devlin v N.I.H.E. [1982] NI 377 Lord Lowry L.C.J., sitting as a judge of the Chancery Division, was of the same mind. Indeed, at p. 388, he drew "attention to the important case of Tiverton Estates Ltd. which dispelled the alarm created for a short time in the profession by Law v Jones." In the Republic of Ireland there had also been authorities which seemed to weaken the effect of the words "subject to contract "e.g. Kelly v Park Hall Schools [1979] IR 340. However the majority in the Supreme Court in Boyle v Lee [1992] IR 555 declined to follow that authority. Finlay CJ, with Hederman and O'Flaherty JJ, (McCarthy J. dubitante, Egan J. dissenting) found that a note or memorandum of a contract made orally would not be sufficient to satisfy the Statute of Frauds unless it directly or by very necessary implication recognised not only the terms to be enforced but also the existence of a concluded oral contract between the parties: no such note or memorandum which contained any term or expression such as "subject to contract" would be sufficient. It is not necessary for these purposes to set out the judgments in extenso but I note with respectful agreement the reminder from O'Flaherty J, speaking of "subject to contract". "This incantation has no talismanic property. Before examining this phrase at all, it is necessary to go back to the rudiments of the law of contract and find out whether there was an offer and acceptance and an intention to create legal relations." It is right to say, as counsel pointed out, that he went on, at p588, to say that the phrase was " prima facie a strong declaration that a concluded agreement does not exist" but I do not consider that affects the position in the instant case.

[5] However it seems to me that the use of the words in the letter of the 26th July, interesting though it is, does not assist the defendant here. The defendant did not give evidence through its directors but Mr Fee did give evidence. He readily acknowledged that in accordance with the normal practice as he understood it in Northern Ireland his client would be bound on foot of the contract he was sending despite the words 'subject to contract' in the adjoining letter, if the vendor had accepted the contract in compliance with General Condition 5.1 of the Law Society conditions. 5.1 reads:

> "The contract (other than in a sale by auction) shall be formed upon receipt by the Purchaser or his solicitor of a copy of the Purchaser's offer as accepted by the Vendor (or on his behalf). …."

Although not expressly stated 'accepted' here means in practice signed by or on behalf of the vendor. When I suggested to Mr Donal Fee that the words 'subject to contract' on his letter therefore really meant "subject to the enclosed contract" he agreed that that was the case. It seems to me that there is little, if any, difference between his view of that matter and the view put forward in evidence by the vendor's expert witness Mr Ian Huddleston, solicitor, of Messrs L'Estrange and Brett, in examination in chief and cross-examination.

[6] On 8 August 2007 Messrs Carson and McDowell replied to Mr Fee. I set out the letter in large part. Again it was 'subject to contract'.

> "Thank you for your letter of 26 July 2007. While we appreciate receiving a Contractual Offer it does not take into account the request made by our client in our letter of 20 July 2007. We would be obliged if you would confirm that your client accepts that the planning condition will be satisfied once the matter has been passed by the local council in which case Special Condition 4 would read as follows:
>
> [Revised special condition 4 is set out.]
>
> Please confirm that this is acceptable.'
>
> You have added a special condition 5 about sight lines etc. This is not acceptable to our client. Without prejudice to this it believes that the development as per the planning application can be fully accommodated within the confines of its title. It will not procure anything further. If it was to assuage your client's concerns our client would be happy for a new Special Condition 5 to read as follows:
>
> > 'For the avoidance of doubt the permission referred to in 4 above shall only be applicable if it can be fully implemented within the confines of the Vendor's title.'
>
> We have requisitioned the company's office for search and we will let you have same shortly. We look forward to hearing from you as soon as possible.

Yours faithfully"

The Companies Office search was forwarded on 10 August.

[7] I will have to return to this letter but I observe for now that the change in Special Condition 4 is an important one. In Northern Ireland the "local council" is merely a consultative body for planning purposes. Its approval does not constitute lawful planning permission but is merely a step on the way. Asking the purchaser to vary its offer in this way was a significant and material change. Furthermore the issue of sight lines is clearly vital for a successful planning permission for a housing estate. It will be seen that the vendor's solicitor's letter not only said that the purchaser's offer in this respect was "not acceptable" but proposed an alternative wording to special condition 4 which also materially differed from the purchaser's offer. In the event there was some further exchange of correspondence between the parties in August leading to a letter from Messrs Murnaghan Fee of 24 August saying that they were not yet in a position to confirm whether the amendments to these special conditions set out in Carson and McDowell's letter of 8 August were acceptable to their client. They said they would revert as soon as they had firm instructions. Messrs Carson and McDowell wrote again on 7 September 2007 in a letter which, for the first time, was not subject to contract. It read:

> "We refer to previous correspondence in this matter. Our client has now spoken further to its roads engineer and planning consultants and have (sic) been advised that the development can be fully implemented within the confines of the site and that the planning application is likely to be passed for approval by the local council towards the end of this month with the green form issuing shortly thereafter. It is therefore prepared to live with your original special conditions as opposed to altering same and we are pleased to enclose copy accepted contract. We look forward to receiving cheque for deposit as soon as possible."

The deposit was £160,000 which, in accordance with practice, had not yet been proffered.

[8] The plaintiff's case is therefore a simple one. The purchasers had made an offer to purchase on 26 July 2007; this offer had not been withdrawn. It was accepted by the vendor on 7 September. That was in accordance with condition 5.1 of the general conditions and a binding contract existed between the parties. The defendants by their defence contended that the plaintiff's

solicitors letter of 8 August 2007 rejected that offer and constituted in law a counter offer the effect of which was to "kill" the defendant's aforementioned offer. Therefore the purchaser's offer was not extant on 7 September. This position was presaged by Mr Fee in a letter of 26 September. In his evidence he explained to the court's satisfaction why there was a little delay in replying to the letter of the 7th. It does not seem to me to assist the vendor that his clients might have contemplated accepting the position without finally committing themselves. The factual background is that the property market in Northern Ireland was changing at this time and it may be that that entered the thinking of one or both parties. It matters not in my view. The issue is whether there was, in accordance with the law of contract, of which conveyancing is a branch, an offer on the table which the vendor could accept by returning the contract signed on the 7th September.

[9] Mr Horner for the plaintiff submitted that the vendor's solicitors letter of 8 August could not constitute a counter offer for the simple reason that it was stated to be "subject to contract". The purchaser's solicitor could not have accepted it for that reason. Mr Donal Fee in evidence said that in his view subject to contract in that letter meant subject to your earlier contract with these amendments and that he could have accepted that counter offer on the part of the purchaser if the purchaser had wished to do so. The obvious difficulty with that argument is that not only might the words not be construed in that way but he would have no note of memorandum in writing signed by the party to be charged. Mr Horner relied on the judgment of Lord Denning in H. Clark (Doncaster) Limited v Wilkinson [1965] 1 Ch. 694 as authority for the proposition that a solicitor has no ostensible or apparent authority to sign for his client. I note the actual terms of this dictum at page 702.

> "The defendant swore on oath that at no time had his first solicitors any authority to sign any contract on his behalf. It was acknowledged to be law before us that a solicitor has no ostensible or apparent authority to sign a contract of sale on behalf of a client so as to bind him when there is no contract in fact. An auctioneer, it was said, has ostensible authority, but a solicitor has not. It would seem, therefore, that if the defendant is to be bound by his contract, then the buyer has to prove that a solicitor had authority in fact to sign it. Now here the defendant swore on oath an affidavit that his solicitor had no such authority. That disclosed a triable issue such as to entitle him to leave to defend in the action."

This seems to me consistent with the opening of the judgment of Danckwerts LJ in the same case at page 703. " It is well settled law that a solicitor prima

facie has no authority to sign a contract of sale and purchase on behalf of its client. He must either have express authority or the circumstances must be such that implied authority can be inferred from them." (My underlining). It can be seen therefore that this case does not address the issue of whether express authority is required for a solicitor to reject an offer on behalf of her client. Furthermore the court must look at the evidence to see if such authority in fact existed or can be inferred from the circumstances. I shall return to that point.

[10] It seems to me that in pursuing the issue of a possible counter-offer there is a danger of ignoring the advice of the thane of Cawdor and let " vaulting ambition … o'erleap itself and fall upon the other." It is clear law that a counter-offer does terminate an offer; Hyde v Wrench (1840) 3 Beav. 334. But does one need to go to that stage? The purchaser had made an offer to purchase, as his solicitor frankly admits, and the vendor could have accepted this until 8 August. However the letter of 8 August from the vendor's solicitor appears to alter the position. The addition of the words 'subject to contract' may, the defendant argues, prevent it "having contractual force" as counsel for the vendor put it but otherwise was it a rejection of the purchaser's offer which terminated that offer? On this Chitty on Contracts 29th Edition Volume 1 para 2-090 is clear. "A rejection terminates an offer, so that it can no longer be accepted." The authority therein cited is Tinn v Hoffman and Company (1873) 29 L.T. 271, 278. In that case Mr Tinn was negotiating with the defendants for the purchase of some 800 tons of iron. The exchange of correspondence between them dealt with quantity, time and price. The majority of the Court of Exchequer held that there was no binding contract as the plaintiff's purported letter of acceptance of 28 November did not constitute the same as it was too late for the defendant's offer to sell contained in the letter of 24 November. On appeal to the Court of Exchequer Chamber the majority of that court (Blackburn, Keating, Brett, Grove and Archibald JJ, with Quain and Honeyman JJ dissenting) affirmed this judgment of the majority below. I quote from Brett J, as he then was, at page 278:

> "I agree that the words 'your reply by return of post' fixes the time for acceptance and not the manner of accepting. But that time elapsed; there was no acceptance within the limited time. So far from there being an acceptance, it seems to me that the plaintiff's letter of 27 November rejects that offer; it rejects it on the ground that the price is higher than the plaintiff is willing to give. That offer is, therefore, not accepted within the limited time but is rejected and it seems to me is at once dead."

It can be seen that the judge was not confining his remarks to the time point.

The letter of 24 November reads:

> "We beg to offer you 800 tons at 69 shillings per ton delivered at p., and awaiting your reply by return remain etc."

The letter of 27 November from the plaintiff read:

> "Your price is high; if I made the quantity 1200 tons delivery 200 tons a month for the first six months of next year I suppose you would make the price lower?"

It is interesting to note that the judges viewed the terms of this letter as a rejection of the offer.

[11] This view of rejection by an offeree is reinforced by the relevant passage in Halsburys Laws of England 4th Edition Volume 9(1) (Reissue) at para. 645:

> "The power to accept an offer may be terminated by any unambiguous intimation, express or implied, by the offeree to the offeror that he rejects the offer. This will generally remain true notwithstanding that the offer was stated to be open for a certain period as yet unexpired. A rejection cannot be effective as such unless and until communicated to the offeror; but, thereafter, the offer cannot be accepted unless subsequently revived by the offeror, or unless the original offer was intended to continue notwithstanding a rejection."

There is no doubt here of communication by the offeree to the offeror. The first proposition is supported not only by Tinn v Hoffman op. cit. but also by Thornbury v Bevill (1842) 1 Y&C Ch. Cas 554, per Knight Bruce V-C. I conclude therefore that in this action the court must determine three issues –

(a) Whether the terms of the letter of 8 August constituted a rejection of the purchaser's offer to purchase;

(b) Whether the author of letter had authority to write it on behalf of the vendor, either expressed or implied;

(c) Whether the presence of the words "subject to contract" on the letter prevented it constituting a rejection of the offer.

I will deal with these in turn.

Rejection

[12] It is correct to say that an offeree in these circumstances may write back enquiring whether the offeror might be agreeable to altering the wording of some clause. As it has sometimes been put they may ask for some indulgence. Halsbury op. cit para 645 states that an offer can only be rejected by a definite indication of intention to reject. However the authority for this is Manchester Diocese Council for Education v Commercial and General Investments Limited [1969] 3 All ER 1593, where one finds that the court was dealing with evidence of acceptance ie a letter of 15 September where the plaintiff's solicitor stated that the "sale has now been approved" by the plaintiff. Buckley J does not seem to have addressed what constituted a rejection. A definition of the word is not to be found in either Stroud or Words and Phrases Legally Defined or in Wylie's Irish Conveyancing Law (3rd Edition). Chitty and Halsbury have already been quoted above. The ordinary meaning of the word, for example from Chambers English Dictionary includes "to refuse to accept, admit or accede to". Or the Shorter Oxford : "to refuse (something offered); to decline to receive or accept". It comes from the Latin rejicere – to throw back.

The court looks at the language of the letter. Firstly one notes that special condition 4 has been rewritten extensively and, as previously pointed out, in a material and substantial way ie. that the vendor will not make the sale subject to planning permission but merely to a recommendation to approve from the "local council". The letter goes on to say of special condition 5 : "This is not acceptable to our client." It seems to me that that language is clear and emphatic. To say that one does not accept something is merely a less stark way of saying one rejects it. Furthermore the very next sentence reads:

> "Without prejudice to this it believes that the development as per planning application can be fully accommodated within the confines of its title."

The revised special condition 5 is therefore subject to this phrase without prejudice. That would normally carry the implication that the preceding words ie. "not acceptable" were with prejudice. I can see no reason why the court should disregard that normal interpretation. Finally the letter goes on to offer special condition 5 which is again materially different to that put forward by the purchaser in its offer. Instead of the vendor being obliged to buy the land for sight lines to make the development work the vendor is merely saying, in effect, that the purchaser can withdraw if the sight lines do not work within the land already acquired. Indeed the letter reads : "It will

not procure anything further." This is a clear rejection of the purchaser's condition that the vendor must procure more land if it is needed. I therefore conclude that the language of the letter does amount to a rejection of the purchaser's offer sent with its solicitor's letter of 26 July. I consider that Mr Fee and his clients were entitled to treat it as a rejection, although not debarred from repeating their earlier offer if they so wished in time.

Authority

[13] I then turn to the contention put forward by the defendant that this letter was written without authority. I have already referred to the submission of Mr Horner QC that a solicitor does not have ostensible or apparent authority to sign a contract of sale on behalf of his client, although I have pointed out the wording of the decision of the Court of Appeal in regard to same. This reference came from Farrand: Contract and Conveyance (1st Edition, 1968). In the same text book at page 36 after a discussion of this topic which is interesting, including a quotation from Danckwerts LJ in Gavaghan v Edwards [1961] 2 QB 220, the learned author concluded that "it is probably better to assume that a solicitor's authority to sign the contract itself can only be given to him expressly whilst his authority to sign a memorandum of a contract may be implied." That aside counsel tended to equate the proposition that the solicitor cannot enter into a binding contract on behalf of the client with the proposition that she could not reject an offer but it seems to me that the two are not one and the same. As it happens this is not determinative of the issue before me in this case but I incline to the view that it would be the preferable and natural approach to assume that a solicitor engaged in a conveyancing transaction, writing on behalf of his client, did have ostensible authority to reject an offer on behalf of the client. It would seem to me a very unsatisfactory situation if another solicitor in such circumstances had to write back and ask whether the letter was or was not written with the authority of the solicitor before he knew whether his client's offer had or had not been rejected. Responsible solicitors intend their letters to be read with care and they should also be written with care.

[14] Ms Rosemary Carson was called on behalf of the defendant whose solicitor she was at all relevant times. The directors of the plaintiff company did not give evidence as to what authority they had given. She has more than 10 years experience as a conveyancing solicitor and is a partner in the firm of Messrs Carson and McDowell. As a generality she said that she did not have any authority to bind her clients. She could negotiate contracts for them but, unless they had given her a power of attorney, the contracts would need to be made or signed by them. She had been acting for this defendant with regard to the purchase of land in County Fermanagh for some years prior to this purchase. She gave evidence both about the generality of practice (on Thursday 16 October) and about this particular contract or putative contract on that date and on Friday 17 October. She said in evidence-in-chief that she

had no authority from her clients to bind them. By her letter of 8 August she told the court that she "asked could the wording be changed?" It can be seen that that is not a correct summary of the letter which was written. She had explained the purchaser's solicitors letter and contract of 26 July to her clients. She recollected that they asked about the planning conditions but she has no attendance note for that period. Nor did she discuss it with Mr Fee between 26 July and 8 August, although she had rung his office on one occasion. She thought her letter of 8 August was, because it was headed subject to contract, intended to preserve the original offer. She referred to Mr Huddleston's use of the word suspensive at this point. (This term 'suspensive' was used in Griffiths v Young op. cit. which was not followed in Tiverton Estates.) She then dealt with subsequent events leading to the letter of Mr Fee of 26 September 2007 which she said amazed her because, therein, he said:

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

The examination-in-chief was largely directed to the issue of whether or not her letter of 8 August constituted a counter-offer rather than the point now in issue as to whether it was a rejection. The witness said in her examination-in-chief and at the beginning of her cross-examination that she used the words subject to contract to avoid entering into contract inadvertently or creating a memorandum which would comply with the statute of frauds. Subject to contract means, she said, subject to subsequent formal contract, if one comes into being. This is a correct summary of the law in my view but not the case being put on behalf of her client. She was cross-examined by counsel who was seeking to elicit that she would have had instructions from her client before sending out the letter of 9 May with the enclosed contract. I have to say the witness was not frank or direct in dealing with this quite simple point. As she said after quite a lengthy passage she could not see what the point of counsel's question was but seemed unwilling to answer the question directly. While a residential conveyance may be quite straightforward without much change entrepreneurial clients could and would change instructions "every day of the week" she said. Counsel put it to that the 14 June letter was written under her client's instructions and she agreed that it would be approved by her client "to the best of my knowledge". But that letter expressly says that she had taken her client's instructions so this qualification is a little hard to understand. She said this particular client did tend to change its mind and while therefore she was satisfied at 14 June that that was it's position it might well be that the client would change it's mind later. She later indeed described them as very unusual clients doing unusual deals all

the time. She would have discussed with her client the specific changes made by Mr Fee in the contract sent with the letter of 26 July, for that was all her client would have been interested in. She did not say in the letter that her client was happy with everything else in the letter of 26 July for she had not discussed that with them. But of course the rest of the material in the contract had indeed been put forward by her on her clients behalf, as she ultimately agreed with counsel. She asked her clients to focus on Mr Fee's special conditions 4 and 5 before writing the letter of 8 August. She said that she was enquiring of Mr Fee in that letter could the contract be changed but that is not, I find, a correct summary of the terms of the letter. She would have discussed it with her client but they would rely on her for the precise drafting. She also said that this letter was not only subject to contract but without prejudice to the original contract but those latter words do not appear in her letter of 8 August. She said the very reason she did not send back a draft contract but sent a letter marked subject to contract was because she did not want to make a counter offer. I concluded and warned that the witness was evading an answer to a perfectly proper question from counsel, which was not objected to, as to what was in her mind at the time of writing the letter. A little later in answer in counsel she said that what she had said on 8 August was: "Thank you for your letter. Is it possible to vary certain things before the contract is concluded?" but it can be seen that that is not in fact what she wrote in the letter. Counsel asked in different ways several times, without objection from his opponent, whether her client's instructions were that special conditions 4 and 5 were not acceptable to them. I regret to say that he never got a straight answer to that question. Mr Fee Q.C. pointed out that in her letter she said her clients would not "procure anything further" by way of additional lands for sight lines. She said this was not an invention of hers but that her client had so instructed her. That is what she had been told by her clients. In re-examination Mr Horner asked the witness whether she had authority to make a counter offer by her letter of 8 August. She answered definitely not. Mr Horner then asked: "Did she have authority to kill the contract on behalf of her client?". She answered "No". That concluded her evidence save for some answers to myself which I need not set out. I am satisfied that the witness did not intend to make a counter offer on behalf of her clients by the letter of 8 August and that she did not do so. This was partly because the letter was marked subject to contract and partly because she did not send a revised contract back with the letter. I think her mind was alert to this point. I feel it was not alert to the point that her letter might constitute a rejection of the earlier offer. In any event, it is clear that these were clients who were engaging in more than one transaction and that these transactions were of a substantial kind. Furthermore it is clear from the documents and her evidence that they were clients who changed their minds from time to time. I fully accept that Ms Carson is a careful and cautious solicitor as she said herself. I am satisfied that she would not have written the letter of 8 August without clear instructions from her client. The precise wording of the letter may have been left to her but despite her best efforts to

try and protect them it is clear to me that they had conveyed to her, in so many words, that special condition 4 would have to be changed and that 5 as drafted by Mr Donal Fee was indeed not acceptable to them. She had authority to write the letter. It is then a matter of law as to what the effect of the letter was. I am satisfied that if her clients had said to her that they were very unhappy about these conditions but please make sure we do not lose the offer of 26 July in case we are prepared to put up with the conditions, she would have said that to the court. That was not the case. There was no attendance note offered relating to the period in question. Legal professional privilege had apparently been invoked on both sides although it might have been thought that it could have been waived by the client if it had chosen to do so. This was not done. However that is to one side. I am satisfied that the defendant's solicitors had authority to write the 8 August letter conveying the substance and effect of what was set out therein.

Subject to contract

[15] The plaintiff strongly relies in it's submissions on the use of the phrase' subject to contract' at the head of the letter of Messrs Carson and McDowell to Messrs Murnaghan Fee of 8 August 2007. Indeed in the plaintiff's detailed written closing submissions the matter is summed up thus at 9.11.1. " The actual wording of Ms Carson's letter is an irrelevance; whether it had been made in trenchant or consolatory terms, the fact remains that the content of the correspondence was protected by the cloak of "subject to contract" and a letter sent "subject to contract" cannot have contractual force". I examine this proposition. First of all I reject the idea that the wording of the letter can be an irrelevance. The words subject to contract are part of the wording of the letter and the correct approach in contractual interpretation is to read the letter as a whole. See Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 W.L.R. 896 H.L. Secondly it seems to me that the defendant is putting a meaning on the words subject to contract which is not justified by authority. For example in the same submissions at 7.17 one finds the following sentence. "In Tiverton Estates Limited v Wearwell the Court of Appeal held that where a document is expressed to be 'subject to contract' this denies any present intention to make a contract and therefore such document could not be a sufficient memorandum capable of being a contract." It seems to me that that is a correct summary of that decision. That indeed is what is achieved by the words "subject to contract". I accept that applies here. But the defendant is, inconsistently with that submission, seeking to put a new, and in my opinion, unjustified gloss on those words. The defendant is seeking to say that the words not only prevent a contract coming into effect but prevent an offer being rejected. No authority is offered for that proposition. Thirdly, it flies against both good practice and common sense. This is a solicitor's letter written to another firm of solicitors. If the defendant is right it means nothing at all because of the use of those three words at the head of it. But it is quite clear that the letter is intended to be

taken seriously and considered carefully by the purchaser and its solicitor. The defendant seeks to have the benefit of the emphatic language used eg. "this is not acceptable to our client". That is likely, as happened, to make the purchaser think hard and carefully before rejecting what the author of the letter and vendor is saying. Emphatic language like that is not used accidentally. On the other hand when that normal reading of the words becomes inconvenient to the defendant they now submit that really the letter means absolutely nothing at all because the words "subject to contract" are to be found at the top of it. It seems to me an illogical position which should not be approbated by the court. The addition of the words "subject to contract" do not render a letter to which they are attached wholly meaningless or nugatory. Fourthly, the plain meaning of the words are against the defendant. Their solicitors did not write "without prejudice to the continuance of the purchaser's offer of July 26th" or something similar. They did not write "without prejudice" save in regard to their alternative special condition 5. They did not write "inquiry only" nor "of no contractual force". Any of those might have alerted the purchaser to the fact that the vendor was anxious not to lose the offer. 'Subject to contract' means not legally binding until and unless a formal legal contract is entered into. It does not mean 'despite what we say below we are not rejecting your client's offer to purchase'.

[16] Mr Horner sought to advance a floodgates argument. Not inappropriately the force of such arguments has ebbed and flowed over the years. For my part I reject it here. Nothing in this decision in the slightest degree alters the efficacy of the words subject to contract, as they have been interpreted since Tiverton Estates and for most of the previous century. If solicitors negotiating the terms of the contract want to ask for some alteration in the wording from their opposite numbers they are liberty to do so. But if they move from a mere enquiry and suggestion to saying that an existing term is not acceptable and putting forward materially different terms and stating their client will not procure something the offeror has made it a condition he should be willing to procure then the offeror is at liberty to treat such a letter as a rejection. I bear in mind that this letter is at a stage when a binding offer has been made by the purchaser and not at the early stages of negotiations. This decision, in my view, makes no radical alteration to conveyancing practice. Solicitors are already under a duty of care with regard to the letters they write and I am sure this firm is as conscious of that as any other firm of solicitors. If your client's instructions are that the proposed terms are not acceptable the client must take the consequences of such a letter being treated as a rejection of the offer then on the table. One must be cautious not only not to give too much meaning to the words "subject to contract" but also to avoid the error of concluding that a label to a document finally determines the true nature of that document. That is not the case. Even if one adds the words 'subject to contract', not as a talisman, but as part of the language of the letter the prevailing effect of the whole, I

find, is of rejection. I have considered the written and oral submissions of counsel for the defendant without reciting every one seriatim. I address the submission that the rejection case was not put to their witnesses. The substance of it was put and repeatedly put by Mr Fee QC to Ms Carson i.e. the emphatic language of the letter of 8 August. It would not have been appropriate for him to ask either witness whether the letter constituted in law a rejection because that was a matter for the court.

[17] Taking all these matters into account I conclude that the letter written on behalf of the defendant on 8 August 2007 constituted a rejection of the defendant's offer contained in the contract sent with the letter of 26 July 2007 by Messrs Murnaghan Fee. The rejection terminated that offer. There was no offer in law for the vendor to accept on the 7 September. In the circumstances therefore no binding contract exists and I find for the defendant.