

JOSHUA WILLIAMS MEMORIAL ESSAY 1980

Sir Joshua Strange Williams, who was resident Judge of the Supreme Court in Dunedin from 1875 to 1913, left a portion of his estate upon trust for the advancement of legal education. The trustees of his estate, the Council of the Otago District Law Society, have therefrom provided an annual prize for the essay which in the opinion of the Council makes the most significant contribution to legal knowledge and meets all requirements of sound legal scholarship.

We publish below the winning entry for 1980. It has been restructured to take into account recent developments.

“SUBJECT TO SOLICITOR’S APPROVAL” CLAUSES

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Of conditional clauses appearing in land contracts one of the more common is the subject to solicitor’s approval clause. This clause is used where a person signing an agreement has not yet received legal advice and accordingly wishes to have some aspects of the instrument scrutinised by a solicitor.¹ To this end the person might insert into the contract a clause simply reading “subject to solicitor’s approval” or alternatively might specify that a particular matter be approved, as with “subject to solicitor’s approval of title” and “subject to solicitor’s approval of contract” clauses. Such clauses, at least in New Zealand, have been used more frequently and have received increased judicial² and academic³ attention in recent years.

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- 1 It is usual, in several Commonwealth countries including Australia and New Zealand, for a person entering into a land contract not to have received legal advice; compare the current English practice which requires that legal advice be given to the parties prior to signing and which therefore excludes the need to use subject to solicitor’s approval clauses.
- 2 All New Zealand cases on subject to solicitor’s approval clauses have been decided in the last ten years: see *Fencecraft (NZ) Ltd v Hitchfield* unreported, Supreme Court, Auckland, 11 June 1971, M 662/70, Henry J; *Buhrer v Tweedie* [1973] 1 NZLR 517; *McCully v Frampton* unreported, Supreme Court, Christchurch, 28 February 1975, A163/74, Roper J; on appeal *Frampton v McCully* [1976] 1 NZLR 270; *Robin v R T Shiels & Co Ltd* unreported, Supreme Court, Christchurch, 26 June 1974, A265/75, Casey J; on appeal *Boote v R T Shiels & Co Ltd* [1978] 1 NZLR 445; *Provost Developments Ltd v Collingwood Towers Ltd* unreported, Supreme Court, Auckland, 15 November 1979, A829/78, Holland J; on appeal [1980] 2 NZLR 205.
- 3 Over the last eight years there have been some six articles in the New Zealand Law Journal on subject to solicitor’s approval clauses: see Molloy, “Agreement ‘Subject to Solicitor’s Approval’” [1974] NZLJ 214; Coote, “More About ‘Solicitor’s Approval’ Agreements” [1976] NZLJ 40; Coote, “Solicitors’ Approval Agreements Again” [1978] NZLJ 170; Coote, “‘Subject to Solicitor’s Approval’—Another Development” [1980] NZLJ 78; Coote, “‘Solicitor’s Approval’—A Partial Solution” [1980] NZLJ 430; Coote, “Solicitor’s Approval Conditions and Conveyancing Aspects” [1981] NZLJ 325. See also case notes [1973] NZLJ 155; [1976] NZLJ 326; and correspondence [1980] NZLJ 396.

When dealing with the clauses courts are bound by normal contractual principles,⁴ rules of interpretation inclusive. In attempting to effect the intention of the parties the court must have regard to the wording of the clause, the context of the clause in the contract as a whole, and the circumstances surrounding the making of the contract.⁵ The existence of the last two rules of interpretation has led some commentators to suggest that a court's construction of a particularly worded subject to solicitor's approval clause does not assist in determining the likely construction of other comparably worded clauses.⁶ With respect, that suggestion is unsupported by a careful examination of relevant case authority. Firm propositions do emerge from the cases on differently worded subject to solicitor's approval clauses.

This essay is divided into two parts. First, the range of possible legal effects a subject to solicitor's approval clause can have is examined. This examination includes a survey of the type of clauses which have given rise to various effects. Secondly, the courts' approach to subject to solicitor's approval clauses is analysed and the concepts underlying that approach are fully discussed.⁷

4 For example, such clauses should not lead to undue vagueness (see *Radium Hill Co v Moreland Metal Co* (1916) 16 SR (NSW) 631) and uncertainty (see *Chatterley v Nicholls* (1884) 1 TLR 14).

5 *Roach v Bickle* (1915) 20 CLR 663; cf *Griffiths v Ellis* [1958] NZLR 840.

6 Vaver, "Contracts for the Sale of Land: Recent Developments" [1978] NZ Recent Law 78, 170. Cf Coote, "More About 'Solicitor's Approval' Agreements" [1976] NZLJ 40, who contends that "a certain amount of assistance can nevertheless be gained from the reported cases".

7 Two points are to be noted here. First that while it is unusual, subject to solicitor's approval clauses can appear in agreements other than land contracts and it seems that ordinary subject to solicitor's approval propositions (namely those expounded in the text) are applicable to such clauses: see *Gordon Leaseholds Ltd v Metzger* [1967] 1 OR 580. Secondly, the discussion is confined to subject to solicitor's approval clauses. Hence it does not extend to consideration of clauses not containing the words "subject to" but still requiring some form of solicitor's approval. The most commonly used of the latter type of clause is that requiring the solicitor to supervise or approve that the terms of an original agreement are fully and satisfactorily incorporated in a subsequent and formal document. Principles applicable to this type of clause are (i) if the clause commences "subject to contract" no binding contract usually results and accordingly the solicitor's approval requirement is irrelevant; (ii) if the clause does not use the subject to contract phrase it is a question of construction whether the clause allows a binding and concluded contract to exist or necessitates the drawing up of a further contract before a concluded agreement can eventuate: *Winn v Bull* (1877) 7 Ch D 29; cf *Von Hatzefeldt-Wildenberg v Alexander* [1912] 1 Ch 284. If the former construction is applied the solicitor's approval requirement has limited effect either because specific performance will be awarded in respect of the original contract or because the court is prepared to step in and consider whether the terms of the original agreement have been satisfactorily incorporated in the later agreement: *Eadie v Addison* (1882) 52 LJ Ch (NS) 80; *Godecke v Kirwan* [1973] 1 ALR 457. If the latter construction is applied it may be that the requirement of solicitor's approval operates to require a solicitor to approve the contract, ie the clause may have the same effect as a subject to solicitor's approval of contract clause: *Barillett v Green* (1874) 30 LT 553; *Re Dominion Stores Ltd and United Trust Co* (1974) 2 OR (2d) 279; affirmed (1975) 6 OR (2d) 199; affirmed [1977] 2 SCR 915; cf *Green v Ainsmore Consolidated Mines Ltd* [1951] 3 DLR 632.

I POSSIBLE EFFECTS OF A SUBJECT TO SOLICITOR'S APPROVAL CLAUSE

There are four possible consequences of a subject to solicitor's approval clause. The following examination includes in each case a consideration of the type of clause that gives rise to such consequences. It begins with the category in which the clause has no effect and then proceeds to consider gradually widening effects on the operation and existence of the contract.

1 *Has No Effect*

The narrowest construction of a subject to solicitor's approval clause is that it has no legal effect. Here the presence of the clause does not affect a land contract but permits the contract to be complete and concluded.⁸ Consequently the fact that pursuant to the clause a solicitor approves or disapproves of the matter referred to, has little significance; if either party disagrees with the solicitor's decision then the issue can be taken to court and the court itself will decide as a question of fact whether approval should or should not be given. The court then will substitute its own view for that of the solicitor on the ground that it thought that the solicitor reached the wrong decision.⁹ The approval of the solicitor is therefore irrelevant to the existence and operation of the contract, although the presence of the clause may sometimes imply other conditions the fulfilment of which must be established to the satisfaction of the court.

There are two instances of nineteenth century judicial opinion that a subject to solicitor's approval of title requirement has no legal effect.¹⁰ The second and more influential of these is the decision of the House of Lords in *Hussey v Horne-Payne*. There Lord Cairns, in a judgment apparently endorsed by the other members of the House,¹¹ expressed a tentative¹² obiter view that the clause "subject to the title being approved by [the purchaser's] solicitors" was devoid of legal effect. This was because the clause merely indicated that the title was to be investigated by the purchaser's solicitors, which was usual practice anyway. Hence, Lord Cairns reasoned that the clause merely expressly stated what was already implicit in the contract, and was accordingly a non-entity.¹³

The construction of a subject to solicitor's approval of title clause as having no effect, has not been adopted in any case subsequent to *Hussey v Horne-Payne*. Indeed that construction was not only expressly re-

8 *Gordon v Mahony* (1850) 13 Irish Eq R 383; *Hussey v Horne-Payne* (1879) 4 App Cas 311, 321-322 (HL).

9 *Hussey v Horne-Payne* *ibid*.

10 *Gordon v Mahony* and *Hussey v Horne-Payne* *supra* n 8.

11 Lord Cairns delivered the leading judgment. Lord Selborne, while giving a separate judgement not specifically dealing with the construction of subject to solicitor's approval of title clauses was, at 322 "of the same opinion and for the same reasons" as Lord Cairns. The third member of the House, Lord Gordon, merely "concurred". It has been suggested both that Lord Cairns' interpretation of the approval of title clause was endorsed by Lord Selborne (see *Chipperfield v Carter* (1895) 72 LT Rep 487, 488) and that it was not endorsed by him (see *Curtis Moffatt Ltd v Wheeler* [1929] 2 Ch 224, 234).

12 Lord Cairns never actually expressed a concluded view on the matter but used such wording as "I am disposed to look upon the words . . ." *supra* n 8 at 322.

13 It appearing to be "nothing more than a guard against its being supposed that the title was to be accepted without investigation": *Hussey v Horne-Payne* *supra* n 8 at 322 per Lord Cairns.

jected in English decisions prior to Lord Cairns' judgment,¹⁴ but was strongly criticised in two later English cases.¹⁵ Moreover it subsequently seems to have been treated as inapplicable to subject to solicitor's approval of title clauses on some three occasions by the English Court of Appeal.¹⁶ In the light of such approaches it is submitted that Lord Cairns' obiter reasoning cannot be regarded as good law and consequently that subject to solicitor's approval of title clauses do not fall within the present category, but have the effect discussed next.

2 Amounts to a Condition Precedent to Performance or a Condition Subsequent

The second possible construction of a subject to solicitor's approval clause is that it amounts to a condition precedent to performance or a condition subsequent.¹⁷ Here a contract incorporating the clause binds the contractual parties, although whether the contract is to continue is conditional upon solicitor's approval.¹⁸

Several contractual consequences follow from a finding that a solicitor's approval clause amounts to a condition precedent to performance or a condition subsequent,¹⁹ one of the more significant being that terms are implied into the clause. The terms implied are that the party

14 *Hudson v Buck* (1877) 7 Ch D 683; *Hussey v Horne-Payne* (1878) 8 Ch D 670 (CA).

15 *Curtis Moffat Ltd v Wheeler* supra n 11 at 234 per Maugham J; *Caney v Leith* [1937] 2 All ER 532. These two cases make it clear that the interpretation placed on the clause by Lord Cairns, and the differing construction of subject to solicitor's approval of title clauses in subsequent cases, is a conflict of law rather than a case of individual factors leading to different constructions. On this point see also *Hussey v Horne-Payne* *ibid*; *Shenstone v Hewson (No 2)* (1928) 29 SR (NSW) 39, 45.

16 *Clack v Wood* (1882) 9 QBD 276; *Marten v Whale* [1917] 2 KB 480; *Smallman v Smallman* [1971] 3 All ER 717.

17 Courts sometimes prefer to describe the contract as binding but conditional rather than use phrases such as condition precedent to performance or condition subsequent: see eg *Smallman v Smallman* *ibid*. For a convincing assertion that conditions precedent to performance and conditions subsequent are analogous concepts see McMorland, "A New Approach to Precedent and Subsequent Conditions" (1980) 4 Otago LR 469; cf *Scott v Rania* [1966] NZLR 527, 537-545 per Hardie Boys J, dissenting; *Sims v Hanford* unreported, Supreme Court, Auckland, 7 June 1977, A158/76, Coates J. See also *Hunt v Wilson* [1978] 2 NZLR 261, 267 per Cooke J (CA).

18 *Marten v Whale* supra n 16; *Caney v Leith* supra n 15.

19 Apart from those referred to in the text consequences include that (i) insertion of the clause upon acceptance amounts to the making of a counter-offer: *Hussey v Horne-Payne* supra n 14; (ii) the party having the benefit of the clause may waive fulfilment of the condition and thereby render the contract immediately enforceable: *Curtis Moffat Ltd v Wheeler* supra n 11; cf *Daubney v Kerr* [1962] NZLR 319; and (iii) if the condition is not fulfilled (ie solicitor's approval given) within the specified time, or if no time being specified, within a reasonable time, the contract usually becomes voidable rather than void, the question being one of the intention of the parties. It was at one stage thought that non-fulfilment of the condition would render a contract containing a condition precedent to performance void rather than voidable (see eg *Scott v Rania* supra n 17 at 532, 534-535) but more recent cases suggest that if the contract is binding (ie if the clause amounts to a condition precedent to performance or a condition subsequent) non-fulfilment of the condition is likely to result in the contract becoming voidable at the option of the innocent contractual party. See eg *Sims v Hanford* supra n 17; *Barton v Russell* unreported, Court of Appeal, Wellington, 5 April 1974, CA 33/75; *McCauley v McVey* (1979) 98 DLR (3d) 577.

to whom the clause applies will appoint and bona fide consult a solicitor, and that the appointed solicitor will bona fide and reasonably approve or disapprove of the appropriate subject matter.²⁰ As long as these requirements are met the appointed solicitor's decision is final and not open to judicial review.²¹ Therefore if the party responsible for so doing appoints and honestly consults a solicitor, a decision to approve by a solicitor acting bona fide and reasonably renders the contract unconditional and fully enforceable,²² while a decision to refuse approval vitiates the contract.²³

A court of law intervenes only if it is proved²⁴ that the implied terms have been breached. If a solicitor was never appointed or consulted, or if the solicitor acted mala fide and unreasonably in reaching his decision, the court steps in.²⁵ In either case appropriate remedies are awarded to the party alleging that the implied terms were breached.²⁶

Clauses readily amounting to a condition precedent to performance or a condition subsequent are those requiring approval of title,²⁷ contract or lease,²⁸ or are generally worded clauses which fail to nominate a matter for approval (eg the subject to solicitor's approval clause).²⁹ Although most consequences of finding that these clauses give rise to a binding but conditional contract are straightforward,³⁰ more must be said about the effect of the requirement that the solicitor act bona fide and reasonably when approving or disapproving the appropriate subject-matter.

If courts require that a solicitor act bona fide and reasonably then what criterion do they use to judge whether the solicitor so acted? Obviously it is necessary to look at the circumstances surrounding the mak-

20 *Smallman v Smallman* supra n 16; *Harris v Dartington Properties Ltd* (1978) 6 BCLR 88. It is suggested in some cases that the traditional requirement that a solicitor act bona fide and reasonably has now been amended to the effect that the solicitor is only required to act bona fide: see eg *Re Dominion Stores Ltd and United Trust Co Ltd* supra n 7. However even in those cases the courts use the criterion of the reasonableness of the solicitor's action to determine whether he has acted bona fide (see eg *Gordon Leaseholds Ltd v Metzger* supra n 7 at 587) and as such there would appear to be no practical distinction between the two tests.

21 *Caney v Leith* supra n 15.

22 In the unusual event of the clause applying to both of the contractual parties both of the appointed solicitors must give their approval, before the agreement can become fully enforceable: see *Provost Developments Ltd v Collingwood Towers Ltd* supra n 2 (CA).

23 *Caney v Leith* supra n 15.

24 The party alleging that the solicitor did not act bona fide and reasonably having the burden of proof: *Clack v Wood* supra n 16 at 279; *Caney v Leith* *ibid*.

25 See *Radium Hill Co v Moreland Metal Co* supra n 4; *Harris v Dartington Properties Ltd* supra n 20.

26 Including damages (see *Harris v Dartington Properties Ltd* *ibid*) and specific performance (see *Shenstone v Hewson (No 2)* supra n 15; *Provost Developments Ltd v Collingwood Towers Ltd* supra n 2 (CA)).

27 The approach taken in *Gordon v Mahony* supra n 8 and *Hussey v Horne-Payne* supra n 8 has already been noted supra p 147. Clauses requiring solicitor's approval of title were held to come within the present category in *Hudson v Buck* supra n 14; *Hussey v Horne -Payne* supra n 14; *Clack v Wood* supra n 16; *Marten v Whale* supra n 16; *Curtis Moffat Ltd v Wheeler* supra n 11; and cf *Smallman v Smallman* supra n 16 ("subject to the approval of the court").

28 See eg *Caney v Leith* supra n 15; *Frampton v McCully* supra n 2.

29 See eg *Provost Developments Ltd v Collingwood Towers Ltd* supra n 2 (CA).

30 See supra n 19.

ing of the decision to assess the nature of the solicitor's actions. More specifically the only way to establish that the solicitor acted mala fide and unreasonably is to show that he did not or could not reach the given decision when considering the appropriate subject matter.³¹ At present it is uncertain whether the bona fide test is an objective one (of whether *any possible justification* for the solicitor's decision can be found when considering the subject matter)³² or is subjective (requiring an assessment of the grounds on which the appointed solicitor *actually made* his decision and then considering whether those are permissible grounds).³³ Nevertheless it is clear that the courts must look to the subject matter of the approval clause for criteria to determine whether the solicitor acted bona fide. Thus whether the bona fide test be objective or subjective, the exact limits of appropriate considerations are important because they dictate whether the solicitor can be said to have acted bona fide and reasonably, and accordingly whether the solicitor's decision can be reviewed by a court.³⁴

The considerations a solicitor is entitled to take into account when acting under a subject to solicitor's approval of title clause are the validity of the title and the encumbrances on that title.³⁵ If a solicitor did not or could not reach his decision on the basis of an invalid title or encumbrances on the title, the exercise of his discretion is mala fide and unreasonable and the court will award appropriate remedies.

That subject to solicitor's approval of contract or lease clauses likewise restrict a solicitor to consideration of a limited subject matter is established law in New Zealand³⁶ and Canada³⁷ and was impliedly

31 In the following cases the court considered whether the solicitor acted bona fide, looking at the considerations the solicitor took, or might have taken, into account, and whether they were relevant: see *Hudson v Buck* supra n 27; *Caney v Leith* supra n 15; *Gordon Leaseholds Ltd v Metzger* supra n 7; *Fencecraft (NZ) Ltd v Hitchfield* supra n 2; *Re Dominion Stores Ltd and United Trust Co* supra n 7; *Provost Developments Ltd v Collingwood Towers Ltd* supra n 2 (CA).

32 *Caney v Leith* ibid at 538, in part of a passage quoted with apparent approval in *Re Dominion Stores Ltd and United Trust Co* ibid at 287, and in *Provost Developments Ltd v Collingwood Towers Ltd* supra n 2 (SC).

33 See *Provost Developments Ltd v Collingwood Towers Ltd* supra n 2 at 214 per Richardson J (CA). The test formulated there contains subjective overtones and the test Richardson J actually applied to the facts of the case was subjective.

34 Coote, "Solicitors' Approval Agreements Again" [1978] NZLJ 170, 170-171 suggests that there are two aspects of the test; that the solicitor must have acted bona fide and reasonably and that the solicitor must have had regard to the appropriate subject matter. However it is submitted that the first aspect—whether the solicitor acted bona fide and reasonably—is in fact absorbed into the second aspect, so that the test is solely one of whether the solicitor had regard to the appropriate subject matter.

35 *Hudson v Buck* supra n 27; *Shenstone v Hewson (No 2)* supra n 15.

36 See *Frampton v McCully* supra n 2; *Boote v R T Shiels & Co Ltd* supra n 2; *Provost Developments Ltd v Collingwood Towers Ltd* supra n 2 (CA).

37 See *Re Dominion Stores Ltd and United Trust Co* supra n 7.

adopted in relevant English cases.³⁸ The courts in these jurisdictions view the clauses as requiring approval of legal aspects of the transaction.³⁹ Hence it is said that the solicitor may refer only to "conveyancing aspects of the transaction",⁴⁰ including "legal impediments"⁴¹ to the execution of the contract, when exercising his discretion to approve or disapprove the contract or lease. A solicitor may, for example, take into account restrictive covenants in a lease⁴² or (probably) a contractual requirement that vacant possession be given where insufficient time is available to meet that requirement,⁴³ but might be unable to consider a provision for deferred payment of the purchase price⁴⁴ and definitely cannot take into account the economic attractiveness of the transaction.⁴⁵

It also seems that a generally worded subject to solicitor's approval clause, inserted in a single and complete contractual document,⁴⁶ will usually limit the solicitor to consideration of legal aspects of the transaction.⁴⁷ Such a clause then usually confers the same discretion on the solicitor as does a subject to solicitor's approval of contract or lease clause. Indeed it seems implicit that where a clause reading subject to solicitor's approval is placed in a contract or lease, the parties' intention is to render the *contract* or *lease* subject to solicitor's approval. The effect of a generally worded clause included in a single contractual document thus appears comparable to the contractual consequences of a subject to solicitor's approval of title and subject to solicitor's approval of contract or lease clauses; these clauses readily amount to a condition precedent to performance or a condition subsequent and therefore confer only a limited discretion on the solicitor.

38 See especially *Caney v Leith* supra n 15; a case which was recently cited (*Frampton v McCully* supra n 2 at 277; cf *Boote v R T Shiels & Co Ltd* supra n 2 at 451) as authority for the proposition that subject to solicitor's approval of contract or lease clauses confer only a limited discretion on a solicitor, even although there is no direct statement to that effect in that case. If the solicitor could have regard to any matter whatsoever so as to have an unfettered discretion, it would be superfluous to say that he must act bona fide, for he is already free to act on whatever basis he likes. Thus it appears that an unfettered discretion and a binding contract cannot readily co-exist: see *Provost Developments Ltd v Collingwood Towers Ltd* supra n 2 at 207, 210, 212 (CA). Other English cases lend only inferential support to the proposition in the text: see *Bartlett v Greene* supra n 7; *Smallman v Smallman* supra n 16.

39 The fact that the inserter of the clause chooses to refer the matter to a solicitor is taken to indicate a concern with legal matters: see *Provost Developments Ltd v Collingwood Towers Ltd* ibid at 208, 211, 213.

40 *Boote v R T Shiels & Co Ltd* supra n 2 at 451 per Cooke J.

41 *Provost Developments Ltd v Collingwood Towers Ltd* supra n 2 at 209 per Woodhouse J (CA).

42 *Caney v Leith* supra n 15.

43 In *Provost Developments Ltd v Collingwood Towers Ltd* supra n 2 Woodhouse J at 209, and Richardson J at 215, stated that a requirement of vacant possession which could not be realised by the required date was a relevant consideration, but Cooke J at 211, held that on the facts before him the solicitor could not take that requirement into account.

44 *Provost Developments Ltd v Collingwood Towers Ltd* ibid in which Woodhouse, Cooke (at least in the circumstances before him) and Richardson JJ held that deferred payment was not a relevant consideration.

45 *Re Dominion Stores Ltd and United Trust Co* supra n 7; *Provost Developments Ltd v Collingwood Towers Ltd* ibid.

46 As to where the clause is inserted in a separate offer or separate acceptance form rather than a single contractual document, see infra pp 155-156.

47 *Boote v R T Shiels & Co Ltd* supra n 2; *Provost Developments Ltd v Collingwood Towers Ltd* supra n 2 at 210-211, 213 (CA).

3 Ensures Binding Relations do not Exist Until the Condition is Met

Another possible effect of a conditional clause is that it ensures binding relations do not exist unless and until the condition is met. Where a subject to solicitor's approval clause has this effect either party is free to withdraw from the arrangement before solicitor's approval is given.⁴⁸ However the act of approval renders the contract enforceable, leaving the parties legally bound to carry out the terms of the contract.⁴⁹

From earlier judicial descriptions, this category might appear to be subdivided into two classes: (i) conditions precedent to contract and (ii) conditions preventing the existence of a binding contract.⁵⁰ But the modern view seems to be that conditions precedent to contract and conditions preventing the existence of a binding contract have the same operation.⁵¹ Both (i) make the existence of binding relations dependent upon the condition being met,⁵² (ii) prevent terms being implied into the

48 *Henning v Ramsay* [1964] NSW 1165 (FCt).

49 *Henning v Ramsay* *ibid* at 1168, 1176; cf *Boote v R T Shiels & Co Ltd* *supra* n 2 at 451 per Cooke J who held that the eventual contractual effect of the clause before the Court was "not important in the present case, as neither party sought to resile before the solicitor's approval was given"; *Provost Developments Ltd v Collingwood Towers Ltd* *supra* n 2. See also *Chillingworth v Esche* [1924] 1 Ch 97, 113-114; cf *Chatterley v Nicholls* *supra* n 4.

50 A variety of descriptions are used. See eg *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 QB 297, 304 ("conditions precedent to the formation of a contract"); *Eccles v Bryant* [1948] Ch 93, 96 ("subject to contract" clause—"no binding contract had come into existence at all"); *Lee-Parker v Izzet (No 2)* [1972] 2 All ER 800, 803 ("subject to finance" clause—"until the condition was fulfilled there was no binding contract of sale"); *Marks v Board* (1930) 46 TLR 424 ("subject to survey" clause—"there was no contract").

51 See eg the recent recognition that terms cannot be implied into a condition precedent to contract: *Provost Developments Ltd v Collingwood Towers Ltd* *supra* n 2 at 27 (CA), and that conditions preventing the existence of a binding contract cannot be waived: *Tiverton Estates Ltd v Wearwell Ltd* [1975] Ch 146 (CA) (Statute of Frauds).

52 A condition precedent to contract has that effect: *Aberfoyle Plantations Ltd v Cheng* [1960] AC 115, 126, as does a condition preventing the existence of a binding contract: see cases cited *supra* n 49.

clause⁵³ and (iii) preclude the possibility of waiving the condition.⁵⁴ The view that there is only one general category of conditions preventing immediately binding relations from arising is being increasingly recognised by the courts.⁵⁵ This recent judicial trend, combined with clarification of the consequences of conditions precedent to contract and conditions preventing the existence of a binding contract, support the submission that there is but a single classification of conditions ensuring binding relations do not eventuate until the condition is met.

Clauses which ensure that binding relations are not formed unless and until solicitor's approval is given are those empowering the solicitor to consider all aspects of the transaction.⁵⁶ For example a clause requiring solicitor's approval of the terms of the contract (as opposed to just approval of contract)⁵⁷ prevents immediately binding relations from arising by conferring on the solicitor an unfettered discretion.

Can a solicitor's approval of contract clause come within this category? There is one judicial suggestion to that effect. It is based on the view that by conferring an unfettered discretion on a solicitor, such a clause ensures that immediately binding relations do not occur. The construction is advanced in the only Australian case⁵⁸ on subject to solicitor's

53 See *Henning v Ramsay* supra n 48 (terms cannot be implied into a contract where a clause prevents the existence of a binding contract). It is now accepted that terms cannot be implied into a condition precedent to contract—because “if there was no contract at all there could be no obligation on either party to take the matter further and in particular to take even reasonable steps to see that the condition was met”: *Provost Developments Ltd v Collingwood Towers Ltd* supra n 2 at 207 per Woodhouse J. “Until the event occurs there is no right to performance on either side. The parties have not promised that it will occur. In the absence of such a promise there can be no breach of contract until the event does occur”: *Turney v Zhilka* (1959) 18 DLR (2d) 447 at 450-451 per Judson J (SC). Note that in *Scott v Rania* supra n 17 at 534, McCarthy J took the view that requirements can be placed on contractual parties to take reasonable steps to fulfil a condition precedent to contract, on the basis that a party cannot rely on his own default (ie that a party may not set up his own failure to bring about a condition as a defence to legal action); cf *Hardie Boys J* at 539. However in a later case he accepted that there can be no default unless a term, either expressed or implied, is breached (see *Gardner v Gould* [1974] 1 NZLR 426, 428, 436-437, 440); but that concession leaves his position in insuperable difficulties because restrictions cannot be placed on the operation of a condition precedent to contract; while the condition remains unfulfilled there are no contractual terms, express or implied.

54 See *Turney v Zhilka* *ibid*; *Tiverton Estates Ltd v Wearwell Ltd* supra n 51.

55 *Eg Hunt v Wilson* supra n 17 at 267 per Cooke J (principal distinction is between stipulations which prevent the formation of any contract at all, and those which assume the existence of a contract but limit the obligations which may arise under it); *Provost Developments Ltd v Collingwood Towers Ltd* supra n 2 at 207 (CA) (Woodhouse J using “subject to contract” clauses to illustrate the effect of conditions precedent to contract). See also *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 QB 297, 304.

56 See *Chatterley v Nicholls* supra n 4 (but even solicitor's approval would not validate contract); *Radium Hill Co v Moreland Metal Co* supra n 4 at 634; *Frampton v McCully* supra n 2 at 277 (solicitor's unfettered discretion).

57 The word “terms” (of the contract) leaves no room for the inference (discussed supra n 39) connected with subject to solicitor's approval of contract clauses that only legal aspects of the contract are to be examined: see *Fencecraft (NZ) Ltd v Hitchfield* supra n 2.

58 *Henning v Ramsay* supra n 48.

approval of contract or lease clauses, and it does of course run contrary to the construction of these clauses by courts in other jurisdictions as giving a solicitor only a limited discretion and as amounting to a condition precedent to performance or a condition subsequent.⁵⁹ Whether future Australian courts will be influenced by this latter, more widely adopted approach to subject to solicitor's approval of contract or lease clauses remains to be seen.⁶⁰ While it is accepted that any clause which is interpreted as conferring an unfettered discretion on a solicitor, will usually ensure that a binding contract does not exist unless and until solicitor's approval is given,⁶¹ it is submitted that an approval of contract clause will not normally be so interpreted.

4 *Creates a Conditional Offer*

A subject to solicitor's approval clause may create a conditional offer, requiring the solicitor to approve the offer or the counter-offer. Here the offer rather than the contract is conditional upon solicitor's approval.

When an offer or counter-offer is conditional upon solicitor's approval no effective offer exists unless and until solicitor's approval is given.⁶² It can be said that while the offer is still conditional, proceedings are at the invitation to treat stage. If the offer is approved it becomes unconditional and capable of acceptance. The act of approval then merely

59 See cases cited supra nn 36-38 and the accompanying text. The differing interpretations of these clauses appear to constitute a clash of authority rather than the situation of individual circumstances leading to different constructions. Certainly it is never mentioned in the cases considering those clauses that individual factors have influenced the construction of the clauses, yet two different judicial interpretations of those clauses exist. See also criticism of *Henning v Ramsay*, (1964) 38 ALJ 142, adopted in *Provost Developments Ltd v Collingwood Towers Ltd* supra n 2 at 210-211 (CA).

60 Note that while the *Henning v Ramsay* view, that subject to solicitor's approval clauses can readily be equated with subject to contract clauses, receives little judicial sympathy it has some professional and academic support: see correspondence [1980] NZLJ 296; Coote, "Solicitor's Approval"—A Partial Solution" [1980] NZLJ 430. See also, and compare, case notes on *Henning v Ramsay* (1964) 37 ALJ 358; (1964) 38 ALJ 142.

61 See *Provost Developments Ltd v Collingwood Towers Ltd* supra n 2 at 207 per Woodhouse J ("[i]f there were not limits upon the considerations in respect of which the discretion could properly be influenced . . . the arrangement made would be nothing more than a nudum pactum"); at 211 per Cooke J "[i]f the clause were interpreted to leave the solicitors free to consider all the terms and conditions from the point of view of mere expediency in the interests of their clients, I think that this would be in effect to ho'd that the parties had not yet come to an agreement"). See also cases cited supra n 56.

62 *Buhrer v Tweedie* supra n 2; *Frampton v McCully* supra n 2 at 276; cf *Harris v Dartington Properties Ltd* supra n 20. Note that in *Frampton v McCully* the New Zealand Court of Appeal were concerned with whether specific performance should be decreed in respect of a land contract. One of the grounds on which they refused the decree (at 276) was that even if the contract were construed as binding but conditional, the clause conferred on the solicitor an unfettered discretion to approve or disapprove, and in such circumstances a decree of specific performance was inappropriate. However the Court (at 277) made it clear that due to the solicitor's unfettered discretion no binding contract existed. More specifically it held that where a clause conferring an unfettered discretion on a solicitor was inserted upon acceptance, the purported acceptance could not even amount to a counter-offer capable of acceptance.

brings proceedings to the stage where a normal offer can be made.⁶³ Terms cannot be implied into a conditional offer and accordingly the party to whom the clause applies is not required to appoint or consult a solicitor and any appointed solicitor does not have to act bona fide and reasonably.⁶⁴

Conditional offers exist where clauses require solicitor's approval of all aspects of the offer or counter-offer.⁶⁵ In these circumstances the solicitor's discretion has the effect of making a purported offer "too wide to constitute an offer in law capable of acceptance".⁶⁶

A clause might be held to require a solicitor's approval of all aspects of the offer and thereby create a conditional offer by virtue of specific wording.⁶⁷ For example it is submitted that a clause reading "the terms of this offer are subject to solicitor's approval" would usually be construed as requiring solicitor's approval of all aspects of the offer. However where less detailed wording such as the simple subject to solicitor's approval clause is used, there may be difficulty in ascertaining whether the clause relates to approval of the offer or the contract.⁶⁸

It is suggested by one commentator that where a simple subject to solicitor's approval clause is used, the clause will more readily be construed as requiring approval of the offer or counter-offer if it is inserted in a separate offer or separate acceptance form, rather than if it is incorporated in a single and complete contractual document.⁶⁹ This rea-

63 *Buhrer v Tweedie* *ibid*. It has been suggested that where the offer is accepted prior to approval, the act of approval brings a binding and enforceable contract into existence: see *Robin v R T Shiels & Co Ltd* *supra* n 2. However other authority states that the act of approval does not result in binding relations but merely enables a firm offer to be made: see *Buhrer v Tweedie* *ibid*; also *Frampton v McCully* *ibid* at 277 (where the New Zealand Court of Appeal applied the reasoning in *Buhrer v Tweedie* in holding that insertion of a wide solicitor's approval clause upon acceptance could not amount to a counter-offer "capable, if itself accepted, of giving rise to a conditional contract of sale"). In principle, one cannot justify the proposition that subsequent approval not only makes the offer effective but also makes an earlier acceptance of a non-existent offer effective. As to the applicability of offer and acceptance analysis to land contracts, see *Gibson v Manchester City Council* [1979] 1 WLR 294 (HL); cf *Boulder Consolidated Ltd v Tangaere* [1980] 1 NZLR 560, 563, 569 (CA).

64 See *Frampton v McCully* *ibid*.

65 In both *Buhrer v Tweedie* *supra* n 2 and *Frampton v McCully* *ibid*, it was the construction of the clause as permitting the solicitor to consider all aspects, that led to the courts' finding that the unapproved and purported acceptance could not give rise to binding relations by in turn being accepted.

66 *Buhrer v Tweedie* *ibid* at 519 per Wilson J, quoting with approval from the Magistrate's decision.

67 For one instance of the influence of the wording, in this case leading to a finding that the clause related to approval of the contract rather than the offer, see *Robin v R T Shiels & Co Ltd* *supra* n 2.

68 In reported cases, generally worded clauses have on two occasions been held to require approval of the contract (see *Boote v R T Shiels & Co Ltd* *supra* n 2; *Provost Developments Ltd v Collingwood Towers Ltd* *supra* n 2 (CA)); while on two other occasions they have been held to require approval of all aspects of the counter-offer (see *Buhrer v Tweedie* *supra* n 2; *Frampton v McCully* *supra* n 2 at 277).

69 Coote, "Subject to Solicitor's Approval"—Another Development" [1980] NZLJ 78, 79. See also *Provost Developments Ltd v Collingwood Towers Ltd* *ibid* at 212.

soning has the rational basis that a clause reading subject to solicitor's approval should be construed as making the document it is contained in, subject to (or conditional upon) solicitor's approval.⁷⁰ However courts appear more ready to find a conditional offer where that clause is inserted in a separate acceptance form.⁷¹ Hence in the case of clauses worded subject to solicitor's approval it may be that while inclusion in a separate offer allows scope for suggesting that there is a conditional offer, there is a stronger case for the clause creating a conditional offer when it is inserted in a separate acceptance document.⁷²

II ANALYSING AND EXPLAINING THE COURTS' APPROACH

1 *Analysis*

Solicitor's approval clauses can now be seen to fall into four main categories. First, clauses requiring the solicitor to approve of title; these amount to conditions precedent to performance or conditions subsequent. Secondly, subject to solicitor's approval of contract or lease clauses; if these are interpreted as conferring a limited discretion on the solicitor, they also constitute conditions precedent to performance or conditions subsequent. An alternative view of solicitor's approval of contract or lease clauses, advanced in one Australian case⁷³ but not accepted in other jurisdictions, is that they entitle the solicitor to consider the whole of the contract or lease. Thirdly, clauses entitling the solicitor to consider all aspects of the transaction; these ensure that binding relations do not arise unless and until approval is given. Fourthly, cases where all aspects of an offer or counter-offer are subject to solicitor's approval; no offer capable of acceptance exists unless and until the offer or counter-offer is approved. Clauses which do not specify a matter for approval (eg the simple subject to solicitor's approval clause) usually have the

70 The argument presented *infra* n 72, may however cast some doubt on the suggestion that a generally worded clause inserted in an offer should be construed as creating a conditional offer.

71 In *Buhrer v Tweedie* *supra* n 2 and *Frampton v McCully* *supra* n 2, generally worded clauses inserted in separate acceptance forms were held to create conditional offers; cf *Boote v R T Shiels & Co Ltd* *supra* n 2 (generally worded clause inserted in a separate offer form required approval of the contract). The claim that courts may be more ready to find that a conditional offer exists where a clause is inserted in a separate acceptance form might also receive support from (i) judicial reference to *Buhrer v Tweedie* and *Frampton v McCully* as "acceptance" cases (see *Provost Developments Ltd v Collingwood Towers Ltd* *supra* n 2 at 207 per Woodhouse J)—thereby inferring that conditional offers are only to be readily found at the counter-offer stage; and (ii) the statement that clauses conferring an unfettered discretion, inserted upon acceptance, result in no legally effective counter-offer being made (see *Frampton v McCully* at 277).

72 Case authority apart, the writer advocates this approach for the following reasons. Insertion of the clause upon acceptance at the very least ensures a counter-offer results (see *Frampton v McCully* *ibid*); here insertion of the clause itself means that a contract has not yet come into existence. (By comparison, if the clause were to be inserted in an offer, the fact that the communication is an offer, rather than the presence of the clause alone, prevents the establishment of contractual relations at that point in time). If the clause in an acceptance operates so as to ensure that a contract does not come into existence, then surely solicitor's approval must relate to the counter-offer which is created by the clause, rather than to a contract the immediate existence of which is precluded by insertion of the clause.

73 *Henning v Ramsay* *supra* n 48.

same effect as subject to solicitor's approval of contract or lease clauses, unless they are incorporated in a separate offer or more especially a separate acceptance form, where they may render the offer or counter-offer conditional upon solicitor's approval.

It is submitted that the above analysis, while not being the subject of an exhaustive exposition in any reported case, is nevertheless established by an examination of relevant authority.⁷⁴ While surrounding circumstances and the overall context of the clause in the contract can operate to give a clause an unexpected effect,⁷⁵ the analysis still clearly illustrates two important points. First, that *a subject to solicitor's approval clause almost invariably makes a contract, or offer or counter-offer, conditional upon solicitor's approval*. The clause does this by giving rise to one of three effects; either making a binding contract conditional upon solicitor's approval, ensuring binding relations do not arise unless and until approval is given, or creating a conditional offer. The second point brought out by the analysis is that *the conditional effects of the clause are determined by the width of the solicitor's discretion*. If a clause gives a solicitor a limited discretion related to legal matters (eg to approve title, or the legal aspects of a contract or lease) the clause merely renders a binding contract conditional upon solicitor's approval. However if the clause confers an unfettered discretion on the solicitor it has an absolute conditional effect in that it prevents legal consequences from arising unless and until approval is given. The concepts that underlie these two aspects of the courts' approach are considered separately.

2 The Conditional Effect

There are two reasons why subject to solicitor's approval clauses are almost invariably construed as creating a conditional arrangement. First, subject to solicitor's approval clauses have that effect because it seems a natural consequence of the words used that the contract or offer is made *subject to* (ie conditional upon) solicitor's approval.⁷⁶ The second reason why subject to solicitor's approval clauses are construed as having a conditional effect is associated with the referral of an important matter, obviously relevant to whether the contract should or should not continue, to the solicitor. The courts interpret this referral as expressing the intention that a solicitor (or at the very least a solicitor acting bona fide and reasonably) is to deal conclusively with the matter, so as to determine whether the important matter (eg title or the legal aspects of the contract)

74 See especially cases cited supra n 27 (title); nn 36-38 (contract or lease); nn 56 and 61 (all aspects of the transaction); n 65 (all aspects of the offer); n 47 (generally worded clauses conferring a limited discretion); and n 71 (generally worded clauses creating conditional offers).

75 Eg *Michael Richards Properties Ltd v Corporation of Wardens of St Saviour's Parish* [1975] 3 All ER 416 ("subject to contract" clause). But no case has been discovered where the construction of a subject to solicitor's approval clause has been similarly affected.

76 Though there is no express judicial acknowledgement of the influence of the "subject to" wording, every subject to solicitor's approval clause judicially considered has been held to give rise to a conditional arrangement, while solicitor's approval requirements which do not contain the wording "subject to" often have a non-conditional effect; see supra n 7; *Takapuna Borough v Australian Mutual Provident Society* [1916] NZLR 256; *Buhrer v Tweedie* supra n 2.

is satisfactory enough to permit the contract to proceed, or gives rise to objections serious enough to provide grounds for terminating the contract.⁷⁷ This interpretation accords with judicial thinking that:⁷⁸

[T]he purpose of making the opinion of a specified person an ingredient in the existence of the right is ordinarily to make the opinion of that person, and not the opinion of a court, the criterion for determining whether the facts give rise to the right.

By allowing the solicitor to deal with the question of whether the particular matter is in order this construction of the clause avoids any possibility of lengthy litigation over whether that matter provides good grounds for repudiating, or proceeding with, the contract. This may well be what the parties intended to achieve by use of the clause.⁷⁹

Thus the "subject to" wording, and the intention to establish the solicitor as arbitrator of whether the given matter is satisfactory or otherwise, result in subject to solicitor's approval clauses almost invariably rendering the contract, or offer or counter-offer, conditional upon solicitor's approval.

3 *The Width of the Solicitor's Discretion*

Accepting that a subject to solicitor's approval clause usually has a conditional effect then the question arises as to how it is determined *which* conditional effect a clause has. It seems from the above analysis that a binding but conditional contract results from a clause giving a solicitor a limited discretion relating to legal considerations. An absolute conditional effect, whereby there are no legal consequences unless and until approval is given, results where a solicitor has an unfettered discretion. It seems that it is both logical and inevitable that the width of the solicitor's discretion should influence the contractual effect of the clause. This view is supported by several considerations.

The first consideration is the connection between the width of the clause and the parties' intention to create binding relations. If parties leave relatively limited matters to be reviewed by a solicitor then it appears that they do not intend that such a review should prevent the existence of a binding contract, while if the clause enables a solicitor to refer to numerous matters it seems probable that the parties' intention is not to be bound, at least until the wide discretion is exercised. This latter point is recognised in *Provost Developments Ltd v Collingwood Towers Ltd*.⁸⁰ There Richardson J stated:⁸¹

[I]f the solicitor's discretion is entirely unfettered that is a strong indication that his client does not intend to commit himself to the purchase (or sale) at all until he has considered his solicitor's advice both as to the substance and as to the form of the proposed transaction.

Indeed it would be unsatisfactory if a clause conferring an unfettered discretion on a solicitor could give rise to a binding contract. In such a

77 See *Hudson v Buck* supra n 14; *Hussey v Horne-Payne* supra n 14, affirmed on other grounds, supra n 8.

78 *John Grant & Sons Ltd v Trocadero Building & Investment Co Ltd* (1937) 37 SR (NSW) 535, 538 per Jordan CJ; reversed on other grounds (1938) 60 CLR 1; quoted with approval in *Gordon Leaseholds Ltd v Metzger* supra n 7 at 588.

79 *Hudson v Buck* supra n 14; *Hussey v Horne-Payne* supra n 14.

80 Supra n 2 (CA).

81 Ibid at 212.

case, where the clause applies to only one party to the contract, that party would be free to end or enforce the contract at any time via solicitor's approval,⁸² while the other party remained bound by the terms of the contract.⁸³ The agreement would thus resemble an option rather than an ordinary sale and purchase contract and could be criticised as not being what the parties intended to achieve by reference to an ordinary contract.⁸⁴ The finding that a binding contract exists conjunctively with one solicitor having an unfettered discretion also leaves the arrangement open to attack as an option without consideration, and therefore unenforceable.⁸⁵

A further consideration is the general equity of the situation. It would be unfair to hold that a binding but conditional contract existed concurrently with one party's solicitor being given a wide discretion. This would leave the party to whom the clause applies free to end or enforce the contract at any time through the medium of his solicitor,⁸⁶ while leaving the other party bound by the contractual terms—surely an inequitable arrangement. The position is different however where a party has only limited prospects of avoiding contractual obligations due to his solicitor having a limited discretion.⁸⁷ In these circumstances it is not harsh on either party to hold that the agreement is binding but conditional.

The above considerations were referred to in *Provost*⁸⁸ by Cooke J. He observed, with reference to a suggestion that a binding contract should exist where only the purchaser's solicitor has a wide discretion, that:⁸⁹

[I]t might well be unfair to the vendor to expect him to hold the property at the purchaser's disposal while the purchaser remained free to withdraw for any reason whatever. Moreover it is at least doubtful whether any consideration could be said to have moved from the purchaser so as to bind the vendor in that way. If an option is really intended, that can be agreed upon in straightforward language and paid for.

There is another, closely linked, consideration. Before exercising his discretion to approve or disapprove a solicitor is entitled to review con-

82 *Infra* n 90.

83 That practical absurdities can result from such an arrangement was recognised by the Privy Council in *Aberfoyle Plantations Ltd v Cheng* *supra* n 52 at 130.

84 "I feel great difficulty in thinking that any person could have intended a term of this kind to have that operation, because, as was pointed out in the course of the argument, it virtually would reduce the agreement to that which is illusory. It would make the vendor bound by the agreement but it would leave the purchaser perfectly free": *Hussey v Horne-Payne* *supra* n 8 at 322 per Lord Cairns.

85 Blanchard, *A Handbook on Agreements for Sale and Purchase of Land* (1978) 103.

86 See *supra* p 158.

87 The discretion, and therefore the prospects of avoidance of contractual obligations, would have to relate to a matter such as whether there is some truly objectionable legal element in the contract. If the discretion related to only one or two considerations but permitted the solicitor to consider the general desirability of those considerations (eg whether the economic attractiveness of the transaction made the transaction worth proceeding with, or bringing it to an end), the solicitor would have a total discretion to approve or disapprove of the limited considerations. It is submitted that in this situation the objections made in the text to a solicitor retaining an unfettered discretion would apply, with the result that no binding contract could result.

88 *Supra* n 2.

89 *Ibid* at 210.

tractual matters. An unfettered discretion permits the solicitor to examine the desirability of all contractual terms. Accordingly, the solicitor can disapprove if any of the terms are in any way unsatisfactory to his client, and may act on instructions from his client where the client himself feels that the terms of the contract should or should not be approved.⁹⁰ This power of review runs contrary to the notion that a contract establishes definitive rights and obligations, the desirability of which cannot be subsequently reconsidered by either party. In the light of this notion that a contract defines unreviewable rights, the only possible construction of an agreement in which the desirability of all terms is reviewable, is that no binding contract has yet eventuated. Conversely, the narrower the solicitor's discretion the more limited is the range of reviewable terms. If the solicitor is not examining the desirability of those limited terms, but is for example considering whether there are any legal difficulties in proceeding with the contract, the arrangement more readily accords with the notion that the terms of the contract are definitive in that their desirability is not open to review, and therefore lends itself to be recognised as binding.⁹¹

Thus in various ways the width of the solicitor's discretion is associated with the effect of the clause. The above-mentioned considerations support the courts' almost invariable findings in cases involving solicitor's approval clauses—that where a solicitor has a limited discretion the clause results in a binding but conditional contract, while if the clause confers an unfettered discretion on the solicitor it ensures that legal consequences cannot eventuate unless and until approval is given.

SUMMARY

To summarise, the legal effect of a solicitor's approval clause on the existence and operation of the contract depends upon what it is that the solicitor has to approve:

(a) Title. The clause amounts to a condition precedent to performance or a condition subsequent rendering a binding contract conditional upon a solicitor bona fide and reasonably approving or disapproving, by limiting him to consideration of the validity of, and of any encumbrances on, the title.

(b) Contract or lease. The clause makes the binding contract conditional upon the approval of a solicitor acting bona fide and reasonably, having regard to legal considerations only. A different view, which has support in Australia but not in other jurisdictions, is that it entitles the solicitor to consider the whole of the transaction and that it prevents binding relations from arising unless and until approval is given.

(c) All aspects of the transaction. The clause ensures that binding relations are established only when and if solicitor's approval is forthcoming, enabling either party to withdraw from the agreement before approval and not requiring any party or appointed solicitor to act bona fide.

⁹⁰ *Frampton v McCully* supra n 2.

⁹¹ The relevance of this type of consideration to subject to solicitor's approval clauses is illustrated in *Chatterley v Nicholls* supra n 4.

(d) All aspects of the offer or counter-offer. The arrangement does not bind the parties and therefore no restrictions can be placed on those parties or any appointed solicitor, while any act of approval merely means that the offer or counter-offer becomes unconditional and capable of acceptance.

Where the clause does not nominate a particular matter for approval it usually requires approval of contract or lease (and accordingly has the same effect as a subject to solicitor's approval of contract or lease clause) but if included in a separate offer form, or more especially a separate acceptance form, may create a conditional offer (ie have the effect of a subject to solicitor's approval of all aspects of the offer clause).

The above summary only provides generalisations based on the wording of the clauses; circumstances surrounding the making of the contract or the influence of other clauses in the contract may result in a clause having an effect other than that predicted by the analysis. Nevertheless it illustrates that a solicitor's approval clause containing the wording "subject to" almost inevitably renders a contract, or offer or counter-offer, *subject to* (ie conditional upon) solicitor's approval. More specifically the analysis establishes that where a subject to solicitor's approval clause confers a limited discretion on a solicitor the clause usually results in a binding but conditional contract, while if a clause confers a very wide discretion on the solicitor it almost invariably has a greater contractual impact.