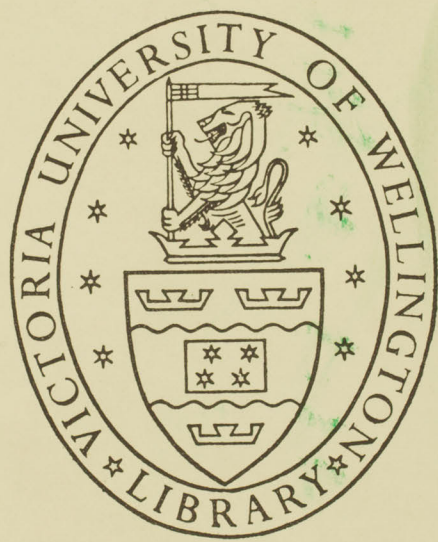


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TOYE P.J.

AGREEMENTS "SUBJECT TO SOUTHERN APPROVAL"







TOYE P.J. AGREEMENTS "SUBJECT TO SOLICITORS' APPROVAL"

1. INTRODUCTION

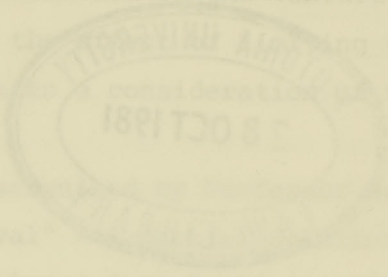
In recent years, there has emerged for the first time in New Zealand, a number of cases dealing with the effects of "solicitor's approval" clauses as conditions in land transactions. The first two of these cases were Suhay v. Deane [1971] 1 NZLR 517, and Frampton v. McCully [1976] 1 NZLR 270. They held that where acceptance was made subject to the approval of a solicitor of one of the parties, the condition operated to prevent the formation of the contract until approval was given. As a consequence, no limits existed on the discretion of the solicitor in approving or disapproving.

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However, the third New Zealand case, Boote v. S.T. Shirls and Co. Ltd. [1978] 1 NZLR 445, held that the use of the words, "this offer is subject to my solicitor's approval", had not prevented the formation of an immediately binding contract because the "solicitor's approval" clause provided that the offer was to be accepted by the offeror within a specified period.

Agreements "subject to solicitors' approval" :

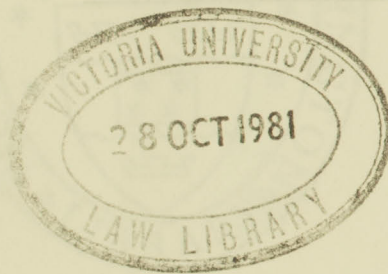
A Case Note on Provost Developments Ltd v Collingwood Towers Ltd [1980] 2 NZLR 205.



It was held in Boote that the solicitor's discretion under the approval clause was not to be exercised as a condition subsequent to the formation of the contract. The court in Boote was concerned with the "solicitor's approval" clause in land transactions being treated as an independent condition. Firstly, the constraints on the solicitor's discretion in such a case would mean there would be little scope for the solicitor to act as a means of consumer protection for his client, even though this is the obvious intention in many cases. Secondly, the restriction of the role of the solicitor would conflict with his usual role of acting in his client's best interests in all respects. A further consequence of the restriction is that the traditional confidentiality of the solicitor/client relationship is threatened if the solicitor is required to divulge his reasons for disapproval. Coote suggested that a partial solution to these problems might be to require the offeror to accept the offer within a specified period.

Submitted for the LL.B. (Honours) Degree at the Victoria University of Wellington.

1 September, 1981



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I. INTRODUCTION

In recent years, there has emerged for the first time in New Zealand, a number of cases dealing with the effects of "solicitor's approval" clauses as conditions in land transactions. The first two of these cases were Buhrer v. Tweedie [1973] 1 NZLR 517, and Frampton v. McCully [1976] 1 NZLR 270. They held that where an offer or acceptance was made subject to the approval of a solicitor of one of the parties, the condition operated to prevent the formation of the contract until approval was given. As a consequence, no limits existed on the discretion of the solicitor in approving or disapproving.

However, the third New Zealand case, Boote v. R.T. Shiels and Co. Ltd. [1978] 1 NZLR 445, held that the use of the words, "this offer is subject to my solicitor's approval", had not prevented the formation of an immediately binding contract because the "solicitor's approval" clause provided that approval was to be given "within seven days from acceptance date". The use of the words, "from acceptance date", was viewed as showing that the "solicitor's approval" clause was intended to operate as a condition subsequent to the formation of the contract. The finding of a contract in the Boote case had the effect of limiting the solicitor's discretion under the approval clause to a consideration of the "conveyancing aspects" of the transaction.

It was then recognised by Professor Brian Coote in his article Coote "Solicitor's Approval" - A partial Solution' (1980) NZLJ 430, that two serious problems emerged from "solicitor's approval" clauses in land transactions being treated as conditions subsequent. Firstly, the constraints on the solicitor's discretion in such a case would mean there would be little scope for the solicitor to act as a means of consumer protection for his client, even though this is the obvious intention in many cases. Secondly, the restriction of the role of the solicitor would conflict with his usual role of acting in his client's best interests in all respects. A further consequence of the restriction is that the traditional confidentiality of the solicitor/client relationship is threatened if the solicitor is required to divulge his reasons for disapproval. Coote suggested that a partial solution to these problems might be to give the words "subject to solicitor's approval" their normal literal meaning and hold that no binding obligation has been accepted by the parties.



The effect of the decision of the Court of Appeal in Provost Developments Ltd. v Collingwood Towers Ltd. [1980] 2 NZLR 205, however, was to hold that "solicitor's approval" clauses in documents expressed as agreements for sale and purchase will ordinarily be taken to condition the performance rather than the formation of the contract. On the facts of the Provost Developments case, this meant that the vendor's solicitor was only able to take into account the "legal implications" of the transaction in the exercise of his discretion.

The two questions which this paper will examine relate to the first problem raised by Coote above. Firstly, in light of the Provost Developments decision, is there scope for holding that a "solicitor's approval" clause in a sale and purchase agreement, will condition the formation of the contract, and if so, to what extent? Secondly, what is the scope of the "legal implications" test?

## II. THE PROVOST DECISION

### A. The Facts

The facts of the Provost Developments case are that an agreement (between the plaintiff/appellant in the action, Provost Developments Ltd., who was the purchaser, and the defendant/respondent, Collingwood Towers Ltd., who was the vendor) was executed for the sale and purchase of several house properties that were occupied by monthly tenants. There was considerable bargaining between the parties before they entered into the agreement. The written instrument representing the agreement was a standard form used by the Law Society and the Real Estate Institute in the Auckland District. The price was \$85,000, to be paid by a deposit of \$5,000, and the balance secured by first mortgage in favour of the vendor for six months. The property was to be sold free of existing tenancies and the agreement contained the clause "subject to solicitors' approval by Friday, 30 June 1978 by 5 p.m.". "Solicitors'" in this context referred to both the purchaser's and the vendor's solicitors. The purchaser's solicitor duly approved, but before 30 June, the vendor's solicitor advised that he would not approve the transaction, stating in a letter to the purchaser's solicitor, that "the contract is at an end".

After hearing evidence from a director of the vendor company and the vendor's solicitor, Holland J. at first instance made the following findings of fact concerning the vendor's solicitor's reasons for failing to approve the transaction. His Honour's findings are quoted by Woodhouse J. at page 207 of the Provost Developments case:

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"I am satisfied that Mr Dew (the vendor's solicitor) disapproved of the agreement because he was concerned about the delay in cash payment and the provision requiring vacant possession to be given, but primarily because he felt confident that his client was able to get an agreement on better terms. Had there not been another prospective purchaser in the offing and had not Mr Dew at the time felt confident that a better offer could have been obtained, I doubt if he would have not approved the agreement, the terms of which I am satisfied were clearly known by the directors of the defendant company at the time the agreement was completed".

As a consequence of the refusal to approve by the vendor's solicitor, the purchaser brought an action for specific performance.

B. The Decision at First Instance

Holland J. at first instance found in favour of the defendants by holding that although there had existed a concluded contract between the parties, the vendor was not bound to perform it because its solicitor had validly refused to approve the transaction.

His Honour applied the "conveyancing aspects" test suggested in the Boote case, in a wide sense. His Honour states, as Woodhouse J. quotes at page 208 of the Provost Developments case, that

"in using the words 'conveyancing aspects', I respectfully suggest he (Cooke J. in the Boote case) did not intend them to be interpreted narrowly, but meant arising out of the duties and obligations owed by a solicitor to his client when acting for that client and advising concerning a conveyancing matter. That must include, in most cases, a considered view or opinion as to the transaction the client is entering into as a whole".

Holland J. supported this interpretation by stating, as Woodhouse J. quotes at page 208 of the Provost Developments case, that

"if the solicitor is not entitled to apply his mind to the appropriateness of the bargain as against the legal validity of the contract, there is very little in respect of which a solicitor can exercise his discretion. Normally a client in seeking a solicitor's opinion as to a contract, would expect advice as to the transaction as well as the mere legal formalities, whatever they may be".

His Honour concluded by stating, as Woodhouse J. quotes at page 209 of the Provost Developments case, that

"I am satisfied in this case, from an examination of the document and the surrounding circumstances, that both parties intended that they should have the benefit of their solicitors' advice concerning the bargain and that in the event of either solicitor disapproving the bargain, there would be no binding contract".

His Honour's view was, that as the agreement did contain terms unfavourable to the vendors, and as the vendor's solicitor did not disapprove solely because of the instructions he received from his client, the withholding

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of approval was not capricious or in bad faith, but a valid exercise of the solicitor's discretion. The vendor's were therefore not bound to perform the contract. However if the vendor's solicitor had withheld his approval solely because a better offer was available, the refusal to approve would have been invalid in Holland J.'s view. His Honour would also have declared it invalid if the vendor's solicitor had disapproved solely because of the instructions he received from his client.

C. The Decision on Appeal

1. The Issues

The plaintiffs appealed to the Court of Appeal on two principal issues. The issues were:

- (1) Whether the execution of a sale and purchase agreement of a final and comprehensive nature, between two commercially aware parties, amounts to an immediately binding contract where a term of the agreement is a "solicitor's approval" clause?
- (2) What aspects of a transaction between two commercially aware parties could a solicitor exercising his discretion under a "solicitor's approval" clause in a contract validly take into account?

Both issues are in essence issues as to the intention of the parties. They are concerned with the interpretation of a clause in a written instrument. In Halsbury Laws of England (4th ed. 1973) at paragraph 1459, under the heading "Object of Interpretation", it is stated that "the object of all interpretation of a written instrument is to discover the real intention of the author, the written declaration of whose mind it is always considered to be. Consequently, the construction must be as near to the minds and apparent intention of the parties as is possible, and as the law will permit".

The Court of Appeal, in considering the issues, accepted Holland J.'s findings of fact at first instance.

2. The Existence of a Contract

The literal interpretation of the words "subject to solicitors' approval" would have led one to believe there was no contract until the solicitors approved. A logical restatement of the clause would be, "contract binding subsequent to solicitors' approval". However, the Court of Appeal preferred to refrain from a literal interpretation. Their Honours recognised that the exact wording of such clauses in standard form agreements, are not a real representation of the parties intentions, because they do not choose them. In such situations, accepted practice and the surrounding circumstances of the particular case, have much greater significance as a basis for examining the intention of the parties.



Cooke J., at page 209 of the Provost Developments case, states that it is accepted "that a provision requiring some approval by solicitors, does not necessarily mean that there is no contract at all". Whether there existed a contract in this particular case was a question which turned upon the meaning and effect of the words "subject to solicitors' approval". Richardson J. at page 212 of the Provost Developments case stated that,

"the meaning and effect of such a provision is a question of construction. It is a matter of arriving at the true intention of the parties as expressed in the instrument, considered against the surrounding circumstances as they existed at the time of its execution. So I do not find it particularly helpful to attempt to categorise the kinds of provisions found in other cases, and I turn to consider the agreement between the parties to this appeal".

This approach to the interpretation of agreements is consistent with that taken by Lord Morris in L. Schuler A.G. v. Wickman Machine Tool Sales Ltd. [1974] A.C. 235. His Honour states at page 256, that

"If it is correct to say, as I think it is, that where there are problems of construction of an agreement the intention of the parties to it may be collected from the terms of their agreement and from the subject matter to which it relates, then I doubt whether, save in so far as guidance on principle is found, it is of much value (although it may be of much interest) to consider how courts have interpreted various differing words in various differing contracts. Nor is it of value to express either agreement or disagreement with the conclusions reached in particular cases".

The cases dealing with "solicitor's approval" clauses fall into three basic categories:

(1) The "solicitor's approval" clause is a term of an agreement and approval is expressly limited to title, form or the lease; or is expressly or impliedly from the words of the instrument, stated to be a condition subsequent to the formation of contract. In these situations, the "solicitor's approval" clause has been held to condition the performance of an already binding contract: Marten v. Whale [1917] 2 K.B. 480 (C.A.); Caney v. Leith [1937] 2 All E.R. 532; Boote v. R.T. Shiels and Co. Ltd. [1978] 1 NZLR 445.

(2) The "solicitor's approval" is expressly directed to the substance of the contract as well as its form, or the approval is expressly or impliedly from the words of the agreement, stated to be precedent to the creation of legal relations, or is a condition on offer or acceptance. In these situations, the "solicitor's approval" clause has generally been held to be a condition precedent to the formation of a binding contract: Henning v. Ramsay [1964] NSW 1165; Buhrer v. Tweedie [1973] 1 NZLR 517; Frampton v. McCully [1976] 1 NZLR 270.

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(3) The "solicitor's approval" clause is a term of an agreement but approval is not expressly directed towards any aspect of the contract, specifically or generally. The "solicitor's approval" clause exists in a non-definitive literal context. The meaning and effect of the "solicitor's approval" clause will then depend on the surrounding circumstance, but ordinarily the fact that the clause is a term of a commercial agreement, specifically referring to "solicitors", will indicate the fact of agreement and an intention to create legal relations. Ordinarily in this situation therefore, the "solicitor's approval" clause will condition the performance of the contract and not its formation: Provost Developments Ltd. v. Collingwood Towers Ltd. [1980] 2 NZLR 205.

In considering the meaning and effect of the words of the "solicitor's approval" clause in the Provost Developments case, their Honours did not refer to the letter sent by the vendor's solicitor to the purchaser's solicitor, which stated "The contract is at an end". For the purpose of interpreting the intention of the parties, events subsequent to the signing of the final agreement are irrelevant: L. Schuler A.G. v. Wickman Machine Tool Sales Ltd. [1974] A.C. 225.

Woodhouse J. emphasised at page 208 of the Provost Developments case, that the approval clause "speaks explicitly of the approval of solicitors, and it does so in the context of a comprehensive and detailed agreement for sale and purchase. The breadth of the discretion is qualified by the contemplated use of professional expertise of the solicitors as such rather than the much wider approach that might be adopted on an open basis by some more general adviser". His Honour concluded that this must mean an immediately binding contract was intended because if there was no such contract there would be no obligations owed by either party and the discretion would be completely unfettered.

Cooke J. in the Provost Developments case referred to the considerable bargaining of the parties prior to the execution of the agreement, the fact that the parties entered into a formal agreement for sale and purchase, and also the fact that it was not contemplated that any further contractual document was to be drawn up. His Honour reasoned that these circumstances pointed to there being a natural and reasonable expectation of a binding legal relationship arising between the parties on execution.

Richardson J. in the Provost Developments case pointed out that it was a commercial transaction between two commercially aware parties where the contract was in the form of an agreement which left no details of the transaction to be determined. It was also a requirement that a deposit be paid on the signing of the agreement. These circumstances, in His Honour's view, indicated that the parties intention was to enter into an immediately binding contract.



To understand the conclusion of their Honours on this issue, it is necessary to review the requirements of a valid contract. In Halsbury, Laws of England (4th ed. 1973 -) at paragraph 203, it is stated that,

"To constitute a valid contract; (1) there must be two or more separate and definite parties to the contract; (2) those parties must be in agreement, that is there must be a consensus ad idem; (3) those parties must intend to create legal relations in the sense that the promises of each side are to be enforceable simply because they are contractual promises; (4) the promises of each party must be supported by consideration, or by some other factor which the law considers sufficient, generally speaking the law does not enforce a bare promise (nudum pactum) but only a bargain".

The question of determining the existence of a contract in the case of a written instrument containing a condition, is essentially a question of whether the parties have or have not completed the process of reaching agreement. This is generally deduced from the surrounding circumstances of each particular case. In the Provost Developments case, the form of the written instrument (as an agreement), its execution as a result of considerable bargaining, and the completeness of its content, all indicated that the parties had reached agreement as to the terms of the contract. The specificity of the adviser in the approval condition, namely the solicitor, meant that according to the circumstances, the solicitor's discretion could be limited to exclude a review of matters essential to the existence of the particular contractual agreement or bargain. In the Provost Developments case the parties were commercially aware. They would therefore not have intended their solicitors to advise them on commercial matters but only on matters peculiarly within the solicitor's sphere.

The question of the existence of a contract can also be a question of whether or not the parties intend to create legal relations. In the case of commercial agreements, it is a presumption that the parties intend to create legal relations, and the question which arises is whether a "solicitor's approval" clause defeats that presumption. In Halsbury, Laws of England (4th ed. 1973 -), it is stated at paragraph 303 that "to oust expressly the presumption of intention to create legal relations, clear words must be used". It is the express ousting which is relevant in this situation. However in the Provost Developments case the agreement was commercial in nature and there was no express ousting of an intention to create legal relations.

The conclusion of their Honours in the Provost Developments case, on the existence of a contract, is clearly correct on an analysis of the applicable law and its application to the facts of the case. However, problems may arise in other cases because, as a current legal practitioner has stated in Jenkinson "Subject to Solicitor's Approval" (1980) NZLJ 430



at page 431,

"the condition is usually inserted because the party is inexperienced in business matters, unsure of himself, has been told by his solicitor never to sign anything without his approval, doesn't trust the land agent, or just wants to have the benefit of having some more time to think about it and/or his solicitor's advice".

Jenkinson believes that most lay people understand a "solicitors' approval" clause to mean exactly what the term implies, that there is no contract at all unless and until the solicitor's approval is given. The layman sees his solicitor as a man of affairs who can offer general advice and who he can rely on to act on his instructions, for this is the solicitor's ordinary role.

The question to now be considered is whether in these circumstances a "solicitor's approval" clause in a sale and purchase agreement, can operate to prevent the formation of a contract. In considering this question, it is necessary to take into account Cooke J.'s statement in the Provost Developments case at page 210, that "a decision now by this Court indicating that a clause as to approval by solicitors is likely to rule out any contract would be against the New Zealand trend". Cooke J. is concerned that "solicitors' approval" clauses should not be used as substitutes for options to purchase. In an option to purchase, the purchaser pays the vendor a sum of money in return for having a fixed period of time in which he can consider all aspects of the transaction and depending on his findings decide to purchase the property or to leave it. During this time the vendor can only keep the property open for sale to the purchaser alone, and he can only offer it to someone else if the purchaser declines to proceed with the purchase. If this were to occur under an ineffective agreement, the vendor would receive no recompense for holding the property for the purchaser.

Where there is a strong seller's market there arises problems for the purchaser under an ineffective agreement. The vendor is likely to get many offers and so there arises the possibility of gazumping. Gazumping is the situation that occurs when a vendor accepts an offer from a purchaser to buy a property, but the agreement they execute is ineffective as a contract until a condition precedent in the agreement is fulfilled. Before this fulfillment the vendor is not bound to honour the agreement and can accept a better offer. If this happens, the purchaser's implied expectation of buying the property is let down. He has been gazumped. This is clearly undesirable from the purchaser's point of view, and as Cooke J. states at page 210 of the Provost Developments case, "the Courts in this country have ... been mindful of the need ... to deter or prevent buyers and sellers of houses from letting each other down without a valid reason".

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Cooke J. concedes at page 210 of the Provost Developments case that "I am not sure that on balance the interests of purchasers as 'consumers' would be better served by treating an agreement of the present type as totally ineffective". His Honour seems to consider, however, that the prevention of defeating the expectation of buying or selling a property is more important than the interests of purchasers as consumers. His Honour is clearly influenced by the fact that if the purchaser intends an option to purchase, that can be agreed upon and paid for as such. The fact, therefore, that in a situation of a duly executed, final and comprehensive, sale and purchase agreement containing a "solicitors' approval" clause, it can be implied from the surrounding circumstances that the purchaser intended his solicitor to act as a general adviser, is unlikely to persuade the courts to hold that there is no contract. For balancing this is the more important consideration in the Court's view, that the vendor's implied expectation of selling the property could be let down without a good reason.

The situation may be different however, if there is an express reference to the solicitor as a general adviser. The purchaser's expectation of buying the property is only implied and this may be defeated by such an express reference. Such a situation would probably be a category (2) case. As Woodhouse J. comments on page 208 of the Provost Developments case, the obligations arising under a contract would be entirely illusory where the solicitor's discretion is unfettered, and so a reference to the solicitor as a general adviser would indicate a lack of agreement and so no contract.

The situation might also be different if in the context of an unexecuted draft agreement or a tentative agreement, the circumstances imply that a solicitor under a "solicitors' approval" clause in the agreement, was intended to act as a general adviser. Richardson J. states at page 213 of the Provost Developments case, that in this situation, "it might have been argued that a solicitor could be expected to reach a conclusion as to whether it was appropriate for his client to proceed with the transaction as provided in the agreement. In so doing he would consider each of the terms of the bargain as it affected his client". This would also indicate a lack of agreement and so no contract.

### 3. The Range of Considerations

The approach of the Court to the second issue in the Provost Developments case is consistent with that applied to the first issue. The conclusion of their Honours was based on an analysis of the intention of the parties as revealed by the wording of the relevant provision considered against the surrounding circumstances. Their Honours noted the specific reference to "solicitors" as opposed to a more general adviser and considered this against the commercial awareness of the parties and the existence of a contract.

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These factors combined to support the Court of Appeal's conclusion in the Provost Development's case that the vendor's solicitor's discretion was intended to be limited to a consideration of the "legal implications" of the transaction as against the appropriateness of the bargain.

Woodhouse J. at page 209 of the Provost Developments case states that,

"If the solicitor were able or obliged to estimate the value for his client of the bargain itself, there would seem to be no issues at all, whether objective or subjective, that could not properly be taken into account. ... In such a situation the condition would have the same wide-open effect of a 'subject to contract' clause and would prevent the actual formation of the conditional contract".

The formation of the condition contract would be prevented by such a discretion because as Woodhouse J. states at page 208 of the Provost Developments case, "the notion of obligations arising in terms of a contract already concluded would be entirely illusory". In limiting the range of considerations of the solicitor to exclude matters going to the value of the bargain itself, Woodhouse J. described the responsibilities of the vendor's solicitor under the "solicitors' approval" clause as being to assess the "legal implications" of the transaction only.

In applying this test in the Provost Developments case, His Honour rejected the validity of the existence of a better offer and the delay in cash payment as proper reasons for disapproval because they went to the value of the bargain. The third reason, the concern about possible difficulties in complying with the vacant possession requirement, His Honour regarded as being proper for consideration if a legal impediment was involved. However as this reason was a secondary consideration in that the vendor's solicitor would have approved had there not been a better offer, it was the validity of disapproving because of a better offer which decided the validity of the solicitor's disapproval. It is therefore implicit, that where a proper consideration or considerations are taken into account with an improper consideration, the proper consideration or considerations will only operate to validate a solicitor's disapproval under a "solicitors' approval" clause in a contract if the solicitor would still have disapproved without having taken into account the improper consideration.

Cooke J. at page 211 of the Provost Developments case phrased the test for limiting the considerations of the solicitor as "considerations peculiarly within the solicitor's sphere". In applying this test, Cooke J. is generally in agreement with Woodhouse J., but His Honour also makes the important point that the same consideration may in different circumstances be both a matter going to the appropriateness of the bargain and a legal implication.

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His Honour states at page 211 of the Provost Developments case that

"One can imagine a case of a solicitor pointing out to an unsophisticated vendor that a contract required vacant possession to be given and that this could not be complied with. I would not exclude the possibility of the clause being used justifiably in such a case. But in this case in the clause referring to existing tenancies (cl. 16), the words 'subject to' had plainly been struck out and 'free of' plainly left standing. The business of the vendor company consisted of letting the properties in the Ponsonby-Freeman's Bay area which are the subject of the contract. It would be stretching the imagination to suggest that at the time of signing the contract the vendor was not fully alive to the obligation to give possession free of tenancies by 28 July 1978 and to whether or not any difficulties were likely to arise in that respect".

This statement indicates that a legal impediment to giving vacant possession would not have been a valid reason for disapproval on the facts of the Provost Developments case because it would have been a matter taken into account by the vendor in arriving at a bargain with the purchaser. It may be possible to argue therefore that a relevant matter not taken into account by a party to a contract in arriving at a bargain is outside the bounds of the appropriateness of that particular bargain. If this is the case then it may be able to be included within the "legal implications" of the transaction. The meaning of the term "legal implications" is dealt with to some extent by Richardson J.

"Legal implications" is defined in a wider sense than "conveyancing implications" by Richardson J. His Honour includes the latter in the former. "Conveyancing implications" relate to the form of the agreement. Richardson J. states at page 214 of the Provost Developments case that the "legal implications" of a transaction include "the form of the agreement, its validity, and the burden of the commitments entered into thereunder by their respective clients". In this respect the "conveyancing aspects" test in the Boote case is expanded by the Provost Developments case. A "legal implication" can be defined as a matter having a consequence in law, a definition which has wide possibilities.

The need to expand the considerations of a solicitor under a "solicitors' approval" clause beyond the form of the agreement arises especially in the case of standard form agreements because otherwise there would be little purpose in such a clause. Holland J. at first instance went too far in expanding the solicitor's discretion however. Richardson J. at page 214 of the Provost Developments case states that Holland J. "was over-influenced by his view of the role of a New Zealand solicitor today and did not give sufficient recognition to his earlier conclusion, with which I agree, that the parties had entered into a concluded contract and had reached agreement between themselves on all matters".

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The "form of the agreement" is a consideration which entitles the solicitor to examine the written instrument representing the agreement to ensure that the bargain reached by his client is properly represented in that instrument and is not altered in any way by an improper use of the language of that instrument. The burden of the commitments entered into under such an agreement by a solicitor's client is a consideration which entitles a solicitor to disapprove the agreement if there is some legal, financial, or other difficulty which prevents his client from being able to perform the contract. The performance of a contract is recognised as a consequence in law. The validity of an agreement is affected by many factors. Misrepresentation, duress, undue influence, mistake and possibly unequal bargaining power, all affect the validity of an agreement.

Misrepresentation is governed by the Contractual Remedies Act 1979. A misrepresentation is a representation that is untrue. A representation is a statement of fact made by one party to the contract (the representor) to the other (the representee) which, while not forming a term of the contract, is yet one of the reasons that induces the representee to enter into the contract. Under section 6(1) of the Contractual Remedies Act 1979, a party induced into a contract by a fraudulent or innocent misrepresentation of another party is entitled to damages. Under section 7 of the Contractual Remedies Act 1979, a misrepresentation having a substantial effect on the contract entitles the suffering party to cancel the contract after which he may apply to the Court for relief.<sup>1</sup>

The legal consequences of damages or cancellation with possible relief therefore operate to entitle a solicitor to disapprove a contract if his client has suffered as a party to that contract because of an innocent or fraudulent misrepresentation of another party. However, it might be of more financial benefit for the client if the solicitor approved and secured the remedies available. This might not be good practice however if there is a provision in the contract,

"purporting to preclude a Court from inquiring into or determining the question;

- (a) Whether a statement, promise, or undertaking was made or given, either in words or by conduct, in connection with or in the course of negotiations leading to the making of the contract; or
- (b) Whether, if it was so made or given, it constituted a representation or term of the contract; or
- (c) Whether, if it was a representation, it was relied on".<sup>2</sup>

In this situation, a Court will be precluded by that provision from inquiring into and determining any such question if

"the Court considers that it is fair and reasonable that the provision should be conclusive between the parties, having regard to all the circumstances of the case, including the



subject-matter and value of the transaction, the respective bargaining strengths of the parties, and the question whether any party was represented or advised by a solicitor at the time of the negotiations or at any other relevant time".<sup>3</sup>

A solicitor acting under a "solicitors' approval" clause prior to performance of a contract is acting at a "relevant time" because the contract will not need to be performed if he properly refuses to approve it. If he does approve the contract then the Courts may be strongly persuaded that the exception provision should be conclusive between the parties. The client will then be precluded from securing any of the remedies for misrepresentation under the Contractual Remedies Act 1979.

Duress is the legal term used to describe the procuring of a contract by actual violence or threats of violence to the person. The effect of duress is to make the contract either void or voidable. Undue influence is where one party to a contract benefits from the contract by exerting an influence over the other party which prevents that other party from exercising an independent judgement in the matter in question. Its effect is to make the contract voidable. Duress and undue influence clearly come within the meaning of "legal implications".

Unequal bargaining power is not yet by itself an established doctrine of law. However there are signs that it may develop as such. This is an important area for "solicitors' approval" clauses because it promises to transform a situation of a party accepting unfair terms in a contract in an unequal bargaining power context, from a consideration going to the appropriateness of the bargain to a "legal implication" appropriate for a solicitor's consideration under a "solicitors' approval" clause in a contract. The doctrine of unequal bargaining power is espoused in an obiter dictum statement of Lord Denning in Lloyd's Bank v. Bundy [1975] Q.B. 326 at page 339, which was neither approved nor disapproved by the other members of the Court. The distinction between the doctrines of undue influence and unequal bargaining power is that in the latter, a contract will be voidable even if the "undue influence" being felt by the suffering party is not being exerted by the other party but is merely a consequence of a situation of unequal bargaining power. The result of the unequal bargaining power doctrine is to make the contract voidable.

Lord Denning states in the Lloyd's Bank case that in the unequal bargaining power situation, independent advice may save the transaction. If in an unequal bargaining power situation the agreement concerned contains a "solicitors' approval" clause, the Courts should therefore be sensitive to the solicitor's role as an independent adviser. In this situation his role should be a general one. The Courts might hold that in the circumstances, the client intended the solicitor to act under the



approval clause as a general adviser, in which case a further consequence might be that there was no immediate contract at all. They might, on the other hand, hold that an unfair contract resulting from a situation of unequal bargaining power is legally voidable and so a "legal implication" for which the solicitor can disapprove the contract.

A mistake by the client has "legal implications" if it qualifies as a mistake for which relief may be granted under section 7 of the Contractual Mistakes Act 1977. "Mistake" is defined as meaning "a mistake, whether of law or fact".<sup>4</sup> To qualify as a mistake for which relief may be granted, the mistake must be by one party to the contract and to be known to the opposing party or be common or mutual to the parties to the contract.<sup>5</sup> The mistake must also have a substantial effect on the contract<sup>6</sup> and the affected party must not be covered by a clause in the contract stating that he assumes the risk that his belief about the matter in question might be mistaken.<sup>7</sup> However, as is the case with a misrepresentation, it might be of more benefit for the solicitor to approve and to secure relief under section 7 of the Contractual Mistakes Act 1977.

The limitation of a solicitor under a "solicitors' approval" clause to a consideration of the "legal implications" of the transaction is not the only limitation on his discretion. A solicitor would not be able to disapprove a transaction because of a "legal implication" of that transaction which was not unfavourable to his client. As Cooke J. states at page 211 of the Provost Developments case, "the solicitors were required to consider the contract bona fide and reasonably". In Caney v. Leith [1937] 2 All E.R. 532, Farwell J. states at page 538 that included within the bounds of an unreasonable act by a solicitor acting under a "solicitor's approval" clause, are those situations where solicitors,

"to assist their client and get him out of the contract, or for some other reason, refuse to approve the lease, without giving the matter any consideration at all, or where the reasons for disapproval are so patent and absurd that the Court can say in a moment: 'This is ridiculous and the solicitors cannot possibly make such an objection as that'."

Despite the limitations however, it can be concluded that the "legal implications" test is flexible enough to cover the differing demands of parties of various strengths, to contracts which are "subject to solicitors' approval". It is clear that the Courts will seek to allow a solicitor under a "solicitors' approval" clause to disapprove where there is something substantially wrong with a contract. The Court's basic concern is to limit the relevant considerations under a "solicitors' approval" clause so that the reasonable expectations of parties are not let down without a valid reason.

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III. CONCLUSION

The decision in the Provost Developments case can fairly be seen as an attempt by the Court of Appeal to place proper limits on agreements with no obligations, as a prevention against gazumping. If parties intend to create merely an option to purchase, then they should enter into one and pay for it accordingly. The Provost decision clearly emphasises the need for consultation between a solicitor and his client before the client goes ahead with signing any documents placed in front of him by a real estate agent. Otherwise, the client runs the risk of ascribing to an intention represented by a document which is not in fact his/her actual intention.

Footnotes

- 1 Contractual Remedies Act 1979, S.9.
- 2 Contractual Remedies Act 1979, S.4(1).
- 3 Contractual Remedies Act 1979, S.4(1).
- 4 Contractual Mistakes Act 1977, S.2.
- 5 Contractual Mistakes Act 1977, S.6(1)(a).
- 6 Contractual Mistakes Act 1977, S.6(1)(b).
- 7 Contractual Mistakes Act 1977, S.6(1)(c).

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Footnotes

- 1 Contractual Remedies Act 1979, s. 2.
- 2 Contractual Remedies Act 1979, s. 4(1).
- 3 Contractual Remedies Act 1979, s. 4(1).
- 4 Contractual Mistakes Act 1977, s. 2.
- 5 Contractual Mistakes Act 1977, s. 6(1) (a).
- 6 Contractual Mistakes Act 1977, s. 6(1) (b).
- 7 Contractual Mistakes Act 1977, s. 6(1) (c).





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