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Three Little Words: "Subject to Contract"

By Matthew Evans

The recent decision in *Newbury v Sun Microsystems* [2013] EWHC 2180 (QB) highlighted the issues in ensuring that draft settlement agreements do not bind the parties until the agreements are in final form. In *Newbury*, a letter from the defendant's solicitors to the claimant's solicitors setting out the terms of a proposed settlement, coupled with a responsive acceptance email from the claimant's solicitors (even though marked "without prejudice save as to costs"), were held to constitute a legally binding settlement agreement.

The High Court reached its decision for several reasons:

- the defendant's solicitors' letter was expressed as an offer of settlement, set out the terms of such offer and stated that the offer was open for acceptance for a specified time. This was a clear indication that the letter was therefore intended to be a binding offer capable of acceptance with certain legal consequences following from acceptance;

- the letter referred to "such settlement to be recorded in a suitably worded agreement". This reference to "such settlement" was held to be a reference to the terms set out in the offer letter itself, and not to terms yet to be negotiated and agreed. The offer and acceptance was to be recorded in a suitably worded agreement in order to create an authentic record of what had already been agreed. Execution of a "suitably worded agreement" was not itself a condition of the agreement, merely an expression of the parties' wishes that there be a formal record of their agreement;

- the court's decision was reinforced by the factual background to the correspondence. The parties were shortly due to start a potentially expensive trial. The letter from the defendant's solicitor was a clear attempt to reach a full and final settlement, thereby avoiding the litigation; and

- it was held that where a contract is said to be contained in a document or documents, it is not legitimate to have regard to the parties' subsequent conduct for the purpose of considering whether those documents give rise to a binding agreement.

So how can lawyers ensure that negotiations proceed without the creation of binding obligations? The High Court in *Newbury* clarified that had the defendant's solicitors letter been marked "subject to contract", the letter's terms would not be binding, and would only become so when a formal contract

was agreed. Had those three little words been used, the letter would not have been an offer capable of acceptance. It is therefore critical to make full use of the wording “subject to contract” where the parties intend to negotiate further and do not wish their preliminary discussions to constitute a binding settlement agreement.