

**THE HIGH COURT****2008 3455 P****BETWEEN****JOHN MOLONEY AND PATRICK MEADE****PLAINTIFFS****AND****TADHG FOX****DEFENDANT****Judgment of Mr. Justice Kevin Feeney delivered on the 22nd day of February, 2010.**

1. The claim brought by the plaintiffs in these proceedings is based upon a contract dated the 25th September, 2006. That contract (hereinafter referred to as the sub-contract) was between John Moloney and Patrick Meade as vendors and Tadhg Fox (in trust) as purchaser whereby the vendors agreed to sell and the purchaser agreed to purchase the registered lands described therein, namely, all that and those part of the lands situated at Foulkscourt, Barony of Galmoy and County of Kilkenny being part of the property comprised in Folio 14004 of the register County of Kilkenny together with part of the property comprised in Folio 10759F of the register County of Kilkenny for the total purchase price of €2,900,000 subject to the terms and conditions set out in the memorandum of agreement.

2. Special conditions contained in the sub-contract between the plaintiffs as vendors and the defendant as purchaser provided that the vendors were selling on foot of a contract (hereinafter referred to as the head contract) for sale dated the 9th May, 2006 and made between Margaret Fitzpatrick of the one part and the vendors of the other part. The sub-contract was essentially an unconditional contract and contained a closing date of the 1st February, 2007.

3. The defendant failed to close the sale by the stated date and a completion notice dated the 26th February, 2007 was served on the defendant/purchaser on behalf of the plaintiffs. That completion notice was signed by Neil Corbett who was a solicitor acting for both the plaintiffs/vendors and the defendant/purchaser in relation to the sale and purchase pursuant to the sub-contract. The completion notice called upon the purchaser in accordance with general condition No. 40 of the contract to complete the sale within 28 days from the date of the service of that notice. It was also stated that if the purchasers should fail to complete the sale within the specified period that the vendors would enforce against the purchaser such rights and remedies as may be available to them at law or in equity.

4. The defendant/purchaser failed to respond to the completion notice and the plaintiffs thereafter proceeded on the basis that the defendant was in fundamental breach of contract.

5. The plaintiffs issued proceedings against the defendant by plenary summons dated the 30th April, 2008 wherein a claim for specific performance was made together with an alternative plea, at the election of the plaintiffs, seeking rescission of the said contract. The statement of claim was served on the defendant on the 1st August, 2008 seeking the same alternative reliefs as identified in the plenary summons. The defendant raised a notice for particulars dated the 23rd October, 2008 and in a reply thereto dated the 10th March, 2009, the plaintiffs elected to rescind the contract and stated that they accepted that their contract with Margaret Fitzpatrick has been rescinded and that they have therefore elected to pursue a remedy in damages.

6. The defendant delivered a defence and counter-claim dated the 20th November, 2008 wherein he admitted the agreement of the 25th September, 2006 (the sub-contract). The defendant pleaded that it was an express, or in the alternative, an implied term of that agreement that the plaintiffs would be in a position to convey to the defendant good title of the said lands on completion of the agreement. The defendant also sought to rely on a plea that he had entered into the said contract as trustee for Trotfox Limited. The plea that the defendant was acting as trustee for a limited liability company was not pursued at the hearing before the Court and the case proceeded on the basis that the defendant was the real principle and that the plaintiffs could rely on the general conditions set out in the contract and that any liability under the contract was the liability of the defendant. The defendant further pleaded, at para. 15 of the defence, that further in the alternative, it was an express condition of the said contract for sale between Margaret Fitzpatrick and the plaintiffs that the plaintiffs would apply for a specified planning permission within three months of the date of that contract and further that in the event of their failing to apply for the said planning permission, the contract could be rescinded by the said Margaret Fitzpatrick. The defendant alleged that in breach of the said condition the plaintiffs failed, refused and neglected to apply for the agreed or any planning permission and accordingly the contract for sale between Margaret Fitzpatrick and the plaintiffs was voidable at the instance of Margaret Fitzpatrick as and from the 9th August, 2006. Based upon such plea it was contended (at para. 17) in the defence that the only consideration received by the defendant on foot of the agreement with the plaintiffs was their rights pursuant to a contract which was unilaterally voidable at the instance of the other party thereto. It was denied that the defendant received or was to receive any or any adequate consideration from the plaintiffs and in those circumstances it was denied that the agreement was enforceable as against the defendant. The defendant further contended (at para. 24) that by reason of the rescission of the contract (the head contract) for sale between Margaret Fitzpatrick and the plaintiffs, which said rescission was caused solely by reason of the failure of the plaintiffs to apply for planning permission, the contract the subject matter of the proceedings could not now be performed. It was further claimed by the defendant that specific performance of the agreement the subject matter of the proceedings or any relief thereunder would be unjust, inequitable and contrary to public policy in circumstances where the agreement was prepared by the solicitor for the plaintiffs and where the defendant to the knowledge of the plaintiffs did not receive impartial or independent legal advice in relation to the terms of the said agreement. The defendant counter-claimed for rescission of the agreement the subject matter of the proceedings (the sub-contract) and for an order directing the plaintiffs to return the deposit paid by the defendant and for damages for breach of contract.

7. The plaintiffs delivered a reply and defence to counter-claim dated the 10th March, 2009 in which it was denied that the contract

for sale made between Margaret Fitzpatrick and the plaintiffs (the head contract) was void for uncertainty or unenforceable. The defendant had pleaded in his defence that the contract for sale between Margaret Fitzpatrick and the plaintiffs was void for uncertainty and unenforceable in that the special conditions within that contract as set out at special conditions 4, 5, 6 and 8 were mutually contradictory and irreconcilable. That was expressly denied in the reply and defence to counter-claim. It was pleaded that even if the contract between the plaintiffs and Margaret Fitzpatrick (the head contract) was void for uncertainty, that that did not affect the liability of the defendant under the contract the subject matter of the proceedings. The plaintiffs further pleaded in the reply and defence to counter-claim that if the head contract with Margaret Fitzpatrick was voidable, the same did not and does not affect the liability of the defendant as the contract between the plaintiffs and Margaret Fitzpatrick was not avoided at any material time. It was admitted that the head contract between the plaintiffs and Margaret Fitzpatrick was rescinded on the 11th October, 2007 but it was denied that such rescission was affected by the reason of any failure on the part of the plaintiffs to make the agreed or any application for planning permission. The plaintiffs also denied all pleas contained in the defendant's counter-claim.

8. The matter came on for hearing before the High Court in Clonmel and oral evidence was heard on the 2nd and 3rd December, 2009. The Court heard evidence from the first named plaintiff. The Court also heard evidence from Ian Corbett, solicitor, who had acted for both the plaintiffs and the defendant in relation to the sub-contract, the subject matter of these proceedings. The Court also heard evidence from Margaret Fitzpatrick who was the person identified in special condition 7 of the sub-contract, and who was the vendor in the head contract for the sale of the said lands to the plaintiffs. Special condition 7 of the sub-contract specified that the sale to the defendant was to be a sale by way of sub-sale on foot of that head contract. The evidence of Margaret Fitzpatrick dealt with the issue of the increased deposit agreed to be paid under the head contract with the plaintiffs. This matter will be dealt with later in the judgment. She also gave evidence that if she was asked to complete the sale to the plaintiffs in September 2006 or in February 2007 or on the closing date that she would have closed the sale. Her evidence was that she would have completed the sale under the head contract if she had been paid the agreed purchase price. She was expressly asked if she would have done so even though there was no planning and she stated that she would have done so. The evidence before the Court established that Margaret Fitzpatrick on the dates material to these proceedings was willing and able to complete the sale of the property to the plaintiffs if the purchase money had been forthcoming. All relevant documents and correspondence were admitted in evidence including a letter from the solicitor acting for Margaret Fitzpatrick dated the 11th October, 2007 wherein the head contract between Margaret Fitzpatrick and John Moloney and Patrick Meade was rescinded. The stated reason for the rescission was that John Moloney and Patrick Meade had not received planning permission in accordance with special condition 4 of the agreement between those parties. The Court also heard evidence from Jim Moran who was an official with Allied Irish Banks. Mr. Moran gave evidence that his bank had advanced a loan to the plaintiffs for the purchase of the said lands and in particular to enable the plaintiffs to pay an increased deposit under their contract with Margaret Fitzpatrick. Mr. Moran's evidence was that the bank advanced such loan on the basis of a requirement that before the money would be advanced that there be an unconditional contract in existence between the plaintiffs and a sub-purchaser. The loan was repayable on the 1st February, 2007. The bank also required an undertaking from Mr. Corbett, solicitor, to lodge the money from the proceeds of sale. Evidence was also given by Mr. Moran that the bank ultimately took proceedings against the plaintiffs in respect of the sum advanced in relation to the contract between the plaintiffs and Margaret Fitzpatrick and in respect of other outstanding sums. Evidence was given that judgment was obtained by Allied Irish Banks Plc against the plaintiffs on the 18th May, 2009 for a sum of €1,202,891.53 together with costs and that sum included as part of the total in the €450,000 loaned to fund the deposit paid to Margaret Fitzpatrick together with interest thereon. Mr. Moran identified that the sum for interest was €79,797.04 up to the 2nd December, 2009.

9. The Court also heard evidence from Pat Shine who was a property intermediary involved in the transaction the subject matter of the proceedings. Mr. Shine was involved in introducing the defendant to the plaintiffs with a view to a potential agreement for the sale and purchase of the lands the subject matter of these proceedings. The sub-contract between the plaintiffs and the defendant provided for a deposit of €150,000 and Mr. Shine gave evidence that the arrangement agreed was that a sum of €50,000 was to be paid by the defendant to the solicitor, Mr. Corbett, and that the payment of the outstanding balance of €100,000 was agreed to be deferred until the closing of the sale with that sum then being paid by the defendant, Mr. Fox directly to Mr. Shine. That sum of €100,000 was never paid as the contract was never completed. The Court also heard evidence that Mr. Fox paid a cheque of €50,000 to Mr. Corbett, as deposit but that that cheque was not cashed. The original of that cheque was produced.

10. The Court heard evidence that in relation to the head contract the original deposit agreed and as provided for in the memorandum of agreement of the 9th May, 2006 was in the sum of €50,000. The purchase price was €2m.

11. In special condition 5 in the head contract, the purchasers, namely the plaintiffs herein, undertook as a condition of that contract that an application for planning permission would be lodged with the planning authority within three months from the date of the contract. That time period expired on the 8th August, 2006 but the Court heard evidence that following negotiations between Margaret Fitzpatrick and the plaintiffs that that special condition was deleted by agreement. The evidence established that as John Moloney and Patrick Meade were aware of a potential sub-sale of the lands to a third party, namely, Tadhg Fox, for a consideration greater than the sum provided for in their contract with Margaret Fitzpatrick, that they entered into negotiations with Margaret Fitzpatrick and agreed that the time limit for them to obtain planning permission would be extended to the 1st February, 2007 and that special condition No. 5 in the head contract could be deleted. In consideration for such agreement, John Moloney and Patrick Meade agreed to pay an additional non-refundable deposit of €450,000 over and above the €50,000 non-refundable deposit already paid. It was agreed that the further non-refundable deposit of €450,000 would be paid within 14 days of such agreement being concluded. That agreement was confirmed by letter of the 27th October, 2006 from Margaret Fitzpatrick's solicitors, Butler Cunningham & Molony, addressed to Neil Corbett, the solicitor acting for the plaintiffs. The additional sum of €450,000 was duly paid within the agreed time period.

12. The extra deposit was additional to the original deposit and it was a special condition (No. 6) that the deposit would be non-refundable notwithstanding the provisions of any of the general conditions or special conditions in the contract for sale, that is the head contract. An issue arose during the proceedings as to whether Tadhg Fox was aware of such alteration to the head contract and of the payment of the additional €450,000 non-refundable deposit to Margaret Fitzpatrick. I will return to this issue later in this judgment. The Court also heard evidence that when Margaret Fitzpatrick rescinded the head contract by solicitors' letter of the 11th October, 2007, she retained the total deposit of €500,000, which was up to that time held by the solicitor as stakeholder.

13. The Court also heard evidence from the defendant. Mr. Fox gave evidence that through Mr. Shine he became involved in the purchase of the lands the subject matter of these proceedings. Together with Mr. Shine he met Mr. Corbett, solicitor. Mr. Corbett had acted for him in respect of one small transaction on a previous occasion and Mr. Fox gave evidence that he, together with Mr. Shine and Mr. Corbett, visited the lands. During that journey Mr. Fox indicated that it was agreed that Mr. Corbett would become his solicitor in respect of the purchase. Mr. Fox was aware that Mr. Corbett was also acting for the vendors, the plaintiffs herein. An agreement was reached between Mr. Fox and Mr. Corbett as to the payment of a €150,000 deposit on the lands, €50,000 of that sum to be paid by Mr. Fox by cheque to Mr. Corbett and the remaining €100,000 "deposit" being deferred and to be paid directly to Mr. Shine on closing.

14. Mr. Fox was a business man involved in the purchase and development of property. He had been working in that capacity for five or six years, having previously been employed by Radio Kerry. Mr. Fox purchased land and then developed the land by building houses thereon. He had built houses in County Galway and apartments in County Kerry and he sought to purchase the lands the subject matter of these proceedings with a view to obtaining planning permission and building houses. The reason that he was interested in the lands was that his housing development in Gort was almost complete. Mr. Fox also explained to the Court that the reason that the purchase of the lands in the sub-contract fell through "was the finance". He explained that at the time that he was buying the land he had been in negotiation with Anglo Irish Bank in Cork, a bank with which he had done a lot of business, and the bank were quite happy and had looked at the land. Mr. Fox went on to explain that as the market started to fall and he was unable to produce planning permission, the finance was not forthcoming from the bank. Mr. Fox indicated that he was aware that he had signed a contract for the purchase of the lands in September 2006 and that when he signed that contract, he thought that the money necessary to complete the sale was available from Anglo Irish Bank and that he would not have signed the contract if he did not so believe. In cross-examination Mr. Fox openly admitted that he was not able to complete the contract and that that was not as a result of anything to do with the head contract.

15. Mr. Corbett was the solicitor acting for both the plaintiffs and the defendant. He drew up the sub-contract the subject matter of the proceedings herein which was ultimately dated the 25th September, 2006. In that contract it was expressly identified that the vendors therein were selling on foot of a contract for sale dated the 9th May, 2006 and made between Margaret Fitzpatrick, of the one part, and the vendors, of the other part, that is the plaintiffs herein. It was also expressly provided in special condition No. 7 that the sale shall be closed by way of a sub-sale. Mr. Corbett sent out the contract to the defendant. The defendant returned it through the post having signed the contract. Mr. Corbett indicated that the defendant knew that he was signing an unconditional contract. Mr. Corbett did not expect to receive the signed contract returned through the post. Mr. Corbett's evidence was that Mr. Fox at all times knew that for the sale under the head contract to proceed that it was necessary that he as the sub-purchaser sign an unconditional contract. When the signed sub-contract came back through the post, Mr. Corbett contacted the plaintiffs, who came in and signed the contract which was dated the 25th September, 2006. Mr. Corbett indicated that he had expected Mr. Fox to call in and go through the contract before signing it but that Mr. Fox did not do so. When he received the signed contract from Mr. Fox he acknowledged the contract, had it signed by the plaintiffs and then sent a copy of the signed contract to the Allied Irish Bank who were providing finance to the plaintiffs. That resulted in the bank providing the funds and the first named plaintiff was able to pay the agreed €450,000 additional deposit.

16. A dispute which arose in the evidence between the defendant and Mr. Corbett was whether or not Mr. Fox was aware of the increased non-refundable deposit of €450,000 to be paid to Mrs. Margaret Fitzpatrick. Mr. Corbett gave evidence that he fully informed Mr. Fox of that fact and that Mr. Fox was well aware of the terms of the re-negotiation between Mrs. Fitzpatrick and Mr. Moloney and Mr. Meade. It was that re-negotiation which allowed the matter to proceed and Mr. Corbett gave evidence that Mr. Fox was fully informed of such re-negotiation. He also gave evidence that Mr. Fox had been informed that Allied Irish Bank would only fund the additional deposit if there was an unconditional contract in place and that that was made clear to Mr. Fox. This position was described by Mr. Corbett in evidence as being "a chicken and egg" situation, that is to say that without the unconditional contract signed by Mr. Fox that the bridging necessary to fund the additional deposit would not have been available. Mr. Fox gave evidence that Mr. Corbett did not tell him about the additional €450,000 deposit and contended that even though the reason why he had not proceeded was due to the lack of finance from his bank, that he had been subsequently led to believe that he had no obligation to proceed as the head contract had been rescinded. On cross-examination he was uncertain in relation to that matter even though he acknowledged that he knew that he was buying by way of sub-sale. Mr. Fox disputed that he had knowledge of the increased €450,000 deposit in the head contract. The Court is satisfied that in relation to this conflict of evidence that the evidence of Mr. Corbett is to be preferred. Whilst Mr. Corbett was in many ways an unsatisfactory witness who demonstrated a disregard for the standard procedures and professional good practice required in dealing with the sale of lands, that in relation to this matter Mr. Corbett's evidence is to be preferred. There was no doubt that Mr. Fox knew that he was purchasing by way of sub-contract and the Court is satisfied that the circumstances which prevailed in this case were such that in all probability Mr. Fox was made aware and knew of the fact that for his purchase to proceed that the head contract must be in place and that additional funds were required to ensure that that could occur and that those funds would only be available if Mr. Fox signed an unconditional contract. There is no doubt but that that was the position of the bank and the willingness and alacrity with which Mr. Fox signed the contract is indicative of the fact that he knew that an unconditional contract was required to be signed by him to enable the head contract to proceed. The Court accepts the evidence from Mr. Corbett that he fully informed Mr. Fox of the altered terms of the head contract and of the willingness of the vendor under that contract to permit the head contract to proceed notwithstanding the terms of special condition No. 5 therein. If the vendor under the head contract had not been prepared to waive special condition No. 5, then the plaintiffs could not have proceeded to identify a future date for the closing of the sub-contract between them and the defendant. The Court is satisfied and accepts the evidence from Mr. Corbett that Mr. Fox was made aware of the amendments to the head contract and agreed to same and that Mr. Corbett's evidence is to be believed when he stated that he told Mr. Fox that the plaintiffs in this action could not sell to him without the amendments to the head contract. The Court accepts the evidence of Mr. Corbett and is satisfied that it is supported by the surrounding circumstances and facts. When Mr. Corbett gave evidence that he informed Mr. Fox of the terms of the re-negotiations between the plaintiffs and Mrs. Fitzpatrick, he was doing no more than indicating the basis upon which the plaintiffs could proceed with the proposed sub-sale to Mr. Fox and given the position of Allied Irish Bank, it was clearly a necessity that an unconditional contract be in place. The Court is satisfied that Mr. Corbett's evidence is to be believed when he stated that he showed the defendant the head contract and went through it with him. This is supported by Mr. Corbett's evidence that he tipped out the purchase price in the head contract prior to showing it to Mr. Fox so that he would be unaware of the actual purchase price in the head contract which would be kept confidential as between the parties to that contract. Even though Mr. Corbett did not have any attendances, there was available to the Court on Mr. Corbett's file the head contract with the details tipped out which was supportive of his recollection of what occurred. The evidence to the Court establishes that the amendments to the head contract were required in order to allow the sub-sale to proceed. The Court is satisfied that on the balance of probabilities Mr. Corbett's evidence that the defendant was fully informed of the amendments including the additional €450,000 non-refundable deposit is to be preferred over Mr. Fox's evidence in relation to this matter. Circumstances required that the defendant execute an unconditional contract and the Court is satisfied that those circumstances were explained to the defendant. 17. The Court does not accept the defendant's denial that he knew nothing of the amendments to the head contract. However, even if the Court had been so satisfied the position is that the defendant signed an unconditional contract knowing that it was a sale by sub-contract for the agreed purchase price of €2.9m. The amendments to the head contract enabled that unconditional contract to be completed and ensured that the defendant's purchase would not be undermined by a rescission of the head contract. The agreed amendments to the head contract also enabled a three way closing to take place and identified a closing date and these amendments were for the benefit of the defendant. The amendments which were agreed to the head contract ensured that the defendant was put in the position where the parties could complete the purchase of the lands on 1st February, 2007.

18. An issue which arose in legal argument related to the fact that Mr. Corbett acted for both the plaintiffs and the defendant in the sub-contract. Irrespective of the desirability of such conduct and of the slipshod and casual manner in which Mr. Corbett proceeded, the Court cannot identify a basis based on Mr. Corbett's conduct which alters the defendant's liability to the plaintiffs. Mr. Corbett's

conduct in how he dealt with the defendant is not a manner which is the responsibility of the plaintiffs. The facts are that Mr. Corbett was acting under a dual mandate to the plaintiffs and the defendant. The defendant was well aware of that dual mandate and proceeded to instruct Mr. Corbett to act on his behalf notwithstanding that he knew that he was acting for the plaintiffs. Mr. Fox was free to proceed with the proposed contract with or without legal assistance. If he chose to receive legal assistance it was open to him to choose whether or not to instruct an entirely independent solicitor or to instruct Mr. Corbett to act under a dual retainer. Mr. Fox was an experienced property developer and on the facts of this case chose to instruct Mr. Corbett under a dual retainer. How Mr. Corbett carried out that retainer in representing Mr. Fox is not the responsibility of the plaintiffs or something for which the plaintiffs can be held responsible. Further, on the facts of this case, Mr. Fox has failed to identify any acts or neglect on the part of Mr. Corbett that has caused the defendant any damage. The facts of this case establish that the defendant desired an unconditional contract for the purchase of the lands the subject matter of these proceedings and that that is what he received. Insofar as the amendments to the head contract are relevant, the amendments which were agreed were such as to enable that contract to be completed and not to be undermined by its rescission. Such amendments as were agreed were for the potential benefit of the defendant and the defendant has failed to identify any prejudice which arises from any alleged default of Mr. Corbett even if such default was to be deemed relevant. Central to the factual background of this case is the fact that the defendant desired to purchase the lands in question for a stated price on foot of an unconditional contract and that the reason why the contract did not proceed was that the defendant was unable to raise the finance when it was required.

19. A number of legal defences were raised by the defendant which are hereinafter dealt with. The factual position which was established before the Court is that there was no issue between the parties to the head contract in relation to the presence or absence of an express completion date in the head contract. The evidence available to the Court provided no support for any contention that the vendor under the head contract, Mrs. Fitzpatrick, was unwilling to complete that contract. The evidence from Mrs. Fitzpatrick established that she was able and willing to complete the sale under the head contract and would have done so if the money was forthcoming. It follows that the issue which was raised by the defendant in relation to the ambiguity of a closing date under the head contract is not relevant on the facts of this case as the clear evidence was that the vendor under the head contract was willing and able to complete as of the 1st February, 2007. Any argument in relation to a suggested ambiguity in relation to a completion date under the head contract is therefore a theoretical argument as the evidence establishes that such ambiguity as there was would not have prevented the completion of the head contract.

20. The evidence establishes that the defendant entered into an unconditional contract with the plaintiffs with a specified closing date of the 1st February, 2007 and that the defendant failed to close on that date. Thereafter, Mr. Corbett acting as solicitor for the plaintiffs served a completion notice on the defendant on the 26th February, 2007. The defendant failed to respond to that completion notice and failed to complete the sale within the time specified therein. It follows that the defendant is in fundamental breach of contract. After the service of the completion notice attempts were made to complete the sale and to raise the finance required by the defendant to permit a completion. Those attempts failed and the sale did not proceed. This resulted in the vendor under the head contract, Mrs. Fitzpatrick, rescinding the head contract.

21. The contract between the plaintiffs and the defendant was a sub-contract in that the sale was to be closed by way of sub-sale. The consequence of that was that the legal estate was vested in the vendor under the head contract, Mrs. Margaret Fitzpatrick. The legal requirement on the plaintiffs under the sub-contract of the 25th September, 2006 was to procure Mrs. Fitzpatrick's participation in the completion of the transaction so as to cause the legal estate to pass to the defendant. The evidence before the Court was that the plaintiffs were in a position to secure Mrs. Fitzpatrick's participation in the transaction causing the legal estate to pass to the defendant. It was contended on behalf of the defendant that the plaintiffs could not discharge that obligation but there is no reality in that claim. The Court heard the evidence of Mrs. Fitzpatrick which was clear and to the point in confirming that she was willing to complete provided she was paid. The Court must look to see what the position was as of the closing date identified in the sub-contract, the 1st February, 2007. By that date an agreement had been reached between the plaintiffs and Mrs. Fitzpatrick to amend the original head contract of the 9th May, 2006. That contract had been amended by the deletion of special condition No. 5 and an effective closing date with a proposed three way closing of 1st February, 2007 had been identified. That closing date was consistent with the closing date in the sub-contract of the 25th September, 2006. It was also the position as of the 1st February, 2007 that the time period provided for in special condition No. 4 in the head contract which would have enabled Mrs. Fitzpatrick to rescind that contract had not run as the period of nine months from the 9th May, 2006 had not yet elapsed. It is also the case that after that date Mrs. Fitzpatrick did not seek to rescind and remained able and willing to complete the head contract.

22. The position therefore is that as of the 1st February, 2007, Mrs. Fitzpatrick had contracted to sell the lands in issue to the plaintiffs, that the plaintiffs had an entitlement under the head contract to complete that sale at any time whether or not planning had issued, as provided for in special condition No. 8, and could therefore enforce the head contract against Mrs. Fitzpatrick as of the 1st February, 2007. The plaintiffs were therefore in the position that by the proposed closing date of the 1st February, 2007 they had obtained a sufficient interest in the lands the subject matter of the proceedings and could compel the owner of those lands to concur in the proposed sale. The fact that the plaintiffs' capacity to so compel was dependent upon an amendment agreed to the head contract entered into after the date of the agreement of the 26th September, 2006 was of no relevance as it is not the interest which the plaintiffs had as of the date of the contract of the 26th September, 2006 which is relevant but rather whether by the date of the closing on the 1st February, 2007, the plaintiffs had sufficient interest or were in a position to compel Mrs. Fitzpatrick to concur in the sale. By that date they were in that position and therefore were in a position to complete the sub-contract as of the 1st February, 2007 and were in a position to fulfil their bargain with the defendant. The requirement that a Court focus on the position as of the date that the vendor under a contract is obliged to perform that contract is illustrated in the judgment of Harmon J. in *Harold Elliott and H. Elliott (Builders) Ltd. v. Pierson* [1948] 1 Ch 452 at p. 455 in the following words:

"At law A may contract to sell to B any defined subject matter and can enforce the contract if by the time when he is obliged to do so he has obtained a sufficient interest or can compel other interested parties to concur in the sale. It matters not at all that at the date of the contract A had no interest if he obtain it in time to fulfil the bargain."

The judgment of Harmon J. went on to deal with a qualification to that statement but the qualification related to a set of circumstances which do not apply to this case as there was no attempt by the defendant in this action to repudiate at any time prior to the closing date of the 1st February, 2007. It is also the case that after the 7th February, 2007 the plaintiffs had a sufficient interest to fulfil the bargain with the defendant as Mrs. Fitzpatrick had not and did not seek to repudiate the head contract under special condition No. 4.

23. The defendant raises a number of points in relation to the provisions contained in the head contract. Whilst the Court will deal with those points, the legal obligations between the plaintiffs and the defendant arise out of the sub-contract of the 26th September, 2006. The defendant entered into an unconditional contract where the sale was to be closed by way of sub-sale. In the documents set out in the schedule on the second page of the sub-contract at para. 4, one of the documents of title identified was the contract for sale dated the 9th May, 2006, Margaret Fitzpatrick to vendors. The defendant was thereby fixed with notice of the contents of

the document schedule including the head contract of the 9th May, 2006. He was so fixed whether or not he read the documents or whether or not he received advice from his solicitor in respect of the contents of those documents. The position as provided for in the general conditions of sale contained in the contract of the 25th September, 2006 and in particular, condition No. 6 identified that the documents specified in the document schedule have been available for inspection by the purchaser or his solicitor prior to the date of sale. The factual position was that the head contract, in its amended form, was unconditional in that it enabled the plaintiffs to complete that contract with or without planning permission, as such entitlement was expressly provided for in special condition No. 8. The plaintiffs could override special condition No. 4 and make it effectively inoperable as of the date of the 1st February, 2007.

24. The defendant made a number of points in relation to the terms of the head contract and, in particular, to the special conditions therein and it is therefore appropriate to set out special conditions No. 4, 5 and 8:

(4) The sale is conditional upon the purchaser obtaining full Planning Permission for the erection on the property in sale of a minimum of 96 houses in accordance with Plans and Specifications whereof details will be submitted to the local Planning Authority for the purpose of obtaining such permission and if, at the expiration of 9 months from the date hereof Planning Permission as aforesaid shall not have been granted and that fact shall have been notified to the vendor within seven days after the expiration of the said period then either party may by notice in writing in that behalf served upon the other rescind this agreement whereupon the vendor shall return the deposit to the purchaser but without interest costs or compensation and the purchaser shall return the copy title deeds and any other papers furnished to him and neither party shall be entitled to any sum in respect of costs, compensation or otherwise.

(5) The purchasers hereby undertake and it is a condition of this contract that their application for Planning Permission as described in the preceding special conditions shall be lodged by them with the Planning Authority within three months of the date of this Contract. In the event that the purchasers do not lodge their Planning Application within the said period of three months then the vendor may, at her option, rescind this agreement whereupon the vendor shall return the deposit to the purchaser but without interest costs or compensation thereon.

(8) The purchasers shall have the right to complete this sale at any time whether or not planning has issued in accordance with condition No. 4 herein.

25. The defendant contended that the head contract did not specify a closing date for completion in that the contract indicated that the closing date should be ascertained by "see special conditions" and the special conditions did not in fact identify a specific closing date. The position of the plaintiffs in relation to a closing date was articulated by Mr. Corbett in his evidence when he stated that the provisions contained in special condition No. 4 meant that the closing date for that contract was the 9th February, 2007. That special condition provided that if full planning permission was not obtained by the 9th February, 2007 that either party to the head contract could serve a notice in writing and rescind the contract. In effect, the head contract was voidable at the instance of Mrs. Fitzpatrick if full planning permission had not been obtained by the 9th February, 2007. Mr. Corbett stated in evidence that it was therefore his view that the closing date could be ascertained as being the 9th February, 2007. Special condition No. 5 had been deleted by agreement between the parties and any entitlement to rescind thereunder no longer existed. The defendant's argument in relation to there being uncertainty in relation to the closing date for the head contract is effectively dealt with by special condition No. 8 which was inserted by Mr. Corbett acting as solicitor for the plaintiffs to enable the sub-sale to the defendant to take place. That special condition allowed and permitted the plaintiffs as the purchasers under the head contract to have the right to complete that sale at any time whether or not planning had issued in accordance with special condition No. 4. The Court is satisfied that, even though the special conditions in the head contract are not drafted in the most lucid form, they are sufficiently apparent and comprehensible to enable the Court to be satisfied that the head contract in its amended form was unconditional in that it enabled the plaintiffs to complete without full planning permission prior to the 9th February, 2007. That is the clear effect of special condition No. 8 and therefore any contention raised by the defendant reliant upon there being no closing date in the head contract or relying upon any uncertainty within that contract is without foundation. In any event, as the Court has already indicated, even if there is any basis to the defendant's argument in relation to the uncertainty as to the closing date within the head contract, it is clear that following the deletion of special condition No. 5 and given the terms of special condition No. 8 that as of the 1st February, 2007, the plaintiffs had a sufficient interest and were in a position to compel Mrs. Fitzpatrick to concur in the proposed sale to the defendant. Mrs. Fitzpatrick was also ready, willing and able to close the sale under the head contract. The relevant date for this Court in considering the contractual obligations of the parties to these proceedings is the 1st February, 2007 and it is irrelevant that at the time that the plaintiffs entered into the sub-contract of the 25th September, 2006 with the defendant that they were in breach of special condition No. 5 of the head contract given that by the date of the proposed closing, the vendor under the head contract had agreed to the deletion of special condition No. 5 and had agreed that the plaintiffs should have the right to complete the sale under the head contract at any time whether or not planning had issued thereby ensuring that as of the 1st February, 2007 the provisions of special condition No. 4 had no effect. Thereafter special condition No. 4 had no effect until Mrs. Fitzpatrick sought to rescind the head contract and the position was that as of the date of the expiration of the 28 day period provided for in the completion notice, Mrs. Fitzpatrick was ready and willing and able to close the head contract and the plaintiffs were thereby able to fulfil their bargain with the defendant as of that date.

26. The defendant raises various arguments in relation to the contention that the plaintiffs were in breach of the provisions of the head contract and, in particular, special condition No. 5 as of the date of the sub-contract of the 25th September, 2006. Those arguments are theoretical given the facts of this case. Firstly, both the plaintiffs and the defendant entered into their contract well knowing that an unconditional contract was required to enable funding to be obtained by the plaintiffs. The Court has already given its conclusion in relation to this matter. As of the closing date provided for in the sub-contract, the plaintiffs were in a position to compel Mrs. Fitzpatrick to complete the contract and in those circumstances there is no basis for the argument raised on behalf of the defendant that there was a failure of consideration based upon the contention that Mrs. Fitzpatrick could not have been so compelled as of the 25th September, 2006. The relevant date for considering such matter is the specified closing date of the 1st February, 2007 and by that date the plaintiffs had obtained sufficient interest to enable them to fulfil the bargain. The legal obligation on the plaintiffs was to be in a position to fulfil their bargain with the defendant as of the closing. As this Court is satisfied that they were in such a position both on the 1st February, 2007 and on the expiration of the 28 day notice period provided in the completion notice, it cannot be said that the consideration for the payment of the deposit by the defendant under the sub-contract was illusory.

27. The defendant raised a further defence based upon a claim that no action can be brought against the defendant on foot of the amended sub-contract unless the amended sub-contract or some note or memorandum thereof is in writing and signed by the party to be charged therewith or some other person lawfully authorised to sign on his behalf. It was accepted that for such a plea to be considered by the Court and for the defendant to succeed on this point that it would be necessary to amend the defence as the Statute of Frauds had not been pleaded. An application for such amendment was considered by the Court and the Court refused the application. In those circumstances this matter does not require to be further considered in this judgment.

28. In paragraph 24 certain special conditions in the head contract are set out. The defendant contends that there was no completion date in the head contract. The Court is satisfied that as a matter of construction of the head contract a closing date can be identified. Special Condition No. 8 does not contain any closing date but the Court is satisfied that consideration of the conditions, read together, result in a situation where the sale was to be completed on or before the period specified in condition No. 4 and having regard to the amendment to the head contract and the deletion of special condition No. 5, the relevant date for completion is the 1st February, 2007. In any event, the evidence established that none of the parties to the head contract and, in particular, the vendor made any point or took any issue in relation to the alleged lack of a closing date. The omission in special condition No. 4 in failing to provide a closing date in the event that planning was achieved, and any argument arising therefrom, is of no relevance given the evidence of what actually occurred. The plaintiffs entered into a contract for the sub-sale of the property and in those circumstances the relevant special condition became condition No. 8 and as the Court has already indicated as a matter of construction the sale was to be completed on or before the period specified in special condition No. 4 and therefore the relevant closing date identifiable from the contract is the 1st February, 2007.

29. A further matter relied upon by the defendant in his defence is a claim based upon the validity of the completion notice dated the 26th February, 2007. The defendant contends that that notice was invalid. The defendant submitted to the Court that whilst the plaintiffs may have been ready, willing and able to complete on the 1st February, 2007, they were not able to complete as of the 26th February, 2007. They based this contention on the argument that the plaintiffs were in breach of their obligation to obtain planning permission from the 8th February, 2007 and so they could not compel Mrs. Fitzpatrick to complete the head contract thereafter. The evidence available to the Court establishes that there is no basis for such argument. The facts establish that as of the date of the completion notice and the expiration of the 28 day period identified therein neither of the parties to the head contract had sought to rely on special condition No. 4 and neither had sought to rescind the contract. The evidence also established that the plaintiffs were ready, willing and able to complete the purchase under the head contract and the oral evidence of Mrs. Fitzpatrick established that she was ready, willing and able to complete the purchase and was not seeking rescission under the terms of special condition No. 4 at such time. There was, therefore, no evidence to support the contention that the plaintiffs were not ready, willing and able to complete the sale. They had sufficient interest both as of the date of the completion notice and at the end of the 28 day period provided therein to fulfil the bargain and complete the sale to the defendant. General condition No. 40 of the sub-contract deals with the issue of completion notices. Under that condition the completion notice is effective if the party giving it shall at the date of the notice be able, ready and willing to complete the sale or if not so able, ready or willing be in that position by reason of the default or misconduct of the other party. The evidence in this case establishes that the plaintiffs were ready, willing and able to complete and insofar as the completion could not take place, the same was as a result of the default of the defendant. What was envisaged was a three way closing and that closing did not take place as a result of the default of the defendant.

30. A further argument raised by the defendant in his defence relates to the basis upon which the plaintiffs' claim damages. The defendant contends that the head contract was rescinded on a particular basis. The head contract was rescinded by letter from Mrs. Fitzpatrick's solicitors, Butler Cunningham & Molony, dated the 11th October, 2007. That letter stated:

"As your clients have not received planning permission in accordance with special condition No. 4 and, indeed, we understand have not even lodged an application for planning permission, we have been instructed by our client to notify you that she is rescinding the contract dated the 9th May, 2006 in accordance with special condition No. 4 therein."

The defendant argues that he cannot be held liable for the plaintiffs' failure to obtain planning permission within the time identified in the head contract or thereafter and accordingly that the defendant cannot be held liable for any loss suffered by the plaintiffs by reason of Mrs. Fitzpatrick's rescission of the head contract based on such failure. The defendant further contends that Mrs. Fitzpatrick was legally entitled to rescind the head contract pursuant to special condition No. 4 and that the letter of rescission, from Mrs. Fitzpatrick's solicitors, must be taken as an accurate record of the exact reason why the head contract was terminated. It is on that basis that the defendant contends that he cannot be responsible for any loss suffered by the plaintiffs. The defendant has failed to identify any grounds upon which the rescission could have been challenged. The argument that the defendant cannot be liable for the plaintiffs' failure to obtain planning permission and therefore is not responsible for the rescission and is not liable for any loss suffered by the plaintiffs arising from such rescission, fails to have regard to the fact that such rescission arose as a result of the defendant's failure to complete the sub-contract when called upon to do so by the completion notice of the 26th February, 2007. When Mrs. Fitzpatrick rescinded the head contract she did so at a time when she was entitled to do so and the reason upon which she relied is irrelevant. For rescission to be valid the right to rescind must have arisen and such right must have been exercised. On the facts of this case Mrs. Fitzpatrick had a right to rescind and exercised such right. It was contended on behalf of the defendant that as time was not of the essence under special condition No. 4 and since Mrs. Fitzpatrick, the vendor under the head contract, had not served a completion notice, that the plaintiffs herein should have queried the entitlement of Mrs. Fitzpatrick to rescind the head contract. That argument fails to have regard to the fact that by the date of that letter the right to rescind had arisen and Mrs. Fitzpatrick was entitled to exercise such right. Even if it was accepted that the reason stated in the letter rescinding the head contract was incorrect, it is of no significance given that by the date of that letter the right to rescind had arisen and therefore such right could be exercised with or without a stated ground and even in such circumstances where the stated ground was incorrect. It was the entitlement to rescind as of the date of that letter which was crucial to the effectiveness of such rescission and as of the date of the letter Mrs. Fitzpatrick had such entitlement.

31. The final matter required to be considered by the Court is the issue of damages. This issue arises in circumstances where the Court is satisfied, for the reasons herein before set out, that the plaintiffs have established that the defendant was in breach of contract in failing to close the sub-contract of the 25th September, 2006 and comply with the completion notice which was served on him on the 26th February, 2007. It also follows that the defendant's counterclaim must fail. Arising out of such breach the plaintiffs have rescinded the contract and have sued for damages. In the completion notice for the 26th February, 2007, the plaintiffs had stated that if the purchaser should fail to complete the sale within the period therein identified, that the plaintiffs would enforce against the defendant such rights and remedies as may be available to the plaintiffs at law or in equity. In paragraph 9 of the replies to particulars of the 10th March, 2009, the plaintiffs indicated that they accepted that their contract with Margaret Fitzpatrick had been rescinded and that they therefore had elected to pursue a remedy in damages. The plaintiffs thereby exercised their option in relation to the nature of the remedy which they were seeking against the defendant.

32. As a result of the defendant's breach of contract, the plaintiffs have suffered loss and damage. That loss and damage can be quantified. Firstly, the plaintiffs have lost the total sum paid as a deposit to Mrs. Fitzpatrick under the head contract, that contract having been rescinded. The total sum of €500,000 was forfeited by Mrs. Fitzpatrick as that sum was a non-refundable deposit. The defendant raised an argument at the hearing that he should not be compelled to indemnify the plaintiffs for the loss of the additional €450,000 deposit for a number of reasons. It was first contended that as he was unaware of the additional €450,000 deposit that he should not be liable in damages for such sum. The Court is satisfied that on the evidence before it, the defendant was aware of such additional deposit and that therefore there is no factual basis for this claim. Secondly, it was contended on behalf of the defendant that the payment of the additional sum of €450,000 arose solely from the plaintiffs' failure to comply with their contractual obligations

to apply for planning permission before the 9th August, 2007 and that the defendant should not be responsible for such sum. It is correct that the payment of the additional deposit of €450,000 arose in circumstances where the plaintiffs had failed to apply for planning permission before the 9th August, 2007. However, the facts of this case establish that that payment was made to the knowledge of the defendant and was made in circumstances whereby it ensured that the plaintiffs would be in a position to fulfil their bargain with the defendant. Further, when the defendant failed to comply with the completion notice of the 26th February, 2007 and was in breach of contract, the defendant knew of the increased deposit and was well aware that a breach of contract on his part would have the potential consequences of causing Mrs. Fitzpatrick to rescind the head contract and to forfeit the non-refundable deposit. In those circumstances the loss of the entire deposit was a loss and damage which could be fairly and reasonably considered to arise naturally from the defendant's breach of contract and to be a loss and damage that would have been in the contemplation of both the plaintiffs and the defendant. It was also the defendant's breach of contract that caused the rescission as no rescission would have occurred but for the failure of the defendant to complete. The third ground relied upon by the defendant in an attempt to avoid liability for the additional €450,000 deposit is a claim that the defendant entered into the sub-contract of the 25th September, 2006 without the benefit of proper or independent legal advice. The facts of this case establish that the defendant was an experienced developer who chose a particular solicitor knowing that that solicitor would be a joint solicitor. Irrespective of whether or not that solicitor provided the defendant with proper or adequate legal advice, and that is a matter which this Court does not have to consider, there is no basis upon which the plaintiffs can be held responsible for any defect in the legal advice and assistance received by the defendant. Nor can any issue arise in relation to the fact that there was a common solicitor acting for the plaintiffs and the defendant given that such situation arose from the actions of the defendant when he instructed Mr. Corbett knowing he was already acting for the plaintiffs.

33. The Court is satisfied that applying the principles identified in *Hadley v. Baxendale & Ors.* [1854] 9 Exch 341 and [1843 – 60] All E.R. 461, that the loss of the entire deposit of €500,000 was a loss which can be identified as being; in essence, a loss actually resulting which was at the time of the contract reasonable foreseeable as likely to result from the breach. When the defendant signed the contract of the 25th September, 2006, he was aware of the requirement for an unconditional contract to facilitate the plaintiffs obtaining a loan to finance the increased deposit to Mrs. Fitzpatrick and therefore the Court is satisfied that the loss of the entire non-refundable deposit is a loss which was reasonably foreseeable to Mr. Fox at the time that he entered into the sub-contract of the 25th September, 2006 and therefore is a loss which the plaintiffs can recover arising out of Mr. Fox's breach of contract.

34. The second loss which was foreseeable to both the plaintiffs and the defendant and must have been within their contemplation at the time that the contract was made, was that any profit that the plaintiffs would make arising out the difference in the purchase price in the head contract and in the sub-contract would be lost by the plaintiffs if the defendant failed to complete the sub-contract. The defendant did not know the amount of that profit as the purchase price in the head contract had been tippexed out when he was shown that contract. However, the defendant was well aware that any profit which the plaintiffs would generate from the difference between the two purchase prices would be lost if he failed to complete. It follows that when the defendant was in breach of contract in failing to complete, that one of the losses which would naturally arise from such breach would be the loss of that profit. The defendant is liable to the plaintiffs for the difference between the two contract prices, namely, €900,000. The defendant is liable to pay the plaintiffs as damages the two sums of €500,000 and €900,000 totalling €1,400,000. As regards the claim for interest the Court is satisfied that since the plaintiffs did not exercise their option to sue for damages as opposed to pursue a claim for specific performance until the notice of particulars of the 10th March, 2009, that any interest should only run from that date and the Court will hear the parties in relation to the issue of the amount of interest and/or its calculation. The plaintiffs are entitled to an order for the rescission of the sub-contract. As no deposit was actually paid, no order is required for forfeiture of a deposit. The plaintiffs are also entitled to damages for breach of contract in the sums identified above. The defendant's counterclaim will be dismissed.