

CONDITIONAL CONTRACTS FOR THE SALE OF LAND

It is not uncommon for parties to enter into agreements for the sale and purchase of land subject to certain conditions being fulfilled. Parties may agree that the contract is made 'subject to contract'; 'subject to approval by some authority'; 'subject to the purchaser obtaining a loan' or such other similar terms.¹

Whatever formulae may be used by the parties, the important question for determination is whether the parties have entered into a legally binding contract. More often than not, this is not an easy question to answer. Though some of these formulae may have acquired a technical meaning, yet to answer the question, it is important to determine the intention of the parties by construing the agreement as a whole. A skilled draftsman will indicate the true intention of the parties with clarity. Usually, the intention of the parties is not clearly stated in the agreement. The Courts then have the difficult task of construing the agreement to determine the true intention of the parties. Generally, when such formulae are used, the intention of the parties may be any one of the following: (i) neither party is to be bound by the agreement until and unless the specified act or event has been fulfilled; (ii) the agreement is binding on both the parties until the specified act or event cannot be fulfilled; (iii) the agreement is immediately binding on both the parties and the act or event merely relates to an obligation to be fulfilled by one of the parties.

Further difficulties are sometimes caused when such formulae are used to describe a conditional offer or acceptance.² In such cases, no question of enforceability of the agreement arises as the parties are still considered to be in a state of negotiation, not having concluded a binding agreement.

It should perhaps be pointed out at this stage that much confusion is also caused when parties contend that an obligation which one of them has to fulfil under the contract of sale renders the contract conditional. In the strict sense of the word this is not the correct position. A conditional contract is one where the uncertain act or event affects the formation of a contract of sale which creates the relationship of vendor and purchaser and not one which affects the performance of one of the obligations or term of an already binding contract.³ In the latter case, the non-

¹See below for the common types of conditions.

²*Caney v Leith* [1937] 2 All ER 523, 533. See Farrand *Contract and Conveyance*, (3rd edn), at page 28.

³It is usually a condition of sale. See discussion below. See also, Goff J in *Eastham v Leigh London and Provincial Properties Ltd* [1970] 3 WLR 848 at 854.

fulfilment of the condition is a breach of a term of the agreement which entitles the other party to bring an action for damages.

It is important to determine whether a contract is conditional or not for a number of practical reasons:

- (i) whether either or both the parties may resile from the agreement whilst the said event or act remains unfulfilled;
- (ii) whether a party may recover the deposit paid in the event the condition is not fulfilled;
- (iii) whether prior to the fulfilment of the condition, the purchaser has acquired an interest in the property so as to entitle him to enter a caveat; and
- (iv) whether a decree of specific performance may be obtained even before the said act or event is fulfilled.

Though much has been written on the nature and effect of conditional contracts, problems continue to arise.⁴ An attempt will therefore be made in this Article to state the position relating to conditional contracts in Malaysia.

Promissory Conditions and Contingent Conditions

It is sometimes said that since the term 'condition' is capable of bearing a number of different meanings⁵ depending on the context in which it is used, it is important to draw a distinction between a condition which affects the formation of a contract of sale and a condition which merely relates to an obligation or term of an already binding contract. A condition which affects the formation of a contract of sale, as in a conditional contract is therefore referred to as a contingent condition whereas one which relates to the performance of a term of a contract is described as a promissory condition.⁶ The distinction between these two types of conditions was highlighted by Buckley LJ in *Eastham v Leigh London and Provincial Property Ltd*,⁷ where his Lordship observed,

That is not, in my judgment, a condition precedent to the contract at all, it is part of the terms of the contract. You may call it a condition if you please, but it does not make it a condition precedent to the existence of a contract, it

⁴See Farrand, *Contract and Conveyance*, (3rd edn) page 28; *Emmet on Title*, (17th edn) page 47. and see discussion below.

⁵Stoljar, 'The Contract Concept of Condition' (1953) LQR 485; Sachs LJ in *Property Bloodstock Ltd v Emerton* [1968] Ch 94, 120. *Perri v Coolangatta Investments Pty Ltd* (1982) 56 ALJR 445, 446. See also Lord Diplock in the Privy Council decision of *Australia and New Zealand Banking Group Ltd v Beneficial Finance Corp* (1983) 57 ALJR 352, 355.

⁶See *Anson's Law of Contract*, (25th edn) at pages 131-132 *Chitty on Contracts General Principles*, Vol. 1, (25th edn) London Sweet & Maxwell, para 752.

⁷[1971] 1 Ch 871.

merely indicates what is part of the terms of the bargain, just as in all contracts for sale the terms of the bargain are customarily described as conditions of sale.⁸

Again Denning LJ in *Trans Trust S.P.R.L. v Danubian Trading Co Ltd*,⁹ said:

Sometimes it is a condition precedent to the formation of a contract, that is, it is a condition which must be fulfilled before any contract is concluded at all. In those cases the stipulation 'subject to the opening of a credit' is rather like a stipulation 'subject to contract'. If no credit is provided, there is no contract between the parties. In other cases a contract is concluded and the stipulation for a credit is a condition which is an essential term of the contract. In those cases the provision of the credit is a condition precedent, not to the formation of a contract, but to the obligation of the seller to deliver the goods. If the buyer fails to provide the credit, the seller can treat himself as discharged from any further performance of the contract and can sue the buyer for damages for not providing the credit.¹⁰

In *Ho Kok Cheong Sdn Bhd & Anor v Lim Kay Tiong & Ors*,¹¹ the Federal Court held that the clause in a contract which provided that the defendants (purchasers) 'agree and undertake to ensure that by or before the completion of the purchase. . . the vendors are released as guarantors. . .' did not render it a conditional contract. The court rejected the argument of the defendants that release from the guarantees was a 'condition precedent' and, therefore specific performance was not granted. The defendants relied on the case of *Heron Garage Properties Ltd v Moss & Anor*¹² and the Privy Council decision in *Aberfoyle Plantations Ltd v Khaw Bian Cheng*¹³ Lee Hun Hoe CJ (Borneo), observed that,

In the present case any talk about conditions precedent or conditional contract is misleading. It is irrelevant and tends to cause confusion. The facts are clearly distinguishable from *Aberfoyle's* case. There the contract was conditional on the vendor obtaining a renewal of certain leases. As the condition precedent was not satisfied there was no contract of sale; the relationship of vendor and purchaser was not created.¹⁴

⁸At page 891.

⁹[1952] 2 QB 297; [1952] 1 All ER 970.

¹⁰*Ibid.*, 304, 976.

¹¹[1979] 2 MLJ 224.

¹²[1974] 1 WLR 148.

¹³[1960] MLJ 47; [1960] AC 115; [1959] 3 All ER 910.

¹⁴[1979] 2 MLJ 224, 229.

His Lordship then stated:

If appellants were right there would be no contract of sale as a condition precedent had not been fulfilled and they should be entitled to a refund of the deposit. The question whether the contract is conditional or not depends entirely on the interpretation of the sale agreement. The 'conditions' agreed by the parties were nothing more than the terms of the contract. The fact that a 'condition' is a term of a contract does not make it a conditional contract. There are no conditions precedent in the present case as understood in *Aberfoyle's case*.¹⁵

There is therefore sufficient authority to support the view that not every contract which is subject to a condition is a conditional contract. It is important to determine whether the condition affects the formation of a contract of sale so as to render the contract conditional or whether it is merely a term of the contract.¹⁶

Condition Precedent and Condition Subsequent

Conditional contracts are usually said to be subject to a condition precedent or a condition subsequent. In the former, the agreement is not binding on the parties until the specified event is fulfilled, whereas in the latter, the agreement is binding on both the parties until the specified event occurs.

It is sometimes said that one of the effects of a contract which is subject to a condition precedent is that no binding contract comes into existence until the condition precedent has been fulfilled.¹⁷ In such a case, the parties are at liberty to resile from the contract anytime before the fulfilment of the condition precedent.¹⁸ Where, however, there is a condition subsequent, as the contract is in existence until the said condition is not fulfilled, the parties are bound by the contract and cannot withdraw from the contract. In such a case too, it is said that a binding contract is created from the moment the contract was made.¹⁹

Sometimes, the terms 'condition precedent' and 'condition subsequent' are also used in case where it does not affect the formation of the entire contract but goes to the obligation of one of the parties under an already existing contract of sale.²⁰

¹⁵*Ibid.* See also *Lee Yew Hin v Kow Lup Piow* [1974] 1 MLJ 114.

¹⁶See Ungood-Thomas J in *Property and Bloodstock Ltd v Emerion* [1967] 2 All ER 839 at first instance and Danckwerts LJ in the Court of Appeal, [1968] Ch 94, at 112 and 118. See also Mason J in *Perri v Coolangatta Investments Pty Ltd* (1982) 56 ALJR 445, 450.

¹⁷See for example, Bransley's *Conveyancing Law and Practice*, (2nd edn) page 129.

¹⁸As to other effects see, *Chitty on Contracts*, Vol. I (25th edn) para 753.

¹⁹Treitel, *The Law of Contract*, (5th edn) pages 46-47; *Chitty on Contract*, Vol. I (25th edn) para 753.

²⁰See the dissenting judgment of Hardie Boys J in *Scott v Rania* [1966] NZLR 527, 537; *Chitty*, para 751, 1619; *Barnsley, supra*, at page 129 and *Farrand* at pages 29-30. But see the views of *Sal-*

It is submitted that the mere labelling of a condition as a condition precedent or a condition subsequent for purposes of determining whether a conditional contract is in existence is unsatisfactory. As it is the intention of the parties which is crucial for the determination of the existence of a conditional contract, little assistance may be obtained by referring to the condition as a condition precedent or subsequent.²¹ This is particularly so since the terms 'condition precedent' and 'condition subsequent' are not restricted to contingent conditions alone.²² Furthermore, the lack of unanimity as to the meaning and effect of the terms 'condition precedent' and 'condition subsequent' poses further problems and uncertainty.

Contracts Subject to Conditions

Generally it can be said that there are four main types of contracts which may be subject to a condition. These are (i) where the parties intend that unless the said condition is fulfilled no binding contract should come into existence; (ii) where the fulfilment of the condition is absolutely necessary to give effect to the contract; (iii) where a condition is stipulated for the benefit of one of the parties and (iv) where the condition relates to the performance of the obligation of either one or both of the parties. In the strict sense of the word, it is only contracts in the nature of situation (ii) above which can properly be referred to as conditional contracts. Each of these four situations will now be considered.

1. Condition which must be fulfilled before a binding contract comes into effect

Where parties enter into an agreement with a clear intention that no contract for the sale and purchase of land should be binding on them until a certain act is fulfilled, then until the said act is fulfilled no concluded agreement comes into existence. Such is the situation where parties agree that the agreement is not binding 'until a formal agreement had been signed' or that 'this agreement is subject to contract' or where the agreement is couched in such other similar phrases.²³ But it must be emphasised that there is no magic in these terms. As oral agreements for the sale and purchase are enforceable in Malaysia, such agreements may still be binding even though such terms have been employed. Therefore, if the parties have agreed on all the terms of the agreement and though it is said to be 'sub-

mond and Williams on Contract, where the learned authors state that it is usually immaterial to the parties' rights whether the condition is precedent or subsequent (2nd edn) at page 30; referred to in *Scott v. Rania*, *supra*, at page 538.

²¹See Danwerts LJ in *Property Bloodstock Ltd v Emerton* [1968] 1 Ch 94, 118.

²²See *Hardie Boys J* in *Scott v Rania* [1966] NZLR 527, 540, and *Hunt v Wilson* [1978] 2 NZLR 261, 267, 267. See generally the recent Australian cases of *Perri v Coolangatta Investments Pty Ltd* (1982) 56 ALJR 445, 446 and 453 and *Meehan v Jones* (1982) 56 ALJR 813, 817.

²³See Generally *Farrand Contract and Conveyancing* (3rd edn) pp. 16-31.

ject to contract', the Courts may hold such contracts to be binding on the ground that the execution of a formal contract is a mere formality.²⁴

2. Fulfilment of conditions which are essential for the creation of a vendor-purchaser relationship

Sometimes it may be necessary for the formation of a binding contract of sale that a certain condition must be fulfilled. The fulfilment of such conditions may be required by law or because of some restrictions imposed on the title.²⁵ Therefore, where the approval of the court is necessary for the sale, unless such approval is obtained, the relationship of vendor and purchaser cannot arise. Likewise, it may be necessary to obtain the consent of the Ruler-in-Council or the approval of the Foreign Investment Committee^{25a} or some other third party before such a relationship may arise. In these cases, such approval may be absolutely essential for the sale. Therefore, the parties may enter into an agreement with a clear intention to be bound by the agreement subject to the fulfilment of the condition.²⁶ An immediately binding agreement comes into effect but it is only when the condition is fulfilled that a contract of sale creating a relationship of vendor and purchaser comes into effect. This type of agreement is the only type of agreement which may strictly speaking be referred to as a conditional contract.²⁷ It is usually said that in such situations the fulfilment of the condition is a condition precedent to the formation of a contract of sale²⁸ or that the agreement is regarded as a binding agreement containing a condition precedent to the formation of the actual contract of sale and purchase.²⁹

Therefore in such cases the contract is said to be conditional since unless and until the condition is fulfilled the relationship of vendor and purchaser can never arise. That such a conditional contract is binding pending the fulfilment of the condition or its non-fulfilment was laid down by Lord Denning MR in *Smallman v Smallman*.³⁰ His Lordship observed:

²⁴See *Daiman Development Sdn Bhd v Mathew Lui Chin Teck* [1981] 1 MLJ 56 PC and *Diamond Peak Sdn Bhd v Tweedie* [1982] 1 MLJ 97.

²⁵It may also relate to the conditions of sale. See also *Property and Bloodstock Ltd v Emerton* [1967] 2 WLR 981.

^{25a}Since the writing of this Article, the Federal Court delivered the judgment in the case of *National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 CLJ 76 on the effect of a contract which was subject to FIC approval.

²⁶For example, see *Aberfoyle Plantations Ltd v Khaw Bian Cheng* [1960] MLJ 47 discussed below.

²⁷See Davis, "Condition Contracts for the Sale of Land in Canada", (1977) 60 Can. BR 289.

²⁸See generally Treitel, *The Law of Contract* (6th edn) page 47.

²⁹See Ungood-Thomas J in *Property and Bloodstock Ltd v Emerton* [1967] 2 All ER 839, 847-8. See views of Farrand, (3rd edn) at page 28 and *Emmel on Title* (17th edn) at page 47. See generally Mason J in *Perry v Coolangatta Investments Pty Ltd* (1982) 36 ALJR 445, 450-51.

³⁰[1871] 3 All ER 717; see generally Gibbs CJ in *Perry v Coolangatta Investments Pty Ltd*, *supra* at 446-448.

In my opinion, if the parties have reached an agreement on all essential matters, then the clause 'subject to the approval of the court' does not mean there is no agreement at all. There is an agreement, but the operation of it is suspended until the court approves it. It is the duty of one party or the other to bring the agreement before the court for approval. If the court approves, it is binding on the parties. If the court does not approve, it is not binding. But, pending the application to the court, it remains a binding agreement which neither party can disavow.³¹

Where, however the condition is not fulfilled a vendor-purchaser relationship does not arise as no contract of sale exists. But until then there is a binding contract between the parties.

It may, however be argued that this principle is contrary to the decision of the Privy Council in *Aberfoyle Plantations v Khaw Bian Cheng*.³²

In that case, by an agreement dated November 8, 1955, 'subject to the condition contained in clause 4 the vendor/the appellant will sell and the purchaser [respondent] will buy' the Harewood Estate consisting of rubber plantations (Clause 1); two deposits were to be paid, one on signing the agreement and the other on or before February 1, 1956 (Clause 2); the purchaser was to have possession on completion and there were provisions for taking over equipment and dividing tapped rubber on the day before completion. Clause 4, which is the most important provision for the present purpose, provided:

The purchase is conditional on the vendor obtaining at the vendor's expense a renewal of the seven (7) Leases described in the Schedule hereto so as to be in a position to transfer the same to the Purchaser and if for any cause whatsoever the Vendor is unable to fulfil this condition this agreement shall become null and void and the Vendor shall refund to the Purchaser the deposit or deposits already made under Clause 2 hereof notwithstanding anything contained in Clause 10 hereof.

By Clause 9, completion was to take place on April 30, 1956, and on the purchaser paying the balance of the purchase price 'the vendor shall as soon as possible thereafter execute a proper transfer of the property to the purchaser. . . .'

The leases mentioned which related to part of the property, 182 out of 1,336 acres, had expired in 1950 and their renewal had been the subject matter of negotiations with the State Government. There was, however delay in granting this renewal because of some uncertainty about Government policy with regard to the granting of State Leases.

³¹ *Ibid.* at page 720, referred to by Yusof Abdul Rashid J in the recent Malaysian case of *Silimuthu v Amalu & Anor* [1983] 1 MLJ 190.

³² [1960] MLJ 47.

On April 30, 1956, the vendor had obtained only a letter agreeing to renewal in principle but it was conceded that this was not in compliance with clause 2 of the Agreement. The purchaser through his solicitors extended the vendor's time to May 31, 1956, and on June 11, 1956 began proceedings for the return of his deposit.

The Ipoh High Court (Good J) dismissed the purchaser's claim with costs. On appeal by the purchaser to the then Court of Appeal³³ of the Federation of Malaya the Court by a majority³⁴ allowed the appeal. From that judgment, the vendor appealed to the Privy Council.³⁵ The Judicial Committee of the Privy Council³⁶ held that on the construction of the agreement, the vendor's obligation to sell and the purchaser's obligation to buy under Clause 1 were subject to Clause 4. Their Lordships³⁷ held that the agreement demanded the fulfilment of the condition before 30th April, 1956 (extended to 31st May, 1956).

Lord Jenkins, made the following observation on the said agreement,

It was thus made plain beyond argument that the condition was a condition precedent on the fulfilment of which the formation of a binding contract of sale between the parties was made to depend.³⁸

His Lordship had earlier pointed out that,

... unless by that date a binding contract had been brought into existence by fulfilment of the condition... there would... in truth be no contract for the purchaser to perform.³⁹

and again

... until the condition is fulfilled there is no contract of sale to be completed.⁴⁰

It is submitted that these observations of Lord Jenkins cannot be read in isolation to mean that agreements such as these are of no effect until the said condition is fulfilled. Lord Jenkin's observation must be restricted in its application to the interpretation of Clauses 1 and 4 of the said agreement. So far as they support the contention that unless the renewal of the seven leases had been approved by the Ruler of Perak, no binding contract exists between the two parties, these observations are a correct inter-

³³Thomson CJ, Sir John Whyatt CJ(Singapore) and Barakbah J.

³⁴Sir John Whyatt CJ dissenting.

³⁵Both the High Court and the Court of Appeal decisions are unreported.

³⁶The decision of the Privy Council is reported in [1960] AC 115; [1959] 3 All ER 910 and [1960] MLJ 47. In this article all references to the case are from the MLJ.

³⁷Lord Denning, Lord Jenkins and Mr L. M. D. de Silva.

³⁸[1960] MLJ 47, 50.

³⁹*Ibid.* at page 49.

⁴⁰*Ibid.*

pretation of the relevant clauses. They, however, do not support the view that before the condition is fulfilled either party may resile from the agreement.⁴¹ In fact, throughout the entire judgment, Lord Jenkins made no reference to such an eventuality. It would therefore be unwise to read too much into the observation of Lord Jenkins. In fact, the decision in *Aberfoyle's* case has been subjected to some criticisms. It has been argued in a number of cases that whenever a condition is stipulated in a contract for sale and purchase of land, such a condition renders the contract a conditional contract. This misunderstanding was highlighted in the English case of *Property and Bloodstock Ltd v Emerton*⁴² The issue in this case was whether it was open to a mortgagor (or borrower) to redeem when the mortgagee had entered into a contract for the sale of the mortgaged property which contained a provision (the property being leasehold) requiring the mortgagee-vendor to obtain the landlord's consent to assign.

It was argued by the mortgagor relying on *Aberfoyle's* case that such a contract was a conditional contract as the assignment was conditional upon the landlord's consent being granted. The Court of Appeal held that this was not a conditional contract in the *Aberfoyle's* sense, and the *Aberfoyle's* case was distinguished. Of the Privy Council decision, Danckwerts LJ observed that —

Lord Jenkins was dealing with a very unusual and special case, and although the principles which he states may have the greatest importance in case where it is necessary to settle the duties of recalcitrant vendor or purchasers, they can have no relevance to a case where vendor and purchaser are equally proceeding to and looking forward to the completion of the contract, without regard to strict performance in regard to time which is the situation in the present case.⁴³

His Lordship even expressed some doubts as to the validity of the observations of Lord Jenkins. He said:

Lord Jenkins thought that the contract was so conditional that even the relationship of vendor and purchaser was never created by it. This is a proposition which, with all respect, I find it very difficult to accept.⁴⁴

⁴¹ See *Ungoed-Thomas J in Property and Bloodstock Ltd v Emerton* [1967] 2 All ER 839, 845 (at first instance).

⁴² [1968] Ch 94. See also *Ho Kok Cheong Sdn Bhd v Lim Kay Thiong*: [1979] 2 MLJ 224. But see the recent Federal Court decision of *National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 CLJ 76.

⁴³ [1968] Ch, 94, 115-6.

⁴⁴ At page 116. The views of Danckwerts LJ were shared by Gibbs CJ and Mason J in the Australian High Court decision of *Perri v Coolangatta Investments Pty Ltd* (1982) 56 ALJR 445, 446 and 450.

His Lordship, however said that it was not necessary for him to differ from any of the principles enunciated by Lord Jenkins with regard to the time within which the condition in a conditional contract has to be fulfilled.

Sachs LJ dealt with the requirement of the vendor to obtain the landlord's consent to assign as follows:

[wheter it was] in law really a condition in the *Aberfoyle* sense of that word or whether it merely relates (as held by Ungood-Thomas J) to a matter of title — in other words, the machinery for carrying out the contract.⁴⁵

His Lordship pointed out that much confusion has been brought into the law of contract by the use, and misuse, of the word 'condition'. He said:

In one category of conditions fall those which in the present case it is convenient to call the *Aberfoyle* type. In another fall the bulk of what are styled 'conditions' in the National Conditions of Sale. The two categories can be poles apart in legal effect. The former are conditions precedent. Unless and until they are fulfilled, or waived by a party entitled to waive them, the contract in which they are embodied does not normally take effect as a contract of sale in the sense of establishing the relationship of vendor and purchaser. . .

. . . on the other hand, the bulk of the so-called 'conditions' in the National conditions of Sale are simply the terms of a contract of sale, in the main dealing with matters of title. These fall into quite a different category of 'conditions' and do not prevent a contract of sale being unconditional.⁴⁶

The Court of Appeal held that the condition in the instant case related to a matter of title and did not constitute a condition precedent of the *Aberfoyle* type.

In fact the approach taken by Lord Jenkins in *Aberfoyle's* case was again doubted by the High Court of Australia in the recent case of *Perri v Coolangatta Investment Pty Ltd.*⁴⁷ In this case it was argued that a clause in a sale and purchase agreement which provided that the contract was subject to the purchaser completing the sale of his property to a third party had a similar effect as in *Aberfoyle*. The High Court in refusing to accept this argument held that the condition did not relate to the formation of a contract of sale between the vendor and purchaser but was a condition relating to the performance of an obligation by the purchaser. The High Court expressed some doubts as to whether the Privy Council in *Aberfoyle's* case was correct in holding the condition in that case related to the formation of a contract rather than to the obligations of the parties. Gibbs CJ observed:

⁴⁵At page 120.

⁴⁶At pages 120-1.

⁴⁷(1982) 56 ALJR 445.

If that view of the condition was correct, it can only be because of particular provisions peculiar to the contract there considered. However, the correctness of what Lord Jenkins said on this point was doubted in *Property and Bloodstock Ltd v Emerton* [1968] 1 Ch 94, at page 116, and I respectfully share those doubts. It seems to me that the condition was one on which the performance of the relevant obligations under the contract depended rather than a condition precedent to the formation of a binding contract.⁴⁸

Again Mason J stated:

In this situation the area in which *Aberfoyle* stands as an authority should be closely circumscribed. I am not disposed to regard it as having authority beyond its own facts or as expressing any general principle applying to conditions other than non-promissory conditions which are precedent to the formation of a contract. It has been pointed out that judges have displayed much ingenuity in distinguishing *Aberfoyle*.

The decision of this Court in *Maynard v Goode* (1926), 37 CLR 529 and that of the Court of Appeal in *Property & Bloodstock Ltd v Emerton* [1968] Ch 94 are illustrations of a different approach.⁴⁹

Two comments may be made of the decision in *Aberfoyle's* case. First, the condition in Clause 4 was treated by the Privy Council as affecting the formation of a contract of sale and not as one relating to the obligations of the parties. This was because of the peculiar facts of the case. The facts clearly indicated that the parties intended that Clause 4 should be satisfied before a contract of sale could come into existence. It may be said that it was for this reason that the Privy Council took the view that the fulfilment of the condition was essential to the formation of a contract of sale. Secondly, in the light of the numerous criticisms against the decision of the Privy Council on this point, it is clear that courts now would deal with such conditions differently. They would consider such clauses as one affecting the obligations of the parties rather than the existence of a contract. As Mason J said in *Perr v Coolangatta Investments Pty Ltd*,⁵⁰

Generally speaking the Court will tend to favour that construction which leads to the conclusion that a particular stipulation is a condition precedent to performance as against that which leads to the conclusion that the stipulation is a condition precedent to the formation or existence of a contract. In most cases it is artificial to say, in the face of the details settled upon by the parties, that there is no binding contract unless the event in question happens. Instead, it is appropriate in conformity with the mutual intention of the parties to say that there is a binding contract which makes the stipulated event a condition precedent to the duty of one party or perhaps of both parties, to perform.⁵¹

⁴⁸At page 446.

⁴⁹At page 450: *Aberfoyle's* case was followed in the New Zealand case of *Scott v Rania* [1966] NZLR 527. But see the strong dissenting judgment of Hardie Boys J.

⁵⁰*Supra*.

⁵¹At page 451.

His Lordship then added:

Furthermore, it gives the courts greater scope in determining and adjusting the rights of the parties. For these reasons the condition will not be construed as a condition precedent to the formation of a contract unless the contract read as a whole plainly compels this conclusion.⁵²

It is, therefore, submitted that in most cases where a condition is stipulated in a contract for sale and purchase, it would be interpreted to relate to one of the obligations of the parties rather than the existence of a binding contract. The Courts will regard such contract as binding. It is only in cases where the parties have clearly expressed their intention that the fulfilment of the condition is essential to the existence of a contract of sale that the courts would consider such contracts as conditional contracts. In practice, the type of contracts which can be regarded as conditional would be 'where the fulfilment of the condition is not within the power or control of either one of the parties to the sale but dependent on the approval of some third party'. Such an approval from a third party must be essential for the very formation of a contract of sale. In other words, the condition must be such that without the said approval, no binding contract for the sale and purchase of land can be effected. In *Turney and Turney v Zhilka*⁵³ Judson J said that it was only such a condition which was 'a true condition precedent'.

The obligations under the contract, on both sides, depend upon a future uncertain event, the happening of which depends entirely on the will of a third party — the village council. This is a true condition precedent — an external condition upon which the existence of the obligation depend. Until the event occurs there is no right of performance on either side. The parties have not promised that it will occur.⁵⁴

The Canadian Courts have been consistent in following this decision of the Supreme Court. In 1976, Dickson J in the Supreme Court of Canada in the case of *Barnett v Harrison*⁵⁵ said:

The rule in *Turney and Turney v Zhilka* has been in effect since 1959, and has been applied many times. In the interests of certainty and predictability in the law, the rule should endure unless compelling reasons for change be shown.⁵⁶

⁵²Ibid.

⁵³(1959) 18 D.L.R. (2d) 447.

⁵⁴Page 450.

⁵⁵[1982] 1 M.L.J. 242.

⁵⁶At page 247. See generally Davis (1977) 60 Can. B.R. 289.

The High Court of Singapore in the recent case of *Ong Boon Pok Realty Co (Pte) Ltd v Chiang Hong (Pte) Ltd*,⁵⁷ also took a similar approach. The Court held that the clause which was added to the sale and purchase agreement which provided that the agreement was entered into on the basis that the Government would approve the sale to the purchaser who was not a Singapore citizen rendered the contract conditional upon the approval being granted. The Court held that the intention of the parties was clearly to enter into a conditional contract, especially since the parties knew that without the approval of the Singapore Government, the sale could not be effected. The Court followed the decision of the Privy Council in *Aberfoyle Plantations Ltd v Khaw Bian Cheng*,⁵⁸ even though, as the Court found, the conditional character of the agreement was not expressed as clearly as was provided in the agreement in *Aberfoyle's* case nor did the said agreement specify as in *Aberfoyle* that if the condition was not fulfilled the agreement shall be null and void.

Sinnathuray J observed:

But I am not persuaded by Mr Price that the differences distinguish the present case from the *Aberfoyle* case, for the reason I have given that once it is concluded that the true construction of the side letter read with the Agreement is that there was a conditional contract, that the facts in the present case are indistinguishable from the facts in the *Aberfoyle* case. Both concern conditional contracts relating to the sale and purchase of land. Both contain stipulations fixing dates for the completion of the sales. The reasoning had in the *Aberfoyle* case must therefore apply to the facts in the present case that "until the condition is fulfilled there is no contract of sale to be completed."⁵⁹

But it must be stressed that in such cases the parties must clearly indicate their true intentions in the contract with clarity, otherwise the difficult task of determining their true intention will be on the courts. The danger in such a case is that instead of construing the condition as affecting the formation of the contract, the court may interpret it to relate to the performance of the obligation of the parties.⁶⁰ It may, however, be pointed out that such situations are few but all the same many such contracts are entered into in Malaysia.

3. Where a condition is provided for the sole benefit of one of the parties

Sometimes a condition may be stipulated in the agreement which is for the sole benefit of one of the parties. For example, the contract may provide the condition that 'planning permission must be obtained' or that 'sub-

⁵⁷[1982] 1 MLJ 242.

⁵⁸*Supra*.

⁵⁹At page 248.

⁶⁰See discussion below.

ject to a loan being obtained' or 'subject to finance'.⁶¹ If these conditions relate to the acceptance of the offer, then clearly no binding contract comes into effect as the acceptance is not unqualified or unconditional. Where, however, they relate to the conditions of sale or the obligation of one of the parties, then a binding contract is in existence.

It is sometimes said that a conditional contract may be waived so as to render the contract an unconditional contract. It is however, submitted that this is not the correct position. A party to a conditional contract cannot waive any condition if the basis upon which the agreement was entered into was the fulfilment of the condition.⁶² It is only a promissory condition which is inserted for the benefit of one of the parties that can be waived. Therefore if there is a condition in a contract of sale which is exclusively for the benefit of one of the parties, such a party may waive the condition.⁶³ Where a condition is for the benefit of both the parties, it cannot be waived.⁶⁴

4. Condition which must be fulfilled before performance of an obligation by either party

Sometimes a distinction is drawn between a condition which affects the existence of a contract and one which is essential to the coming into existence of an obligation of the parties. It is said that in the latter case neither party can demand the performance of an obligation until the condition is fulfilled.⁶⁵ In such cases it is said that the parties are bound by the contract from the very beginning and the relationship of vendor and purchaser exists. This being the case, neither party can withdraw from the contract until the condition is not fulfilled. If it cannot be fulfilled an action for specific performance cannot be maintained.⁶⁶ Until the condition is fulfilled, the vendor may not be under an obligation to transfer the property or the purchaser to pay the purchase price. The obligation to fulfil the said condition may be on either one of the parties or both. If the party who

⁶¹See Coote, "Agreements 'Subject to Finance'" (1976) 40 Conv (NS) 37 *Scott v Rania* [1966] NZLR R 527.

⁶²See *Turney and Turney v Zhilka* (1959) 18 DLR (2d) 447 and *Barnett v Harrison* (1975) 57 DLR (3d) 225.

⁶³*Hawksley v Outram* [1982] 3 Ch 359; *Scott v Rania* [1966] NZLR 527, 534; *Gunge v Sullivan* (1966) 116 CLR 418.

⁶⁴See *Heron Garage Properties Ltd v Moss* [1974] 1 All ER 421. See note in (1975) 39 Conv. (NS) 251, 255. See Farrand, at page 30.

⁶⁵See Judson J in *Turney and Turney v Zhilka*, (1959) 18 DLR (2d) 447; *Maynard v Goode* (1926) 37 CLR 529, 540; *Hardie Boys J in Scott v Rania* [1966] NZLR 527, Hinde, McMorland and Sim, *Land Law*, Vol. 2, Butterworths (New Zealand), para 10.007; Davis (1977) 60 Can BR 289 and the recent judgment of the Privy Council in *Newmont Pty Ltd v Laverton Nickel* (1983) 57 ALJR 348, 352 (on appeal from the Supreme Court of New South Wales).

⁶⁶*Newmont Pty Ltd v Laverton Nickel* (1983) 57 ALJR 348, 352.

is under an obligation to fulfil the condition does not do so, the other party has the option of avoiding the contract. If however, the condition is not fulfilled through no default of either party, then either party may avoid the contract. It is further said that if one party having a right to avoid the contract does not exercise his right, the other party may enforce the contract against him.⁶⁷

As pointed out earlier, these types of contracts are not strictly speaking conditional contracts. These conditions are what is commonly referred to as conditions precedent to the obligations of the parties.⁶⁸ It is only the obligation to perform a particular provision of the contract which is conditional and not the entire contract. The contract is fully binding together with all the other provisions except the one which is conditional.

The Federal Court in *Lee Yew Hui v Kow Lup Piow*⁶⁹ considered the effect of such a contract. In this case, the purchaser (plaintiff entered into an agreement for the purchase of 105 acres out of about 1045 acres of rubber land from the defendant). At the time of the agreement the vendor was not the registered owner but had entered into another agreement with a third party to purchase the said land. Clause 3 of the sale and purchase agreement between the plaintiff and the defendant provided that the sale of the land was subject to the completion of the purchase of the said land by defendant from the third party. The purchase price under the agreement was \$125,250. The plaintiff had earlier paid a deposit of \$12,000 to the defendant and a further sum of \$10,000 on the execution of the agreement. The balance of the purchase price was to be paid on or before 20th November 1967. The defendant was to give possession of the land to the plaintiff on or soon after the payment of the balance of the purchase price.

It was further provided by Clause 13 that in the event of the defendant being unable through no fault of his or owing to circumstances beyond his control to complete the purchase, he was to refund the deposit of \$22,000 and any other sum paid by the plaintiff towards the purchase price together with 5% of such sums as liquidated damages.

Clause 14 provided that if the plaintiff shall fail to pay the balance of the purchase price on or before the stipulated date, then the agreement shall *ipso facto* absolutely determine and all sums of money paid by the plaintiff shall be deemed to be forfeited to the defendant as liquidated damages for breach of contract by the purchaser.

⁶⁷*Suttor v Gundowda Proprietary Ltd.* (1950) 81 CLR 418, 441.

⁶⁸See *Chitty on Contracts* Vol. 1 (25th edn) para 752.

⁶⁹[1974] 1 MLJ 114.

The plaintiff did not pay the balance of the purchase price on the stipulated date and the defendant purported to forfeit the \$22,000 under Clause 14 of the agreement. One of the arguments raised by the plaintiff was that the contract between the plaintiff and the defendant was a conditional contract, the condition being that the sale between the defendant and the third party should have been completed before the date on which the plaintiff was required to complete his purchase. The plaintiff relied upon the case of *Aberfoyle Plantations Ltd v Khaw Bian Cheng*⁷⁰ Gill FJ (with Suffian CJ and HS Ong FJ concurring) held that the contract was not a conditional contract as in *Aberfoyle's* case. His Lordship observed.

The facts here are clearly different. Reading the Agreement in the present case as a whole, I do not see how I can possibly read into it a condition precedent that the defendant was to become the registered owner of the land by the date of the final payment by the plaintiff. The intention of the parties was that the plaintiff shall be given possession soon after the plaintiff paid the purchase price, but he was not entitled to and indeed could not possibly be registered as owner until after completion of the purchase under the Principal Agreement had taken place. Clauses 3 and 13 of the Agreement clearly mean the ultimate completion was to depend on completion under the principal agreement.⁷¹

His Lordship pointed out that on the construction of the agreement between the plaintiff and the defendant, the plaintiff was required to make his final payment on 20th November 1967, whether or not the defendant had completed the sale with the third party. In other words, his Lordship held that this obligation of the plaintiff to make payment was not conditional upon the defendant completing the sale with the third party. His Lordship observed:

Contract differs from most other branches of the law of obligations in one important respect, namely, that generally speaking the parties themselves are free to make their own rules as to what shall and shall not bind them. (See Chitty on Contracts 23rd edition, page 1). The plaintiff had clearly bound himself under the Agreement to make his final payment on 20th November 1967. Once he had committed a breach of that agreement, the defendant was entitled to repudiate the contract and forfeit the deposit under clause 14 of the Agreement.⁷²

It must however, be emphasised that it is sometimes difficult to distinguish between a condition which renders the entire contract conditional and one which relates only to the performance of an obligation. This difficulty is highlighted in the Federal Court decision of *Halimah binti Abdul Rahman v Fatimah binti Abdullah*.⁷³ In this case, the respondent (ven-

⁷⁰[1960] MLJ 47.

⁷¹At page 117.

⁷²At page 118.

⁷³[1976] 2 MLJ 64.

dor) applied for a piece of land from the State Authority. Soon after that, she agreed to sell the land to the appellant making it clear in the agreement that she was not its owner but had applied to the State Authority for the alienation of the land and promising to complete the transaction soon after she had obtained the title from the State Authority. The Agreement which was prepared by the parties themselves provided:

My agreement. . . with Halimah is that when the Government issue the documents of title on the said land, then. . . I undertake to transfer [the land] to. . . Halimah.

The appellant paid \$300 towards the purchase price and went into occupation of the land. After the respondent had obtained the necessary document of title, the appellant asked her to complete the sale but she refused to do so. The appellant thereupon applied for specific performance. This was refused in the High Court on the ground that as the land had reverted to the State, the agreement offended against section 195 of the Kedah Land Enactment relating to unlawful occupation of State land. The appellant appealed.

The Federal Court held that the contract was enforceable in law by the appellant. Suffian LP said:

I think that the purchaser's claim should have been allowed, because the sale here was not an outright sale, but a conditional sale, to be completed when the vendor's application has been approved by the State. Just as it is legal for some one to sell rubber which he does not have but which he plans to buy and own on a future date, when it is to be delivered, so it is in my opinion equally legal for someone to sell State land on condition that the deal will be completed if and only if the vendor's application for the land has been successful and the State has issued a title to him.⁷⁴

On the issue of the legality of the arrangement whereby the vendor allowed the purchaser to take possession of the State land to which the vendor had no title, Suffian LP observed:

. . . this in my opinion is only a matter between the purchaser and the Government and does not affect the validity of the conditional arrangement between the vendor and the purchaser.⁷⁵

Ali FJ in deciding the case invoked section 33(a) of the Contracts Act 1950 which provides as follows:

Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened⁷⁶

⁷⁴At page 65.

⁷⁵*Ibid.*

⁷⁶*Ibid.* The case also dealt with the question of illegality under section 24 of the Contracts Act.

His Lordship held that the instant case clearly fell within the said section.

The Federal Court did not discuss the issue whether the condition related to the formation of the entire contract or merely to the performance of the obligation of the parties. Though Suffian LP held that the sale was conditional upon the vendor's application to the State Authority being successful, his Lordship did not say whether that condition rendered the contract conditional. Whether by referring to the transaction as a 'conditional sale' he meant it to be a conditional contract is not clear. Furthermore no reference was made to *Aberfoyle's* case.

The fulfilment of a condition which is imposed for the coming into existence of any obligation of one of the parties may be within the power or control of the said party. In such a case there is an implied duty on the part of the party to take reasonable steps to fulfil that condition. It is sometimes said that where the party makes it impossible for the condition to be fulfilled, the condition is to be taken as satisfied.⁷⁷ But this is so only in cases where the fulfilment of the condition is for the benefit of either one of the parties to the contract. Where the fulfilment is not for the benefit of the parties but for the benefit of others, like beneficiaries of the estate of a deceased, the condition must be fulfilled. Sir Harry Gibbs in *Newmont Pty Ltd v Laverton Nickel*⁷⁸ observed:

whether the performance of a condition precedent is excused where a party has prevented its performance must depend on the nature of the condition and the circumstances of the case. In some cases the nature and purposes of the condition will themselves be sufficient to indicate that the parties must have intended that the obligations which are expressed to be dependent on the fulfilment of the condition will come into existence only if the condition is fulfilled, and that it will not be enough that performance of the condition has been prevented by the wrongful act of one of the parties.⁷⁹

Therefore where the fulfilment of the condition is essential before performance of an obligation under the agreement is sought, such a condition must be fulfilled. If the condition could be fulfilled or whose fulfilment could be procured by one of the parties and if the party refuses to do so, specific performance may be decreed to compel him to do so.⁸⁰

⁷⁷ *Mackay v Dick* (1881) 6 App Cas 251. See also Sir Harry Gibbs in *Newmont Pty Ltd v Laverton Nickel* (1983) 57 ALJR 348, 352.

⁷⁸ (1983) 57 ALJR 348.

⁷⁹ At page 352.

⁸⁰ See discussion below.

Where, however, the condition cannot be fulfilled by any one of the parties or has become incapable of performance, an action for specific performance cannot be maintained.⁸¹

Time for Fulfilment of A Condition in A Conditional Contract

Lord Jenkins in *Aberfoyle's* case pointed out that the time for the fulfilment of a condition in a conditional contract must plainly depend upon the true construction of the agreement, or in other words upon the intention of the parties as expressed in, or to be implied from, the language they have used. His Lordship, however pointed out that subject to this overriding consideration, the following general principles which are 'warranted by authority and manifestly reasonable in themselves' would apply:

- (i) Where a conditional contract of sale fixes a date for the completion of the sale, then the condition must be fulfilled by that date;
- (ii) Where a conditional contract of sale fixes no date for completion of the sale, then the condition must be fulfilled within a reasonable time;
- (iii) Where a conditional contract of sale fixes (whether specifically or by reference to the date fixed for completion) the date by which the condition is to be fulfilled, then the date so fixed must be strictly adhered to, and the time allowed is not to be extended by reference to equitable principles.⁸²

To support these propositions, his Lordship relied on the English cases of *Smith v Butler*⁸³ and *In Re Sandwell Park Colliery Company*.⁸⁴

The importance of the date fixed for completion in a conditional contract was also emphasised by Lord Jenkins:

the reason for taking the date fixed for completion by a conditional contract of sale as the date by which the condition is to be fulfilled appears to their Lordships to be that until the condition is fulfilled there is no contract of sale to be completed, and accordingly that by fixing a date for completion the parties must by implication be regarded as having agreed that the contract must have become absolute through performance of the condition by that date at latest.⁸⁵

⁸¹ *Newmont Pty Ltd v Laverton Nickel*, *supra*.

⁸² [1960] MLJ 47, 49.

⁸³ [1900] 1 QB 694.

⁸⁴ [1929] 1 Ch 277.

⁸⁵ [1960] MLJ 47, 49.

Furthermore, his Lordship pointed out that similar considerations are applicable where a conditional contract of sale fixes no specific date for completion of the sale by the performance of both sides of the bargain, but does fix a date for the performance on the part of the purchaser of his part of the bargain by payment of the purchase money, even though no definite date is fixed for the performance on the part of the vendor of his part of the bargain by the transfer of the property:

In such a case it could hardly have been intended that the purchaser should on the date specified perform his part of the bargain unless by that date a binding contract had been brought into existence by fulfilment of the condition: for unless that had happened by the date specified there would on that date in truth be no contract for the purchaser to perform.⁸⁶

In the instant case, their Lordships of the Privy Council held that on the construction of the agreement in question and based on authorities, the date of completion was fixed by the parties to be 30th April, 1956.

It should be noted that in the present case, there was no specific date fixed for the vendor to fulfil the condition, though by Clause 9 the date and place for completion of the purchase was specified. The Privy Council held that the effect of such an agreement was as follows:

A provision in a sale agreement to the effect that the sale should be completed on such a date and at such a place, when the purchaser should pay the purchase price and the vendor should thenceforth hold the property in trust for the purchaser, would in their Lordships' view clearly amount to a provision for completion of the sale. At all events the purchase money in accordance with clause 9 would fully discharge his part of the bargain, which must in their Lordships' view, necessarily presuppose the existence of a binding agreement, of which he would be discharging his part.⁸⁷

Their Lordships of the Privy Council also rejected the argument of the vendor that a reasonable time should be given to the vendors to fulfil the condition and the reference to 30th April, 1956 in Clause 9 did not apply to the vendor, but only to the purchaser. Their Lordships held that the vendor's contention as to the construction and effect of the agreement would produce results so unreasonable that the parties should not be taken to have intended them unless the language they have used clearly shows the contrary. The purchaser would have been obliged to perform his part of the bargain on or before 30th April, 1956, by paying the balance of the purchase money before there was any binding contract, and with no assurance that a binding contract would ever emerge. On the other hand

⁸⁶*Ibid.* at page 49.

⁸⁷At page 51.

the vendor would have been under no effective obligation to procure the fulfilment of the condition within any foreseeable time or at all. Again, from the vendor's point of view, he would have been under an obligation on the 30th April, 1956, to let the purchaser into possession on receipt of the rents and profits against payment of the purchase money, before it was known whether fulfilment of the condition would ever be procured. Further, there would be a great deal of confusion in the event of the agreement being avoided for non-fulfilment of the condition.

The principle stated by Lord Jenkins in *Aberfoyle Plantations Ltd v Khaw Bian Cheng* with regards to the time within which a condition in a conditional contract is to be performed was applied in *Re Longlands Farm v Superior Developments, Ltd.*⁸⁸ Cross J held that as the contract was silent as to the time in which the condition relating to planning permission was to be satisfied, it must be taken that the purchasers were given a reasonable time to obtain planning permission to their satisfaction. His Lordship, however qualified the scope of reasonable time. He said that:

the reasonableness of the time must be determined as at the date of the contract and that what is reasonable must be judged by an objective test applicable to both parties, and does not simply mean what is reasonable from the point of view of the defendants [purchasers].⁸⁹

As pointed out earlier, in *Aberfoyle's* case the Privy Council held the contract to be conditional and until the fulfilment of the condition no contract of sale came into existence. Therefore the principles stated by Lord Jenkins relating to time for the fulfilment of the condition may be restricted to conditional contracts in the strict sense of the word. Furthermore, in *Aberfoyle's* case, the observations of Lord Jenkins were restricted to cases where the contract fixes a time either expressly or by implication, by which the condition must be fulfilled. Whether the same principles are applicable in the following two situations was not considered by the Privy Council.

- (a) whether the principles spelt out by Lord Jenkins are also applicable to condition which relate not to the formation of the contract but to the performance of their obligations; and
- (b) whether in cases where no time is fixed one party can terminate the contract without giving notice of his intention to do so or

without requesting the other party to fulfil the condition.

Connected with the second situation is the question whether equitable principles relating to time apply in these cases. Lord Jenkins merely said:

where a conditional contract of sale fixes (whether specifically or by reference to the date fixed for completion) the date by which the condition is to be fulfill-

⁸⁸[1968] 3 All ER 552.

⁸⁹At page 556.

ed, then the date so fixed must be strictly adhered to, and the time allowed is not to be extended by reference to equitable principles.⁹⁰

It is submitted that the principles enunciated by Lord Jenkins in *Aberfoyle's* case are equally applicable to the fulfilment of a condition relating to the performance of an obligation of the parties just as they are applicable in cases of conditional contracts. In both the cases, there is a need for the parties to know how long they need to wait for the fulfilment of the condition or the completion of the contract. To wait indefinitely would cause a great deal of inconvenience and loss to the parties.

On the second issue as to whether notice must be given to the party to fulfil the condition before the other party may terminate the contract, the position is unclear. The cases of *Aberfoyle*, *Suttor v Gundowda Pty Ltd.*⁹¹ and *Gange v Sullivan*⁹² only establish the rule that where a conditional contract fixes a time by which the condition must be fulfilled, failure to fulfil the condition within the specified time will entitle the party to terminate the contract. In such a case the party may do so even without giving the other party prior notice.⁹³

There is little authority on the question as to whether notice must be given when no time is stipulated in the contract for the fulfilment of the condition. It is clear, however that even in such situations, the condition must be performed within a reasonable time.

However, the Australian High court in the recent case of *Perri v Coolangatta Investments Pty Ltd.*⁹⁴ observed that where a condition in a contract stated that the contract was entered into subject to the purchaser completing the sale of his own property to a third party, such a condition was not promissory in nature but rather contingent,⁹⁵ and that no notice is required at the expiry of a reasonable time for completion of the sale. Gibbs CJ said:

... I consider that when the time has elapsed for performance of a condition which is not a promissory condition, but a condition precedent to the obligation to complete a contract of sale, either party, if not in default, can elect to

⁹⁰[1960] MLJ 47, 49. See also Treitel, *Law of Contract*, (4th edn) at page 570.

⁹¹(1950) 81 CLR 418.

⁹²(1966) 116 CLR 418.

⁹³See Gibbs CJ in *Perri v Coolangatta Investment*, (1982) 56 ALJR 445, at page 448.

⁹⁴(1982) 56 ALJR 445.

⁹⁵The purchaser without care had not promised that he will sell his own house but rather that the sale with the vendor was contingent on the sale of his house to a third party. See Brennan J at page 457.

treat the contract as at an end if the condition has not been fulfilled or waived, and that it is not necessary first to give a notice calling on the party in default to complete the contract or fulfil the condition.⁹⁶

His Lordship then said:

What I have said is, of course, subject to any sufficient indication of a contrary intention in the words of the contract itself. The conclusion that I have reached is supported by the judgment of Lord Keith in *T Boland and Co Ltd. v Dundas's Trustees* [1975] SLT 80, with whose reasoning I respectfully agree. It accords also with the judgment of Cross J (as he then was) in *Re Longlands Farm* [1968] 3 All ER 552, a decision whose authority on this point is weakened by the fact that a notice to complete had in fact been given. A contrary view was taken in *Hunt v Wilson* [1978] 2 NZLR 261 by Cooke J, who considered that a notice making time of the essence is necessary. Although in *Aberfoyle Plantations Ltd v Khaw Bian Cheng* and erroneous view may have been taken of the nature of the condition there considered, nevertheless, in my respectful opinion, it was correct to hold that the time fixed by the contract for performance of the condition was not to be extended by reference to equitable principles, and the same conclusion should be reached when the condition is to be performed within a reasonable time.⁹⁷

Brennan J in arriving at the same conclusion said:

... it was submitted, the vendor seeking to avoid the contract was bound to give a notice to complete after that time expires, affording the purchasers a further reasonable time for compliance with the demand in the notice. These submissions suggest a confusion between the consequence of non-fulfilment of a contingent condition and the consequence of breach of a promissory term. A notice to complete insists upon performance by a party in default to whom the notice is given of an obligation binding upon him. It can have no application to a situation where the party to whom it is given is under no obligation to perform.⁹⁸

It therefore seems on the authority of this decision of the High Court of Australia⁹⁹ that no notice to perform the condition need be given upon the expiry of a reasonable time for completion. However, it should be emphasised this only applies if the condition in the said contract is not a condition precedent to the obligation to complete or is not promissory in nature, but only when it relates to the obligation to perform or is contingent in nature. In the latter case, there is no promise by the party that the event will occur. It only means that the obligation to purchase will arise when the event is fulfilled. The distinction is important because when the time

⁹⁶At page 448.

⁹⁷Page 448.

⁹⁸Page 458.

⁹⁹But see dissenting views of Mason and Wilson JJ.

for fulfilment of the condition has expired, there is no obligation on the purchaser to complete the sale. Until the event occurs the obligation of the purchaser is merely contingent. However, at this stage, the vendor is entitled to terminate the contract. He, however, cannot sue the purchaser for breach nor recover damages. But it may be important for the vendor to indicate this intention to terminate the agreement.¹

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¹In *Perri v Coolangatta Investment Pty Ltd. supra*, it was held that the institution of the action in court was sufficient notice of intention to complete. In such cases too the non-fulfilment of the condition is treated as rendering the contract voidable rather than void.