IN PRAISE OF CONDITIONS SUBSEQUENT

An Appraisal of the Functions of and Law Relating to some Aspects of "Conditions Subsequent" in Contracts for the Sale of Land.

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INTRODUCTION

A party to a prospective contract, particularly an important contract such as the sale and purchase of land, is often in a dilemma. He would like to have an arrangement which binds the other party, so as not to lose the bargain, but would also like himself to be able to escape from the bargain if matters (for example the availability of finance) do not turn out as he hopes.

The law offers various solutions. The prospective buyer could seek an option to purchase. That would leave him will-free, but the prospective vendor bound. The latter might reject the proposal as being one-sided, notwithstanding the consideration that would have to be given to make the option binding.[1] An alternative, apparently widely used in England,[2] would be to enter an arrangement "subject to contract"[3] That however would leave both parties free to withdraw, and the prospective buyer might find himself "gazumped". The solution in Australia has been to make use of a provision widely known as a "condition subsequent". A well-known example is the "subject to finance" clause, but there are others.[4]

1 The consideration may be nominal: Mountford v. Scott, [1975] Ch. 258. Where there is a commercial venture dependent upon a number of transactions, it may be more suitable to obtain a series of options.

2 Coote, 'Agreements "Subject to Finance"' (1976) 40 *Conv.* 37.

3 The leading Australian case is Masters v. Cameron (1954), 91 C.L.R. 353.

4 For discussion of "subject to finance" provisions see Nicholson, 'Law and Suburbia; Contracts of Sale Subject to Finance' (1967) 8 *U.W.A. L. Rev.* 1; Coote, supra n. 2; Phillips, '"Subject to Finance Clauses" in Real Estate Contracts' (1976) 3 *Qd. Lawyer* 113; Owen-Conway, 'The "Subject to Finance Clause" in the Offer and Acceptance Approved by the Law Society and the Real Estate Institute of Western Australia' (1977) 13 *U W A L Rev.* 196. Other provisions relate to planning, and the obtaining of consents or approvals of administrative bodies or officials, or of some other person such as a landlord.

TERMINOLOGY

The modest phrase "condition subsequent" conceals a number of features and functions. An expanded version (not recommended for general use) might be "non-promissory resolutive condition subsequent to contract".

Nearly every word of this description is provocative to the purist. A contract is concerned with promises—what function has a "non-promissory" condition? Then again, the word "condition" is one of the most overworked in the contract lexicon.[5] Even more mystery surrounds it when coupled with the word "precedent" or "subsequent",[6] and when "resolutive"[7] is thrown in for good measure, confusion is complete.[8] Some justification is required.

The provision is described as subsequent to contract in that it assumes that there is a binding contract in existence, but resolutive because it allows the contract to be brought to an end; it is a condition in that it must be fulfilled before certain other obligations (usually but not always those involved in settlement) become due,[9] but non-promissory in that

[5] In a famous article S.J. Stoljar identified twelve separate shades of meaning—Stoljar, 'The Contractual Concept of Condition' (1953) 69 *L.Q.R.* 485 at 486-8. The Australian editors of *Cheshire and Fifoot Law of Contract* 4 Aust. ed. (1981) 104 content themselves with "at least four", and Lord Denning M.R. in the context of the case limited himself to a modest three—Wickman Machine Tool Sales Ltd. v. L. Schuler A.G., [1972] 2 All E.R. 1173 at 1180-1; affirmed *sub nom.* L. Schuler A.G. v. Wickman Machine Tool Sales Ltd., [1974] A.C. 235.

[6] See generally Stoljar; supra n. 5 at 506ff. Stoljar's questions at 506: "Precedent to what? Subsequent to what?" echo that of Isaacs J. as long ago as 1926: "We must ask the question 'Precedent to what?"— see Maynard v. Goode (1926), 37 C.L.R. 529 at 540.

[7] The *Oxford English Dictionary* gives, as the first legal meaning: *"Resolutive condition*, a condition by the happening of which a contract or obligation is terminated". See also Zieme v. Gregory, [1963] V.R. 214 at 222: "a condition subsequent or resolutive". Lord Denning M.R. has used the word "defeasant"—Felixstowe Dock and Railway Co. and European Ferries Ltd. v. British Transport Docks Board, [1976] 2 Ll. R. 656 at 660.

[8] This by no means exhausts the possibilities. Canadian literature, for instance, refers to a "true condition precedent" (presumably in contra-distinction to a false or pseudo condition precedent)—see Nathan, 'Conditional Contracts—Waiver of a True Condition Precedent—Damages' (1974) 12 *Osgoode Hall L J* 650; Webb, 'Contract: Waiver of Conditions Precedent' (1976) 8 *Ottawa L Rev* 82; Davies, 'Some Thoughts on the Drafting of Conditions in Contracts for the Sale of Land' (1977) 15 *Alberta L. Rev* 422.

[9] There would seem to be general agreement that this is the primary meaning of "condition"; see Corbin, 'Conditions in the Law of Contract' (1918-1919) 28 *Yale L J* 739 at 743 "In its proper sense the word *'condition' means some operative fact subsequent to acceptance and prior to discharge*, a fact upon which the rights and duties of the parties depend"; Pannam, C.L. and Hocker, P.J., *Cases and Materials on Contract* 4 ed. (1979) 771 "the term 'condition precedent' . . . is used in its correct and primary sense of indicating a fact or event which must exist or occur before the

neither side promises that it will be fulfilled.[10]

PHILOSOPHY

In this light, "conditions subsequent" can be seen as a useful device for resolving the dilemma referred to above. Unfortunately, there are areas of uncertainty in the law relating to their operation. For them to be fully effective, the law should be clear, and should strike a fair balance between the interests of the parties. Of course each individual contract must be construed in the light of its particular circumstances, so as to give effect to the intention of the parties. Nevertheless there is much merit in certainty where, as in contracts for the sale of suburban land, standard forms are frequently used by people not particularly sensitive to the niceties of the law. What is needed is a set of prima facie rules which will yield only to the clearly expressed contrary intention of both parties. This article suggests some guiding principles for use in those areas where the law remains uncertain.

PRECEDENT OR SUBSEQUENT

A preliminary difficulty is to decide whether a particular condition is indeed subsequent to contract, or whether it is precedent to contract.[11] The theoretical difference is that in the first case, prior to fulfilment of the condition, there is a binding contract, whereas in the second case there is none. It is not intended in this article to discuss the nature and properties of conditions precedent, but two situations may be mentioned in which the distinction becomes crucial. The first is where one party purports to withdraw from the arrangement for reasons unconnected with the condition itself. This is possible, prior to its being

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obligation to perform arises"; Stoljar, supra n. 5 at 493 "we call the event or contingency upon the happening of which the duty of performance depends, the *condition*"; Denning M.R. in Wickman, supra n. 5 at 1180 "The first is the proper meaning . . . 'Something demanded or required as a prerequisite to the granting or performance of something else'; and which is carried over into the law in this way: 'In a legal instrument, e.g. a . . . contract, a provision on which its legal force or effect is made to depend.'"

10 There may be promises associated with the condition not to interfere with, or actively to seek, its fulfilment: see below.

11 As long as it is understood that a binding contract is the reference point, the phrases "condition precedent" and "condition subsequent" can be used to mark the distinction. An alternative is to allow the reference point to shift, and to distinguish, as does *Halsbury's Laws of England* 4th ed. (1974) Vol. 9 paras. 264 and 511, between 'conditions precedent to contract' and 'conditions precedent to performance'. When using this last phrase it should be appreciated that the same condition may be subsequent to one act of performance, for example payment of a deposit, but precedent to another, for example payment of the balance of the price.

known whether or not the condition is or can be fulfilled,[12] only if the condition is categorised as precedent to contract. If the party can withdraw, it must be because there is no contract; if he cannot, it must be because he is contractually bound. If he is bound, it is either through the arrangement itself, or through a collateral contract not to withdraw pending fulfilment.[13] This latter solution is inelegant and unnecessary.

A second situation in which the distinction between conditions precedent and subsequent may become important is where the condition is not fulfilled. If the condition is precedent to contract it appears the arrangement lapses automatically,[14] whereas with a condition subsequent to contract this is not necessarily so.[15]

Few judgments discuss the principles on which the distinction is to be made. In the precedent camp can be placed, for present purposes, all cases where the parties, whether or not they have settled the terms,[16] wish to delay any binding effect produced by contract to a later date. In these instances a later assent to contract by each party is required,[17] although it is theoretically possible to have an agreement which will automatically become a contract on fulfilment of the condition.[18] In the subsequent camp go all cases where the parties intend to be immediately bound. How is the distinction to be drawn in practice?[19]

12 If withdrawal is because of alleged non-fulfilment of the condition itself, that allegation becomes the focal point, and it matters little whether or not there was a binding contract from the outset. Thus if the court finds non-fulfilment, the decision can be either that no contract has ever existed, or that the contract has been defeated. If there is fulfilment, the contract either comes into being, or becomes unconditional.

13 For a similar suggestion related to the doctrine of non-interference (discussed at above) see *Halsbury's Laws of England* 4th ed. (1974) Vol. 9 para. 511 n. 5 and Lindgren, K.E., *Time in the Performance of Contracts* 2nd ed. (1982) 111-112 and 114.

14 Aberfoyle Plantations Ltd. v. Khaw Bian Cheng, [1960] A.C. 115.

15 See discussion at below.

16 If the parties have not settled the terms, that constitutes a separate reason for saying there is as yet no contract. For criticism of a terminology which regards offer and acceptance as conditions precedent to contract see Stoljar, supra n. 5 at 489-491.

17 Sometimes, as in contracts "subject to survey", assent must be preceded by fulfilment of some other requirement. In other cases, as with arrangements "subject to contract" assent is the only requirement lacking. In these latter cases, strict analysis suggests that the "condition" is none other than an intent to create legal relations.

18 For the reasons stated supra n. 12, no case clearly decides the point. Although judgments sometimes say a condition is precedent to contract, it is often possible (except in "subject to contract" cases) to analyse the clause as precedent to performance: see *Halsbury's Laws of England* 4th ed. (1974) Vol. 9 para. 264 n. 8. See also Stoljar, supra n. 5 at 492 commenting on Pym v. Campbell (1856), 6 E. & B. 370; 119 E.R. 903; Lindgren, supra n. 13 at 111 n. 7 on Caney v. Leith, [1937] 2 All E.R. 532; Sellers L.J. in Property and Bloodstock Ltd. v. Emerton, [1968] Ch. 94 at 124-5 commenting on Aberfoyle Plantations Ltd. v. Khaw Bian Cheng, supra n. 14.

19 The approach of English judges, schooled in "subject to contract" conveyancing, may differ from that of their Australian and New Zealand counterparts—Coote, supra n.

On some phrases "the pressure of litigation has stamped a precise significance".[20] Thus "subject to contract" invariably[21] means "no contract" until the appropriate documents have been prepared and exchanged in a manner recognised by law,[22] although any departure from those magic words opens the possibility that the parties intended to be immediately bound.[23] A similar meaning is said to attach to the words "subject to survey"[24] whether in respect of land[25] or ships.[26] In Australia it has become generally recognised, without any landmark decision,[27] that "subject to finance" clauses create conditions subsequent;[28] and other phrases have been so categorised by concession or with the minimum of discussion.[29]

In the absence of authority, it is possible to suggest some factors which may help to arrive at a decision. Where the subject-matter is land, the value and relative infrequency of contracting (as far as the parties are concerned) suggest an intention to be bound once there is agreement on essential terms.[30] The agreement will usually be in writing,[31] often on a standard form which contains or incorporates obvi-

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2 at 37 and 42-43. For an Australian approach see now Perri v. Coolangatta Investments Pty. Ltd. (1982), 56 A.L.J.R. 445 esp. at 450-1 per Mason J.

20 *Cheshire and Fifoot Law of Contract*, supra n. 5 at 34-35 and n. 36.

21 See the dramatic description by Denning M.R. of the "consternation" caused by Law v. Jones, [1974] Ch. 12 with its suggestion of an inroad into the traditional understanding of solicitors, in Tiverton Estates Ltd. v. Wearwell Ltd., [1975] Ch. 146 at 153-4 and 159-160. Both cases relate, not to the nature of the condition, but to the sufficiency of written evidence for satisfying the requirements of the Statute of Frauds.

22 Eccles v. Bryant and Pollock, [1948] Ch. 93. For sanction of "exchange" by telephone see Domb v. Isoz, [1980] Ch. 548.

23 The tendency in Australia is to find a binding contract—see recently Godeke v. Kirwan (1973), 129 C.L.R. 629.

24 This may be an example of the willingness of English judges to find condition precedent rather than condition subsequent. The attitude may be changing: Varverakis v. Compagia de Navegacion Artico S.A. (The "Merak"), [1976] 2 Ll. R. 250 at 254.

25 Marks v. Board (1930), 46 T.L.R. 424; Graham & Scott (Southgate) Ltd. v. Oxlade, [1950] 1 All E.R. 91.

26 Astra Trust Ltd. v. Adams and Williams, [1969] 1 Ll. R. 81; Goodey and Southwold Trawlers Ltd. v. Garriock, Mason and Millgate, [1972] 2 Ll. R. 369.

27 Each case turns on construction of the clause, but the tendency is clear: compare Zieme v. Gregory, supra n. 7 and Meehan v. Jones (1982), 56 A.L.J.R. 813.

28 In earlier New Zealand decisions this was assumed: later cases have categorized the condition as "precedent". See generally Coote, supra n. 2 at 42-43.

29 G. & S. Koikas v. Green Park Construction Pty. Ltd., [1970] V.R. 142 (subject to permission to build); Clark v. Refeld and Refeld (1980), 25 S.A.S.R. 246 per Wells J. at first instance (subject to finance, subdivisional approval and sale of other land).

30 See for example Godeke v. Kirwan, supra n. 23.

31 In Western Australia, in order to satisfy Statute of Frauds 1677 s. 4 and Property Law Act 1969-1979 s. 34.

ously contractual provisions,[32] and the execution of which is surrounded by some formality.[33] The circumstances and the nature of the condition will usually be such that non-fulfilment will destroy any chance of a contract,[34] rather than merely signal a renewal of negotiations at a different price or on different terms. Most special conditions in land contracts relate to single perceived obstacles, rather than to the general advisability of making the contract, or the price or terms on which it should be made.[35]

At least in contracts for the sale of suburban land, it seems appropriate therefore to start with an assumption that any non-promissory conditions will be subsequent rather than precedent. This assumption will the more easily be displaced as the various factors mentioned above are lacking. One factor which, if present, is likely to be decisive is illegality. If it would be illegal to make the contract before the condition is fulfilled, it will be construed as precedent to contract, but if the illegality lies in performance, the condition can more readily be construed as subsequent.[36] One matter requiring special mention is certainty.[37] On general principles, and regardless of classification, if the wording of the condition is so obscure as to render it meaningless, there will be no contract;[38] similarly if it is clear that the parties are still negotiating as to the content of the condition.[39] On the other hand, where fulfilment of the condition requires the decision of one of the parties, or a third party, it does not necessarily follow that there is no immediately binding contract. Such a provision might be included to avoid expensive litiga-

32 In Western Australia see the "Agreement for Sale of Freehold Land (1980 Edition)" produced by The Law Society of Western Australia (Inc.) and the "Contract for Sale of Land by Offer and Acceptance (1982 Revision)" approved by The Real Estate Institute of Western Australia (Inc.) and The Settlement Agents Association (Inc.).

33 Both forms have provision for witnessing of signature.

34 If for instance the purchaser cannot get finance, he will not wish to proceed.

35 If for example the sale of a ship is made "subject to survey" (supra n. 26) the purchaser may be intending to require that any defects be rectified, or the price reduced.

36 See Ovenden v. Palyaris Construction Pty. Ltd. (1974), 11 S.A.S.R. 42 at 74-75 per Bray C.J.

37 It is not intended here to examine the cases exhaustively. For discussion see Coote, supra n. 2 at 38-40 and Owen-Conway, supra n. 4 at 197-203. Much of the discussion must now be read in the light of Meehan v. Jones, supra n. 27.

38 Brown v. Gould [1972] Ch. 53. Severance is seldom appropriate, as such a clause is of importance to the parties—see Grime v. Bartholomew, [1972] 2 N.S.W.L.R. 827 at 837.

39 It would be rare for the content of a "subject to finance" clause to be negotiated. In Bishop & Baxter Ltd. v. Anglo Eastern Trading and Industrial Co. Ltd., [1943] 2 All E.R. 498 a sale of goods "subject to . . . licences . . . Government restrictions . . . and war clause" was too uncertain as there were many forms of war clause. The war clause however related to the contents of the contract, and was not a condition subsequent in the sense discussed in this article.

tion,[40] or more simply to provide one party with greater flexibility. If the fact of fulfilment is objectively ascertainable, that should suffice.

CONDITIONAL AND RESOLUTIVE ASPECTS

In dealing with a condition subsequent, it is useful to distinguish the conditional from the resolutive aspects.[41] In its conditional aspect the clause is designed to provide one or both parties with an excuse for non-performance when the time for performance (usually settlement) arrives. The effect of one party successfully relying on such an excuse is that the contract will come to an end because of excused non-performance.[42] In such a case no reference need be made to the resolutive effect, unless indeed to justify the return of moneys paid, for example the deposit.

Often however a date is fixed prior to settlement, by which, it is said, the condition must be fulfilled. It is here that the resolutive aspect comes into play. The clause itself may specify that the contract may then be terminated, the machinery for doing so, and the persons who may use that machinery.[43] If that is not done these matters must be dealt with by implication. There is no point in having a gap of time between a specified date for fulfilment, and performance of promissory obligations, other than to allow someone to terminate the contract in the interim.

The point of time after which termination becomes a possibility may be fixed either by the occurrence of an event or by expiry of a period of time. Sometimes, as where the condition requires consent of a third party, this is a difficult matter of construction. In an early case,[44] where transfer of a lease was subject to the landlord's approval of the new tenant, it was said that the contract would cease once approval was refused, notwithstanding counsel's argument[45] that the landlord might change his mind prior to the date for settlement. More recently[46] in the New South Wales Court of Appeal Jacobs P. and Hope J.A. thought, on construction, that non-approval of a plan of sub-division involved a state of affairs continuing over a period, whereas Hutley J.A. construed the condition as referring to an event.

40 Caney v. Leith, supra n. 18 (subject to the purchaser's solicitor approving the lease).
41 As analysed at above.
42 For the concept of excused non-performance see Treitel, G.L., *The Law of Contract* 5th ed. (1979) 578-9 and 631-2.
43 See the forms referred to supra n. 32.
44 Davies v. Nisbett (1861), 10 C.B. (N.S.) 752; 142 E.R. 649.
45 Id. at 756-7; 651.
46 J.A.G. Investments Pty. Ltd. v. Strati, [1973] 2 N.S.W.L.R. 540.

Where non-fulfilment is a continuing state of affairs, it is necessary to fix a period of time. Presumptively it starts when the contract is made, and often the parties fix a date when it ends. If they do, time is usually regarded as of the essence, in the sense that the court will not imply an extension for a further "reasonable" period.[47] Obviously the parties themselves may extend the period by agreement.[48] Where no time is set, at least a reasonable period will be allowed,[49] although where there is a fixed date for settlement, that will also determine the period for fulfilment,[50] and the resolutive aspect will be irrelevant.

FULFILMENT AND NON-FULFILMENT

If the condition is fulfilled prior to the point of time after which termination is possible; the contract will become unconditionally binding. If it remains unfulfilled at that point, the contract may be terminated, and in any event if it is unfulfilled at settlement, a party (still having the right to do so) may rely on it to avoid performance of his obligations.

What must occur to achieve "fulfilment" can only be determined on construction of the condition itself. Opinions may differ on the precise content of a particular clause,[51] but a generous approach should be adopted[52] in an effort to preserve both contractual relations, and flexibility.[53] While no doubt a vendor would generally prefer a conditional contract to no contract at all, its continued existence should not be subject to merest caprice. The High Court has now indicated[54] that content can be given to a clause requiring one of the parties to be "satisfied", although it was unnecessary[55] to formulate exactly what that

47 See Zelling J. (obiter at 280) disagreeing with Wells J. in Clark v. Refeld and Refeld, supra n. 29.

48 There may be express provision for extension in the condition itself as in Gough Bay Holdings Pty. Ltd. v. Tyrwhitt-Drake, [1976] V.R. 195.

49 See Re Longlands Farm: Alford v. Superior Developments Ltd., [1968] 3 All E.R. 552 and the majority judgment in J.A.G. Investments Pty. Ltd. v. Strati, supra n. 46. This is also one of the explanations for the result in Waldron and Waldron v. Tsimiklis (1976), 12 S.A.S.R. 481, discussed at below. Once a reasonable time has elapsed, a party entitled to terminate may do so without giving notice requiring fulfilment or completion – Perri v. Coolangatta Investments Pty. Ltd., supra n. 19.

50 See Aberfoyle Plantations Ltd. v. Khaw Bian Cheng, supra n. 14 (said to be a case of condition precedent to contract).

51 See for example the differing views of the meaning of "development approval" in Gange v. Sullivan (1966), 116 C.L.R. 418.

52 See Waldron and Waldron v. Tsimiklis, supra n. 49.

53 See Meehan v. Jones, supra n. 27 at 820-1 per Mason J.

54 Meehan v. Jones, supra n. 27. The clause concerned finance.

55 The case was argued on the basis that no contract had ever been formed.

connoted.[56] In the interests of certainty in the law, it is to be hoped that any differences of view may soon be resolved.[57]

THE SPECIAL DOCTRINE OF WAIVER

In the period before termination becomes possible, the condition may become irrelevant in certain circumstances not amounting to fulfilment. It is said that if one or (sometimes) both parties, having the ability to do so, waive[58] the condition, prima facie the contract proceeds as if the condition had not formed part of the contract.[59] This proposition raises difficult questions: what is being waived? who may waive? how is waiver effected? is waiver irrevocable? what is the effect of waiver?

The first question is seldom addressed. A party may waive a right conferred on him, but not one conferred on another.[60] Depending on construction, a condition subsequent may confer on a particular party neither, one or both of the rights to terminate (the resolutive aspect) and to rely on the condition as an excuse for non-performance (the conditional aspect). When a party waives, he should be taken (unless there is clear expression to the contrary) as waiving whatever rights he still has connected with the condition. All the decided cases are concerned with the effect of waiver of the conditional aspect before rights of termination arise. If however a party having both conditional and resolutive rights purports to waive after the date for termination, this can readily be taken as an election not to exercise the resolutive right as well as waiver of the conditional right. Likewise a party having only a resolutive right can be said to waive, or elect, depending on the point of time at which he surrenders the right.

56 Alternative tentative suggestions were that the party concerned (a) has an unfettered discretion (Murphy J.); (b) must act honestly (Gibbs C.J. and Wilson J.); (c) must act reasonably as well as honestly (Mason J.).

57 Meehan v. Jones, supra n. 27 was decided after this article had been substantially written. The judgments raise many interesting points and should have fuller discussion than is given here.

58 The literature and learning on waiver and the associated concepts of election and estoppel is too vast even to attempt selective citations. For purposes of this article they are distinguished as follows: *waiver* refers to surrender of a right before it becomes exercisable; *election* refers to a choice between exercising and not exercising a right after it has arisen; *estoppel* refers to circumstances in which one party, by representation or conduct, precludes himself from denying that he has waived or has elected, or that the condition has been fulfilled. There is little authority on estoppel in this area, although some judgments contain references to its possible operation.

59 This statement is supported by reference to the cases cited in dealing with the separate questions discussed below.

60 Clark v. Refeld and Refeld, supra n. 29 at 262 per Wells J. at first instance. The learned judge takes a more extreme view of the lack of effect of waiver by one party on the rights of the other than is expressed in this article at below.

The standard answer to the second question is that any party for whose "benefit" the condition was inserted in the contract may waive it.[61] If the condition was designed to benefit one party only, waiver by him alone will render the contract unconditional. It is sometimes said the other cannot waive, but what is meant is that he cannot object to the clause becoming irrelevant *before* the date for termination arises.[62] If the condition was designed to benefit both parties, both must waive if the condition is to become irrelevant.[63] It is in determining the meaning of "benefit" that the difficulties have arisen. In its conditional aspect the clause provides the benefit of an excuse for non-performance when the time for performance arrives; in its resolutive aspect it provides the benefit of terminating the contract before that time arrives. It is perfectly sensible for the same clause to confer the conditional benefit on one party only, but the resolutive benefit on both. Although, as indicated earlier, judgments on the point are properly concerned with the conditional benefit, the intrusion of arguments based on the resolutive benefit have created great difficulty.

In most cases the clause is included at the instance of the purchaser or his advisers, and the conditional benefit to him is that he need not perform obligations which would otherwise be absolute where, the condition being unfulfilled, it would be practically impossible,[64] or inexpedient, or financially disadvantageous[65] for him to do so. Usually the vendor has no such interest in the fulfilment of the condition[66]—come settlement his only interest is in getting the price.[67] It would seem to be

61 See Gange v. Sullivan, supra n. 51 at 430 per Barwick C.J., 443 per Windeyer J. It is not clear whether Taylor, Menzies and Owen JJ. in their joint judgment regarded the provision as exclusively for the benefit of one party—see 441.

62 This is a matter relating to the effect of waiver, as to which see below

63 Raysun Pty. Ltd. v. Taylor, [1971] Qd. R. 172; Heron Garage Properties Ltd. v. Moss, [1974] 1 W.L.R. 148; Gough Bay Holdings Pty. Ltd. v. Tyrwhitt-Drake, supra n. 48.

64 As where he does not have and cannot borrow the money to pay the price. In this case fulfilment of the condition is directly linked to the ability to perform obligations under the contract. In the other instances cited this is not necessarily so.

65 As where he wants to be sure of selling existing property first, or has a particular use in mind for the land, but needs planning permission.

66 It is true that, if the condition is neither waived nor fulfilled, the vendor may be able to terminate the contract. This however is a resolutive benefit. If the basis of the decision of Brightman J. in Heron Garage Properties Ltd. v. Moss, supra n. 63, is that conditions subsequent are always designed for the (conditional) benefit of both, because both are interested in termination, there is, with respect, a confusion of the conditional and resolutive aspects. On the facts, the decision was clearly correct, as the condition (obtaining of planning consent, the vendor retaining adjacent land—see above) benefitted both in the conditional aspect.

67 See however Goodwin v. Temple, [1957] S.R. Qd. 376 where, in an instalment sale, fulfilment of the condition would make the farm more profitable, and the price was specifically payable out of the proceeds of farming.

now settled that the mere fact that there is a gap of time between the date for fulfilment of the condition and the date for settlement (or performance of some other obligation) does not mean that the clause benefits both in the relevant sense,[68] nor does the fact that one party is expressly obliged to take steps to obtain fulfilment.[69] The argument based on different dates has met with varied success where the date of settlement is directly linked to and dependent upon the date of fulfilment of the condition.[70] The one clear instance of vendor benefit is where the sale is subject to the granting of approval for development of the land sold, *and* the vendor has retained adjacent land.[71] In such a case it is said that the benefit, if not actual, is potential.[72] Perhaps it would be more accurate to say that the benefit is that the vendor can refuse to convey where he has good reason to do so, namely where it has become clear that the purchaser's efforts at development have (at least temporarily) not succeeded, and there is therefore no present possibility of the value of retained land being enhanced.[73]

The cases in the area provide little guidance on how to waive, or on the revocability or otherwise of waiver. The first matter can be resolved in practical fashion—notice by the party having an ability to waive, to the other party, that he dispenses with the protection of the provision, should suffice.[74] There is no authority on whether, in this area, waiver is

68 The argument is that the vendor has an interest in being relieved of uncertainty as to whether the contract will proceed. Again there is a confusion of the conditional and resolutive aspects. The argument was presented but not used as a factor in Raysun Pty. Ltd. v. Taylor, supra n. 63, B. H. McPherson *arguendo* at 174, and expressly rejected as a factor in Gough Bay Holdings Pty. Ltd. v. Tyrwhitt-Drake; supra n. 48 at 202 relying on Gange v. Sullivan, supra n. 51.

69 Gough Bay Holdings Pty. Ltd. v. Tyrwhitt-Drake, supra n. 48 at 202.

70 Although present, it was not stressed as a factor in Gange v. Sullivan, supra n. 51, nor in Waldron and Waldron v. Tsimiklis, supra n. 49, but in Heron Garage Properties Ltd. v. Moss, supra n. 63 and Carpentaria Investments Pty. Ltd. v. Airs and Arnold, [1972] Qd. R. 436 (at first instance) it was explicitly relied on. (In the case last cited, it appears the vendor had a certain discretionary control over fulfilment of the condition, and hence over the date for settlement.) Again, this factor does not affect the conditional aspect. Insofar as waiver may interfere with the mechanism for fixing the date of settlement, any difficulty can be overcome by implication—see above.

71 See cases cited supra n. 63.

72 See the cases cited supra n. 63. It is recognised that, even with approval, the purchaser may not in fact develop the land, but an argument that there is therefore no benefit has been said to be "unreal"—Heron Garage Properties Ltd. v. Moss, supra n. 63 at 154.

73 In construing the condition it is permissible to have regard to the background against which the parties contracted— Jones v. Walton, [1966] W.A.R. 139 at 142; Gough Bay Holdings Pty. Ltd. v. Tyrwhitt-Drake, supra n. 48 at 202-203.

74 At least notice of waiver must be unequivocal—id. at 206. A notice stating that the party is satisfied with consents which have in fact been obtained, or that he is ready to settle, or calling on the other party to settle, may be enough.

an irrevocable act. It is unlikely that in an ordinary land sale one party would be so vacillatory as to seek to re-instate the condition after waiving it. The point creates great difficulties, and in *Goodwin* v. *Temple*[75] Dixon C.J., McTiernan and Kitto JJ., in their joint judgment, found no need to consider it. They held however that once a party has received all he is entitled to under the contract, it would be too late to revoke a waiver.

The effect of waiver, before the date for termination, is twofold. It prevents the party waiving from relying on non-fulfilment, either to terminate the contract or as an excuse for non-performance of his own obligations; that is, it denies him both the conditional and the resolutive benefits of the clause. If both have conditional benefits,and both waive, obviously the condition ceases to have any function; but if only one waives, the other can rely on such rights as the clause gives him.[76] It is where only one party has conditional benefits that the special doctrine of waiver operates. If that party waives, the prima facie rule is said to be that the condition ceases to have effect, that is, the other party loses such resolutive benefits as he might have.[77] This special doctrine can be justified only if the circumstances are such that the other party ought no longer to have an interest in terminating the contract. In some cases this may be so, but it is submitted that the prima facie rule would be better reversed, to read that a non-waiving party should not be deprived of a right to terminate unless he has no further interest, connected with the condition, in being able to do so.[78]

Where waiver renders the condition irrelevant it is tempting, but inaccurate, to regard waiver as equivalent to fulfilment. The difference between these two becomes relevant where the time for performance of subsequent obligations under the contract is directly linked to and dependent upon fulfilment of the condition.[79] As waiver is not fulfilment, some other method of fixing the relevant point of time must be

[75] Supra n. 67.

[76] See cases cited supra n. 63.

[77] Gange v. Sullivan, supra n. 51 at 430 per Barwick C.J., 443 per Windeyer J.; Phillips, supra n. 4 at 127-129. No case actually decides the point. In Gough Bay Holdings Pty. Ltd. v. Tyrwhitt-Drake, supra n. 48 Newton J. initially posed the question whether a term should be implied that one party could waive so as to prevent the other from relying on non-fulfilment to terminate the contract, and declined to make the implication. Later in his judgment he posed an 'objective' test: "Was it clear at the time when the contract was made that if special condition 4(b) were not fulfilled and were waived by the plaintiff, then the defendants would not thereby be deprived of any benefit or potential benefit which would have accrued to them if the condition had been fulfilled'"—supra n. 48 at 207. Again the answer was in the negative.

[78] For further discussion of rights to terminate, and the possibility of termination despite waiver, see below.

[79] For examples, see the cases cited supra n. 70.

found. One possibility is to deem the condition to have been fulfilled when waiver occurred, but a more accurate solution is to regard the machinery for fixing time as having failed, so that a reasonable time or date must be implied.[80]

THE DOCTRINE OF NON-INTERFERENCE

Another circumstance in which the condition may be affected by events occurring prior to non-fulfilment is where one party interferes with fulfilment.[81] The precise basis of the doctrine of non-interference is unclear[82] but its effect is not. A party who seeks to rely on non-fulfilment must be prepared, if required, to prove[83] the fact of non-fulfilment, and that non-fulfilment is not attributable to him.[84] In some commercial contracts the courts have required quite vigorous steps of a party if he is to escape having the failure of a condition attributed to him.[85]

The doctrine of non-interference in land sale contracts can be traced to the case of *New Zealand Shipping Co. Ltd.* v. *Societe des Ateliers et Chantiers de France*,[86] and through that case ultimately to a principle stated in Coke on Littleton, 206b. There the proposition is that a person cannot take advantage of the non-fulfilment of a condition if he "is the cause wherefore the condition cannot be performed", alternatively if "he himself is the mean that the condition could not be performed". In

80 Carpentaria Investments Pty. Ltd. v. Airs and Arnold, supra n. 70 at first instance.

81 The phrase "doctrine of non-interference" has been invented for the purposes of this article to describe a particular phenomenon. Interference includes the failure to take appropriate steps towards fulfilment. See generally Stoljar, 'Prevention and Co-operation in the Law of Contract' (1953) 21 *Can B Rev* 231.

82 See below.

83 For statements as to onus see Barber v. Crickett, [1958] N.Z.L.R. 1057 at 1061, Martin v. Macarthur, [1963] N.Z.L.R. 403 at 405; Zieme v. Gregory, supra n. 7 at 223; Agroexport State Enterprise for Foreign Trade v. Compagnie Europeene de Cereales, [1974] 1 Ll. R. 449 at 507.

84 For one instance where a party was precluded from relying on non-fulfilment see Zieme v. Gregory, supra n. 7. Other examples occur in cases cited during discussion of this issue.

85 See for example Brauer & Co. (Great Britain) Ltd. v. James Clark (Brush Materials) Ltd., [1952] 2 All E.R. 496 (exporter should have complied with requirement for obtaining an export licence which obliged him to pay his local supplier a price higher than that for which he had sold the goods); Agroexport State Enterprise for Foreign Trade v. Compagnie Europeene de Cereales, supra n. 83 (exporter should have re applied for licence). He is not however obliged to co-operate in fulfilment of a condition different to that agreed on, merely to facilitate the contract —Layman Pty. Ltd. v. Murray, [1973] 2 N.S.W.L.R. 863 (land sale conditional on subdivision into two lots. council required dedication of part of vendor's retained land as public reserve, i.e. subdivision into three lots).

86 [1919] A.C. 1.

the hands of some of the Law Lords[87] this undergoes a subtle abbreviation to the proposition that a person cannot take advantage of "his own act or default" or "his own act or omission" or, more concisely still, "his own wrong".[88] This introduction of a concept of "wrong" has in turn raised the question whether anything other than a breach of contract can be a "wrong" for this purpose.[89] The result has been to turn attention from "cause", to whether any and if so what terms should be implied in the contract, imposing contractual obligations to take reasonable steps towards and co-operate if necessary in obtaining fulfilment, and to refrain from acts or omissions which might hinder fulfilment.[90]

The implication of terms as the basis for the doctrine of non-interference is irrelevant, but is possibly not harmful, provided that the terms become standardised and strike a fair balance between the competing interests. In other words, terms should be implied "in law" rather than "in fact".[91] It may be that in subject to finance cases the form of terms to be implied has already become standardised[92] though not their content.[93] On the assumption that the doctrine rests on the implication of terms, further difficulties arise. If such a term is broken, it seems that the party in breach can still rely on non-fulfilment if he can show that that would have been inevitable even if he had performed[94]—presumably because the breach has not caused non-fulfilment. So far no attempt has been made to seek damages for failure to perform the term. It may be that in appropriate circumstances failure constitutes antici-

87 They were preceded in this by Lord Ellenborough in Rede v. Farr (1817), 6 M. & S. 121 at 124; 105 E.R. 1181 at 1182.

88 Lord Shaw of Dunfermline stood stoutly by a deliberately broader formulation based on Coke.

89 See the elaborate discussion in the judgments in Gardner v. Gould, [1974] 1 N.Z.L.R. 426 and the comment thereon by Coote, '"Subject to Finance"—Again' [1974] *N.Z.L.J.* 392.

90 In some instances the obligations are express— see for example Clause 3 of the Standard Form Contract (1975 Revision) approved by the Law Society of Western Australia and the Real Estate Institute of Western Australia considered in Heel v. Bicknell (1975), 1 S.R. (W.A.) 11 and McDonald v. Castrianni (unreported, 1975) W.A. Jmts. No. 10903 of 1976—and now Clause 18(2) of the Law Society's Agreement for the Sale of Freehold Land (1980 Edition) and Condition 1 (1.2) of the R.E.I.W.A. Contract for Sale of Land by Offer and Acceptance (1982 Revision).

91 For this distinction see Treitel, supra n. 42 at 147-148.

92 In Zieme v. Gregory, supra n. 7, two are stated, namely (a) to take all reasonable steps to seek finance; (b) not unreasonably to refuse finance offered. This has gained acceptance.

93 The wider the provision, in terms of what finance is required, the greater the difficulty of deciding what it is the purchaser must do to fulfil his obligations—see for example Heel v. Bicknell, supra n. 90.

94 Agroexport State Enterprise for Foreign Trade v. Compagnie Europeene de Cereales, supra n. 83. This is often very difficult to do—Malik Co. v. Central European Trading Agency Ltd., [1974] 2 Ll. R. 279 (also an export licence case).

patory breach entitling the injured party to repudiate the contract.[95] If termination for breach is possible, it would not be necessary for the injured party (usually the vendor) to argue that the condition itself permits him to terminate.[96]

THE RESOLUTIVE EFFECT

As suggested earlier,[97] there is sometimes a point of time before settlement, after which termination becomes possible. Assuming there has been no waiver, does non-fulfilment have an immediate effect? It is said to be a matter of construction whether the contract terminates automatically, but in the present state of the authorities it seems that careful wording is necessary to achieve this result. Merely to provide that the contract is to be "void" is by no means decisive.

In the *New Zealand* case[98] Lord Atkinson suggests that the test is that if the condition is one the fulfilment of which neither party can influence, then termination is automatic on non-fulfilment. For Australia the test was carried further in *Suttor* v. *Gundowda Pty. Ltd.*,[99] where the High Court held that if the condition is one the fulfilment of which one or both of the parties are able to influence, termination is not automatic, even though in the particular circumstances non-fulfilment has come about without any influence being exerted by either party. The reason appears to be that, if the provision were to be construed as making termination automatic, one party would have the ability unilaterally to bring the contract to an end through his own wrong. If termination is not to be automatic in that event, it should not be automatic in any event.[100]

The High Court in *Suttor*[101] based its decision on the judgments in the *New Zealand* case.[102] In that case the issue was not automatic termination, but whether non-fulfilment, through no fault of either party,

95 The possibility seems to have been considered in Waldron and Waldron v. Tsimiklis, supra n. 49 and Carpentaria Investments Pty. Ltd. v. Airs and Arnold, supra n. 70.

96 In McDonald v. Castrianni, supra n. 90, Brinsden J. (obiter) declined to construe the clause as permitting the vendor to terminate for non-fulfilment, but did not advert to the possibility of termination for breach, although breach was conceded and established. The argument may have failed in any case for lack of proper notice of intention to terminate for breach pursuant to the (1974) General Conditions of Sale, Clause 16.

97 See above.

98 Supra n. 86 at 9.

99 (1950), 81 C.L.R. 418. See more recently Havenbar Pty. Ltd. v. Butterfield (1974), 133 C.L.R. 449.

100 See Suttor v. Gundowda Pty. Ltd., supra n. 99 at 441-2.

101 Supra n. 99.

102 Supra n. 86.

made the contract terminable at the option of one only of the parties. Only Lord Wrenbury holds clearly that termination was not automatic, and even he recognises that in the particular case a decision on the point is unneccessary.[103] The other judgments are either equivocal, or strongly suggest automatic termination.[104]

It has been suggested that the *Suttor* test now stands independently of its antecedents.[105] If an opportunity presents itself for re-examining those antecedents, there is justification for modifying the *Suttor* test. The *New Zealand* case can be interpreted as suggesting a two-stage analysis:

(a) The first stage is to consider whether, on construction and apart from the question of how in fact non-fulfilment came about, the parties intended automatic or non-automatic termination.[106] In both *Suttor* and *New Zealand*, the language used suggested automatic termination.[107]

(b) The cause of non-fulfilment must then be investigated. If it has not been caused by either party, then the parties' intention, as ascertained above, should govern. If however one party has brought about non-fulfilment, he can neither himself claim that the contract is automatically terminated or terminable by him, nor can he force the other party to do so.[108] This consequence does not depend on construction of the provision, but on the independent doctrine of non-interference.[109]

A prima facie rule against automatic termination should be supported if it produces better results than a rule of automatic termination, but it is doubtful whether that is the case. The parties themselves, if not their legal advisers, may well expect that if the condition is not fulfilled, nothing further need be done. Non-automatic termination requires one of the parties to elect before termination is effected, with consequent difficulties of deciding if there has been election,[110] and allows the con-

103 Id. at 14.

104 Id. at 8 per Lord Finlay L.C.; at 10 per Lord Atkinson. Lord Shaw's judgment is equivocal—id. at 12-13.

105 J.A.G. Investments Pty. Ltd. v. Strati, supra n. 46 at 465 per Hutley J.A.

106 It is suggested at below that the prima facie approach should be in favour of automatic termination.

107 Both the forms referred to at n. 32 above expressly provide for automatic termination.

108 See the New Zealand case, supra n. 86 at 9 per Lord Atkinson.

109 Discussed at above.

110 See the discussion of election at below.

tract to subsist in the meanwhile. If both parties are content that the contract should survive, this could as well be achieved by automatic termination followed by further agreement.[111] Something new would be achieved by non-automatic termination if, after non-fulfilment but before election to terminate, the contract could become unconditional by satisfaction of the condition out-of-time.[112] This has occurred in some cases where the court has construed the condition as permitting termination by one party only.[113] Where the court considers that either may terminate, there is authority that the condition may be fulfilled out-of-time by one party before the other terminates.[114] The result is unfortunate, as it could lead to an unseemly race between the party seeking to fulfil and the party seeking to terminate.

In sum, a construction against automatic termination introduces no new benefits, and brings complications of its own. Nevertheless, since *Suttor* such clauses have universally been construed as not permitting automatic termination, as it is always possible to envisage ways in which fulfilment may be prevented.[115] Hence the cases provide no clear guidance as to what would be sufficient to achieve automatic termination.[116]

AFTER NON-FULFULMENT

If the provision is so construed that the contract does not terminate automatically on non-fulfilment of the condition, some further step must be taken before the contract ends. Some questions remain: who may take that step? how is it taken? can a party disentitle himself from taking it?

There is a tendency in the cases to relate the ability to terminate to the special doctrine of waiver.[117] In those cases where the provision is inserted for the (conditional) benefit of one party only, this means that,

111 For a factual situation see Hutchinson v. Payne, [1975] V.R. 175, discussed at below.

112 To be distinguished from fulfilment within time-as-extended, which is unobjectionable in that it requires of the co-operation both parties.

113 As to which see below.

114 Suttor v. Gundowda Pty. Ltd., supra n. 99. There was however an alternative basis for the judgment, namely that both parties had extended the time for fulfilment.

115 See the discussion by Hutley J.A. in J.A.G. Investments Pty. Ltd. v. Strati, supra n. 46 at 465-6.

116 In McDonald v. Castrianni, supra n. 90 at 11-12 Brinsden J. (obiter) noted that the clause before him expressly gave effect to the doctrine of non-interference, and continued: "I therefore cannot see why the reasoning applicable to the cases I have cited above requires the interpretation that Condition 3 should be construed as if it provided that upon the purchaser being unable to obtain approval for any reason not attributable to his default and not having given notice of waiver, the agreement becomes voidable rather than 'at an end'".

117 See at above.

on non-fulfilment, that party can at his option take steps to terminate, or ignore the non-fulfilment and proceed to settlement, and the other party must abide the event. This was said to be the case in *Hutchinson* v. *Payne*,[118] where the contract was to terminate should a specific loan be refused. That occurred, but purchaser and vendor thereafter co-operated in efforts to find alternative finance. On the facts, the case could more easily have been decided on the basis that this amounted to a reinstatement of the contract, with a new condition for finance from a suitable source, to be obtained within a reasonable time. No such alternative was available in *G. & S. Koikas* v. *Green Park Construction Pty. Ltd.*,[119] and in *McDonald* v. *Castrianni*[120] Brinsden J. (obiter) felt himself reluctantly compelled by the authorities to the view that, if termination is not automatic, only he for whose "benefit" the clause is inserted can terminate for non-fulfilment.

This is an unfortunate result. Quite different considerations apply to waiver and to election to terminate. What is waived by a party is his ability to escape from the contract if events do not turn out as he expects, those events often being of no interest to the other party.[121] This relates to the clause in its conditional aspect. In its resolutive aspect both parties are vitally interested in whether or not the contract *comes to an end* as a result of non-fulfilment but prior to the date for settlement. The whole point of fixing the earlier date is that both parties want to know, by then, whether the contract is to go on or to go off. Either should be able to resolve the uncertainty by terminating.[122] Even assuming that there may be cases where one party can, by waiving prior to the date for termination, deprive the other of an ability to terminate, there is no justification for saying that that other cannot terminate when there has been *no* waiver.

It is suggested, therefore, that irrespective of benefit in the conditional sense, if one party is to have a right to terminate prior to completion, so should the other, unless the clause with pellucid clarity provides

118 Supra n. 111.

119 Supra n. 29. The judgment is difficult to follow, but it seems that Little J. construed the "special condition" (relating to permission to erect a building) as allowing the purchaser until completion to obtain permission, but with a right to terminate if permission was not obtained within thirty days of contracting. He comments that there was therefore no period between the final date for getting approval, and completion, during which the vendor would be in a state of uncertainty as to whether the contract was to go on. Be that as it may, the effect of the decision is that he can be left in uncertainty, after thirty days, as to whether or not the purchaser will rely on non-fulfulment when the time for completion arrives.

120 Supra n. 90 at 13.

121 See at above.

122 If one elects not to terminate, he has only himself to blame for the uncertainty as to whether the other will do likewise.

otherwise. A rather more finely balanced issue is raised by the impact of the special doctrine of waiver on termination. As indicated above,[123] if only one party is benefitted (in the conditional aspect) by the clause, and waives, prima facie the whole clause, even in its resolutive aspect, becomes irrelevant. The justification for this is that it then becomes certain that the contract will not go off at the instance of the waiving party, whereas the non-waiving party generally has no further reason, connected with the condition, for needing to terminate.

In those cases where fulfilment of the condition affects one party's ability to complete[124] it may be, however, that the other party does have a need for a right to terminate *notwithstanding* that he has a fully binding contract by reason of waiver by the first. The uncertainty here is not whether the contract binds, but whether the other party will actually perform when the time comes. In a fluctuating market a vendor might prefer to be able to terminate, even at the cost of returning a deposit, rather than be locked in to a contract until settlement. The purchaser's waiver of a "subject to finance" clause may have been a gamble that prices will rise and finance will be found: if it succeeds he gets the land at the contract price; if it fails, the vendor is left with the deposit, the land, and rights of action against the purchaser of possibly dubious value.[125]

Even so, to permit termination might do injustice in as many cases as it does justice. The purchaser might waive because he has come into money; the clause might nominate a minimum amount or a lender,[126] whereas adequate finance might become available from another source, or the purchaser might ultimately prefer to rely on his own resources.[127] The solution to the dilemma is to reverse the prima facie rule, so that a party who would normally have a right to terminate may do so despite waiver by the other, unless it is clear that in the circumstances he has no

123 At .

124 An example is the "subject to finance" clause: if the purchaser does not get finance he may not be able to pay the price at settlement.

125 Considerations of this nature may lie unspoken behind those judgments where the court has striven to find "benefit" to both parties.

126 Specific clauses may become less common as a result of Meehan v. Jones, supra n. 27, discussed at above.

127 For a factual situation see Clark v. Refeld and Refeld, supra n. 29. A "subject to finance" clause specified a minimum amount (being in fact more than the total purchase price), a lender, a period for the loan, and a maximum interest rate. The purchaser did not need finance and could have settled without it. He did not waive before the final date for fulfilment, and the vendor purported to terminate thereafter. As to this point, the headnote reads: "Held, (by Wells J. and on appeal by Mitchell, Zelling and Legoe JJ.) (1) That the vendors were not entitled to cancel the contract". The judgments give widely diverse reasons for this conclusion.

further interest, connected with the condition; in being able to terminate.[128]

A prima facie rule to this effect could be extended to cover cases where termination is not automatic,[129] and there is "waiver"[130] or fulfilment after the date for termination but before any election to terminate. If the condition is fulfilled, the other party can have no further reason connected with the condition for wishing to terminate; if there is waiver, he may or may not have such a reason, depending on the circumstances.[131]

Granted that, on non-fulfilment, either party may terminate, this is effected by notice. A party may however disentitle himself from terminating by electing not to terminate.[132] Election is a deliberate act, done with knowledge,[133] and the party electing must know of the facts entitling him to elect. Since the right to terminate arises from a contractual provision, he need not also know of his right to elect.[134] It seems that knowledge of an agent may be imputed to a principal.[135] An election to affirm may be constituted by notice, or by performance of acts justified by the contract and consistent only with its continued existence.[136] It may be performed by an agent acting under authority, and a solicitor engaged to act in a sale transaction has authority to take steps necessary for completion.[137]

128 The new prima facie rule suggested here could of course be overcome by clear wording indicating some other intention, but its very existence would serve as a focal point for draftsmen.

129 Either on construction, or because of the doctrine of non-interference.

130 "Waiver" here would in truth be election not to terminate, together with waiver of the conditional right to refuse to complete.

131 A similar attitude seems to lie behind the judgment of Zelling J. in Clark v. Refeld and Refeld, supra n. 29 at 279. The resolutive provision was that if the special condition was not "fully satisfied" within the time appointed, either party could cancel the contract. Zelling J. held that "the words mean that provided the respondent had his finance organised so that the appellant could be sure that at the date of settlement they had somebody able ready and willing to settle, that was sufficient to fully satisfy clause 14(1)".

132 In effect, the party affirms the contract.

133 It is the selection of one of two inconsistent rights, extinguishing one and entitling the elector to the other—see generally Sargent v. A.S.L. Developments Ltd. (1974), 131 C.L.R. 634. Mere inaction, even with knowledge of the choice, does not necessarily amount to election—see per Mason J. in Turner v. Labafox International Pty. Ltd. (1974), 131 C.L.R. 660. Both cases concern clauses which have a resolutive but not a conditional effect.

134 Sargent v. A.S.L. Developments Ltd., supra n. 133.

135 See the judgment of Hutley J.A. in J.A.G. Investments Pty. Ltd. v. Strati, supra n. 46. See also Sargent v. A.S.L. Developments Ltd. and Turner v. Labafox Investments Pty. Ltd., supra n. 133.

136 See cases cited supra n. 135.

137 See Turner v. Labafox Investments Pty. Ltd., supra n. 133. In the particular facts of that case, the client must have been very unhappy at the result.

CONSEQUENCES OF TERMINATION

Throughout this article it has been suggested that non-fulfilment of a condition may lead to termination of the contract, either automatically or by election. Sometimes the parties specify this result, and go to some lengths to deal with the consequences of termination, such as return of deposit and instalments. Where nothing at all is specified, it could be argued that the only consequence of non-fulfilment is that, when the time for settlement arrives, one or both parties have an excuse for refusing to perform. The intention of the parties, however, clearly demands an ability to terminate immediately after non-fulfilment. This involves at least relief from obligations outstanding, and restoration of money or property already delivered pursuant to the contract. Nevertheless it is termination pursuant to a contractual provision, not rescission by way of equitable relief, and it must remain a moot point whether basically equitable doctrines such as indemnity, or compensation for use, deterioration or improvement of property,[138] will be imported via the presumed intention of the parties.

ENVOI

This article opened provocatively with the invention of a complex name for something usually described simply as a "condition subsequent". The justification has been that the concept is a complex one, resting primarily on the intention of the parties, and that each adjective does indeed denote a separate function of the provision.

138 As where work is performed on land in order to get planning approval.