

CONDITIONAL CONTRACTS FOR THE SALE OF LAND IN CANADA

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Introduction

The development of the law in Canada with respect to conditional contracts for the sale of land has followed a strange course and has produced strange results and in so doing appears to have departed both from previously decided authority and from good sense. In this article, that course of development and the results which have emerged from it will be examined. The conclusion which has been reached is that the law respecting conditional contracts for the sale of land suffers from loose use of terminology and imprecise conceptualization on the one hand and undue reliance upon formulae and abstract conceptualization on the other. The courts, particularly the Supreme Court of Canada, have substituted the application of a general formula for the individual examination of different contractual arrangements.

The consequences have included a twenty year period of uncertainty about the effect of various clauses quite commonly inserted in contracts for the sale of land. So great has been the uncertainty that it has been necessary for parties to litigate such common clauses over and over again with the Supreme Court of Canada itself being called upon on no fewer than four occasions to answer what was in each case essentially the same question of law. Conditional contracts have thus been productive of considerable expense, much of it avoidable.

The expression "conditional contract" is not a term of art but in the context of sale of land can be given a reasonably satisfactory general definition. A conditional contract is one in which the ultimate promise of performance on one or both sides is made to depend upon the happening or non-happening, or upon the existence or non-existence, of some specific event or state of affairs. Conditions can and do take many forms. They may simply "condition" the offer or the agreement without spelling

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out the consequences of fulfilment or non-fulfilment of the condition or they may spell out the consequences in precise detail. They may be precedent in form, thus preventing or suspending insistence upon performance of the conditional promise or they may be subsequent in form, having the effect of bringing to an end the obligation to perform the conditional promise. These terms "precedent" and "subsequent" will be the subject of further discussion in this article.

Conditional contracts, as generally defined above, are capable of raising a number of problems. The issue which has arisen most frequently is whether a purchaser, who has contracted to buy land under a contract which is subject to a condition relating to the obtaining of finance or of subdivision or planning approval or the like, may waive the condition so as to render the contract unconditionally binding upon both parties. The most recent pronouncement upon this matter by the Supreme Court of Canada is found in *Barnett v. Harrison*.¹

This case, of course, involved the interpretation of a specific contract. The details of the contract and the conditions contained therein will be discussed fully later. Now it is proposed simply to note that whatever may have been the correct interpretation of the terms and conditions of that particular contract the majority of the Supreme Court, through Dickson J., regarded the case as one to be disposed of by the application of the "general principle" laid down in *Turney and Turney v. Zhilka*.²

The latter case appears to be the *fons et origo* of the Canadian law with respect to conditional contracts. It shall therefore be the starting point of this discussion. The judgment in *Turney and Turney v. Zhilka* was delivered by Judson J., who also delivered two subsequent Supreme Court decisions³ upon conditional contracts and was amongst the majority in *Barnett v. Harrison*. Judson J.'s judgment upon this question in *Turney* is remarkable in a number of ways. First, it is, for a seminal judgment, remarkable for its brevity. Secondly, it is remarkable for the fact that it ignores many of the fully articulated reasons for decision put forward by the trial judge, Spence J.⁴ and concurred in by the Ontario Court of Appeal.⁵ Thirdly, it is remark-

¹ (1975), 57 D.L.R. (3d) 225.

² [1959] S.C.R. 578.

³ *F. T. Developments v. Sherman* (1968), 70 D.L.R. (2d) 426; *O'Reilly v. Marketers Diversified* (1969), 6 D.L.R. (3d) 631.

⁴ [1955] 4 D.L.R. 280.

⁵ (1956), 6 D.L.R. (2d) 233.

able in that it is based upon a theory of contractual obligation which it supports neither by reference to authority nor by means of *a priori* reasoning. Furthermore, if the conclusions as to contractual obligation in that case can be justified upon the peculiar facts of the case no attempt was made to do so, notwithstanding that different conclusions had been reached at the lower levels of the judicial hierarchy. The decision proceeds by way of bald assertion rather than reasoned argument.

The contract was for the purchase and sale of a farm property. It was formed by the vendor's acceptance of a written offer by the purchaser, which offer was subject to the following condition:

... providing the property can be annexed to the Village of Streetsville and a plan is approved by the Village Council for subdivision.

The date for completion of the sale was specified as "60 days after plans are approved". Acceptance was made simply by signing in the appropriate spot upon the typed form which contained the offer. The purchaser found himself unable, despite diligent efforts, to obtain the necessary approval from the Village Council. He purported to waive the condition so as to proceed to completion of the contract asserting that as it was solely for his benefit and was severable he had the right to do so. The vendor disagreed and when the purchaser brought an action for specific performance the vendor defended on the ground that the purchaser had failed to comply with the condition and was therefore not entitled to specific performance. The purchaser succeeded at trial and before the Ontario Court of Appeal, but lost before the Supreme Court of Canada.

Judson J., speaking for the Supreme Court, noted that neither party to the contract had undertaken to fulfil the condition and neither party had reserved a power of waiver. Furthermore, he noted that the trial judge had found that the condition was one inserted for the sole benefit of the purchaser. His Lordship expressed doubts about drawing that inference from the evidence but did not indicate in what respect he felt the evidence fell short of establishing that conclusion.⁶ In any event, he thought that the case was to be decided upon broader grounds.

His Lordship then examined two cases which the trial judge had cited as supporting the conclusion that the purchaser had

⁶ Spence J. at trial, on the other hand, carefully examined, in his judgment, the arguments put forward by the vendor to the effect that the condition could be shown to be for his benefit also. His Lordship found them unconvincing.

the right to waive the condition in this case. The decisions are *Hawksley v. Outram*⁷ and *Morrell v. Studd and Millington*.⁸ He pointed out quite correctly that those cases involved one party to a contract foregoing a promised advantage, or dispensing with part of the promised performance of the other party, in circumstances where that advantage or performance was solely for the benefit of the first party and was severable from the rest of the contract.

Then His Lordship concluded that waiver is possible only in such cases as *Hawksley v. Outram* and *Morrell v. Studd and Millington*. That is to say, it is possible only in cases where the other party has promised either to do something for the waiving party's benefit or to refrain from doing something. According to Judson J. only in those circumstances is there a right which is capable of being waived. In the *Turney* situation he said there was no right to be waived.

Even if one were to accept that proposition, that would be a strange conclusion indeed. If B promises to buy but only if he can obtain the money from some third source and A accepts that offer and promises to sell, can it not be said that A has promised an advantage to B? Is not the advantage the right to escape liability under the contract if the specified finance proves unobtainable? Surely in such a case there is a promised advantage to be foregone if he chooses to waive the protection which the condition affords him.⁹

However, Judson J. went on to say that the obligations under the contract, on both sides, depended upon a future uncertain event, the happening of which depended entirely on the will of a third party. Thus the condition was a true condition precedent — an external condition upon which the existence of the obligation depended. Now it is, of course, obviously possible that the obligations of both parties to perform may be made to depend upon some external factor. However, that is merely one possibility. There are others. For example, it may be that only one party's obligation to perform depends upon that factor, or it may be that there is no contract in existence until that factor is supplied. It is necessary to examine the "contract" to determine which of the possibilities is in fact involved. Presumably Judson J. did

⁷ [1892] 3 Ch. 359.

⁸ [1913] 2 Ch. 648.

⁹ See the casenote in (1976), 8 Ottawa L. Rev. 82 for a concurring opinion.

that. Unfortunately, his judgment does not reveal the reasoning that led to his choosing the conclusion he did. Particularly is this unfortunate as Spence J. at trial had examined the contract carefully and had set out in detail the steps involved in his reasoning and Judson J. was rejecting the conclusion reached by Spence J. and concurred in by the Court of Appeal.

Judson J. asserted that until the event occurred, there was no right to performance on either side. "The parties have not promised that it will occur. In the absence of such a promise there can be no breach of contract until the event does occur".¹⁰ Initially then, His Lordship appears to have treated the condition as going to performance, albeit to performance by both parties, but his conclusion is more consistent with a condition going to obligation. It may be that His Lordship was saying that where there is a condition precedent no contract comes into existence until the condition is performed but his judgment is not clear on this point.

In addition to there being some difficulty in accepting Judson J.'s conclusions as to the effect of the particular "agreement" in front of him there appears to be some confusion of concepts or at least terminology. A brief examination of the legal concept of condition and related terminology is called for.

I. *The Legal Concept of Condition.*

A large amount of learned literature has been written about conditions in contracts and other related contractual concepts.¹¹

All of the writers agree that the term "condition" is used in a variety of senses. Stoljar, for example, lists twelve meanings accorded to "condition" by legal usage.¹² It is his twelfth listed meaning which concerns us here:

- (xii) "condition" may mean a fact or event upon which a promise somehow depends, or the words in a contract providing for such dependence.

Stoljar classifies a condition as part of the promise to which it relates and not an independent qualification or protection for

¹⁰ *Supra*, footnote 2, at p. 584.

¹¹ Montrose, *Conditions, Warranties and Other Contractual Terms* (1937), 15 Can. Bar Rev. 309; Stoljar, *The Contractual Concept of Condition* (1953), 69 L.Q. Rev. 485; Corbin, *Conditions in the Law of Contract* (1917), 28 Yale L.J. 739; Corbin on Contracts (1950), vol. 3A; Williston on Contracts (3rd ed., 1957), Ch. 24.

¹² *Op. cit.*, *ibid.*, at pp. 487-488.

the benefit of the promisor. Williston on the other hand, says that a condition is inserted for the benefit and protection of the promisor.¹³ Montrose also says that a condition is inserted for the benefit of the promisor.¹⁴

All of these writers, however, agree that in the ordinary case a condition assumes an undertaking, in which the mutual promises have given rise to a reliance or expectation interest which will be protected irrespectively of the future duty of performance which may never arise at all.

In other words, it is their thesis that ordinarily a condition goes to performance rather than obligation. Montrose says: "... not only does English law recognise that a condition may be precedent to performance only, but that a condition should be regarded as going to performance unless the parties have made it clear that they intend it to go to the existence of obligation . . . ordinarily parties contemplate that a binding obligation will arise from the time of the conclusion of the agreement."¹⁵ The good sense of what Montrose says can readily be demonstrated. If a condition goes to performance rather than obligation it follows that repudiation by one party will constitute anticipatory breach and that liability will ensue even if the condition is never fulfilled. In the case where the purchaser has conditioned his offer upon his being able to obtain finance it quickly becomes obvious why the courts should, if at all possible, classify the condition as to finance as going to performance rather than obligation. If the vendor sells to another the purchaser should not have to persevere pointlessly to obtain finance in order to have a remedy against the vendor. However, the question is one of construction and consequently must depend upon the circumstances of each case. It is simply argued that in the absence of clear intention otherwise, the primary assumption should be that performance rather than obligation has been made conditional.

A further enquiry as to the nature of a condition is often made. That is whether it is precedent or subsequent, no matter whether it be performance or obligation to which it is precedent or subsequent.¹⁶ Corbin treats a "condition subsequent" as one

¹³ *Op. cit.*, footnote 11, vol. 5, s. 663.

¹⁴ *Op. cit.*, footnote 11, at p. 313.

¹⁵ *Ibid.*, at p. 317.

¹⁶ Stoljar points out that there would be little point in selecting the existence or formation of the contract—as the point of reference, and therefore that we should select the duty of performance as the relevant point. *Op. cit.*, footnote 11.

which terminates, extinguishes or divests the duty of performance after it has once accrued.¹⁷ Williston and Stoljar on the other hand, argue that there is no such thing as a genuine subsequent condition. To them all conditions are essentially precedent, though some are subsequent in form in that they speak in terms of divesting an existing duty of performance. Conditions as previously defined are in their opinion precedent not to obligation, but to the promisor's performance (or continued performance in a situation where performance is spread out over a period of time). Stoljar regards the confusion between precedent and subsequent conditions as arising from a false comparison made between the law of property and the law of contract.

Be that as it may, what is the significance of the supposed distinction which is drawn by many judges, lawyers and writers between conditions precedent and conditions subsequent? Stoljar's view is that the only practical significance lies in the distribution of the burden of proof.¹⁸ Plaintiffs carry the burden when suing upon contracts containing conditions precedent. Stoljar further asserts that the kind of facts which have to be proved by a defendant in connection with a condition subsequent provide no real difficulty but some real difficulty may arise for a plaintiff required to prove the existence of an immediate duty of performance by showing that a condition precedent has occurred. He then suggests that the existence of this difficulty and the desire to overcome it has led to the incorrect classification of many conditions as being subsequent rather than precedent.

The significance of the supposed distinction in case of conditional contracts for the sale of land, in view of the Supreme Court of Canada's approach, is perhaps even greater. The impact upon a claim to waive a condition is clear. There may be other significant impacts upon other matters, such as for example, the activity or inactivity of either or both parties with respect to fulfilment of conditions.

The discussions in which these learned writers engage are illuminating, but they suffer to some degree from the same flaw as the judgments delivered by the courts both within and without Canada. They deal in abstractions. They put forward definitions to tell us what conditions precedent and conditions subsequent are. They then proceed to lay down the consequences which flow from defining a condition as precedent or subsequent. They set

¹⁷ Corbin on Contracts, *op. cit.*, footnote 11, s. 628.

¹⁸ *Op. cit.*, footnote 11, at p. 509. See also, Corbin on Contracts, *op. cit.*, *ibid.*, s. 749.

forth characteristics whereby to recognise various types of condition. It all sounds quite impersonal but it is not or ought not to be. The words in which parties to a contract set out the agreement between them constitute the expression of their personal arrangement. We may choose for convenience sake to call certain types of word formations conditions, or terms, or warranties, but we make a grave mistake if we allow ourselves to lose sight of the essential truth that the words merely express the parties' meaning. The parties rarely speak in terms of conditions subsequent or conditions precedent. They more usually say that something is or is not to happen if some other thing does or does not occur. Our task is to determine what they mean in each individual case. It must be doubted whether categorization of parts of a contract under one name or another has much to contribute to such a process.

The Supreme Court judgments in *Turney and Turney v. Zhilka*,¹⁹ *F. T. Developments v. Sherman*,²⁰ *O'Reilly v. Marketers Diversified*²¹ and *Barnett v. Harrison*²² illustrate the danger well. Uncritical and formulaic categorization is seen as producing the answers and enabling the court to avoid the necessity to examine carefully the actual contract before them and the circumstances surrounding its making. This in turn makes possible the departure from good sense which has occurred.

II. *The Supreme Court's Approach Further Examined.*

It was noted above²³ that in *Turney and Turney v. Zhilka*, Judson J. said that the obligations of both parties were dependent upon fulfilment of the condition. What did he mean? Did he mean that the purported agreement was of no binding effect whatsoever until the condition was fulfilled or did he mean only that neither party could call on the other to perform (by paying the purchase price or making the transfer as the case may be) until the condition had been fulfilled? The difference being that in the latter case the parties are clearly bound by the contract in the sense that the vendor cannot sell to another until the time prescribed for fulfilling the condition, or a reasonable time for so doing, has elapsed; while both the purchaser and the vendor

¹⁹ *Supra*, footnote 2.

²⁰ *Supra*, footnote 3.

²¹ *Ibid.*

²² *Supra*, footnote 1.

²³ *Supra*, text preceding footnote 6.

may have obligations with respect to achieving the fulfilment of the condition. In the former case the position is much less clear.

The answer to the question posed is not to be found in *Turney* itself. An examination of subsequent cases at the Supreme Court level reveals only more of the same trite statements of conclusions without articulated reasons. In *F. T. Developments v. Sherman* the agreement read "This offer is conditional upon the Purchaser obtaining the rezoning of the said lands on a M-5 zoning basis". With little ado, Judson J. asserted that the obligations of both parties under the contract were conditional upon the rezoning. Why both parties? Why not only the purchaser's obligation? His Lordship does not explain. Of course, one can envisage circumstances in which the vendor might well wish to see such a condition inserted and then to rely upon it but the judgment contains no indication that this was in fact the case and again the lower courts had taken a different view from that of Judson J.

Then, in *O'Reilly v. Marketers Diversified*, Judson J. said that the agreement was subject to a condition precedent and that the vendor had no enforceable contract without performance of the condition and neither had the purchaser. The condition placed upon the offer was that the purchaser should be able to purchase the adjacent lot from its owner on satisfactory terms and conditions. Nowhere in the judgment are any facts set out which would enable the aforementioned conclusion to be reached.

The impression left by these cases is that conditions in agreements for the sale of land wherein the intervention of some third party is called for are necessarily "conditions precedent" and necessarily must be satisfied before performance can be demanded because they inevitably affect the obligations of both parties.

This is dogma and definition ruling reason and analysis. Such approach reaches its zenith (or nadir) in *Barnett v. Harrison* where Dickson J. said²⁴ that the rule in *Turney* should not be disturbed for several reasons, the fourth of which was that application of the rule avoided the determination of two difficult questions:

- (i) whether the condition precedent is for the benefit of the purchaser alone or for the joint benefit, and
- (ii) whether the condition precedent is severable from the remainder of the agreement.

²⁴ *Supra*, footnote 1, at p. 246.

With respect, this is Alice in Wonderland reasoning. The first of those "difficult questions" is surely the essential one that must be answered to properly determine a dispute between the parties with respect to waiver of or reliance upon a condition. One cannot sensibly talk of a formula which enables one to avoid asking and answering a question which is central to the issue to be resolved. As for the second "difficult question" one might simply wonder what particular difficulty it presents once the first question has been answered.²⁵

Barnett v. Harrison is worthy of further study. A number of conditions was inserted into the contract and these conditions were formulated differently so that verbal distinctions could certainly be drawn between them. Some of the conditions were worded so as to give the purchaser the option of declaring the agreement null and void. The condition which lay at the centre of the dispute simply provided that the agreement should be null and void if the condition was not complied with. It may well be that on the facts the distinction is indeed more than verbal. Possibly the vendor did play some part in the inclusion of the disputed condition and did so for his own protection or benefit. The majority judgment, however, does not rest upon any such finding but upon the "general principle" laid down in *Turney and Turney v. Zhilka*. That general principle is presumably contained in the following extract from *Turney* quoted by Dickson J.:²⁶

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 depends. Until the event occurs there is no right to performance on either side. The parties have not promised that it will occur. In the absence of such a promise there can be no breach of contract until the event does occur. The purchaser now seeks to make the vendor liable on his promise to convey in spite of the non-performance of the condition and this to suit his own convenience only. This is not a case of renunciation or relinquishment of a right but rather an attempt by one party, without the consent of the other, to write a new contract. Waiver has often been referred to as a troublesome and uncertain term in the law but it does at least presuppose the existence of a right to be relinquished.

The fourth reason given by Dickson J. for adhering to the rule in *Turney and Turney v. Zhilka* has already been mentioned.

²⁵ See Laskin C.J.'s dissenting judgment, in *Barnett v. Harrison*, *ibid.*, at p. 239.

²⁶ *Ibid.*, at p. 241. Commented upon previously in this article. See text accompanying footnotes 6-10, *supra*.

The first reason related to the distinction drawn in *Turney* between the right of one party to a contract to waive default by the other party in failing to perform a severable promise intended to benefit the first party on the one hand and an attempt by the one party to waive his own default or the default of a third party in the performance of the condition. Dickson J. judged the distinction to be a valid one, but is it? Can one speak of default on the part of the would-be "waivor" or the third party? Surely this can only be done if the party wishing to waive had promised the other party that the condition would be fulfilled or if the non-waiving party had insisted that he should only be bound if the condition was fulfilled. Or if there had at least been some understanding that the would-be waivor "owed" it to the other party to actually perform the acts contemplated by the condition. This involves an analysis of the contract and perhaps the surrounding circumstances. It cannot properly be resolved simply by calling the condition a condition precedent. The difficult questions adverted to by Dickson J. in his fourth reason cannot legitimately be avoided; they are at the heart of the problem.

The second reason advanced possibly carries more weight, although once again the language in which it is expressed begs the question. Dickson J. said:²⁷

Second, when parties, as here, aided by legal advisors, make a contract subject to explicit conditions precedent and provide therein specifically that in the event of non-compliance with one or more of the conditions, the contract shall be void, the Court runs roughshod over the agreement by introducing an implied provision conceding to the purchaser the right to waive compliance.

When a condition provides that the agreement shall be null and void in the event of non-fulfilment, it does appear *prima facie* to be a reasonable interpretation to say that the contract will become automatically avoided once the time for fulfilment of the condition has passed without success. However, the English courts, as well as those of Australia, New Zealand, and some parts of the United States, prefer to read "null and void" to mean "voidable at the option of a party not in default" in any case where the action or inaction of a party can affect the fulfilment of the condition. Perhaps as Dickson J. suggests, they are running roughshod over the agreement in so doing. But they do so for a particular reason. This is that they do not interpret the parties to intend that the one who would normally be expected to seek fulfilment of the condition should be able to sit back, do nothing towards

²⁷ *Ibid.*, at p. 246.

fulfilment of the condition and yet escape liability under the contract on the ground that the condition has not been fulfilled. That would be to allow him to rely upon his own wrong or default. Obviously there is inherent in that view a basic assumption that some obligation to act is owed by the party seeking to rely upon the condition. However, in many of the cases it is quite clear that there is no promise on anyone's part to achieve or even to attempt to achieve the fulfilment of the condition. This approach is based rather upon the courts' perception of what the "understanding" of the parties was as to seeking fulfilment.

Dickson J.'s third reason was that to allow the purchaser to waive if fulfilment of the condition could not be achieved was equivalent to giving him a gratuitous option. That reasoning is obviously fallacious. There is a clear distinction between a conditional contract and an option.²⁸ An optionee is under no obligation to exercise the option nor to take any preliminary steps that may be necessary to his being able to exercise it. The purchaser under a conditional contract is bound to complete the purchase if the condition is fulfilled and, according to conventional theory, obliged to make such reasonable efforts as are necessary on his part to achieve fulfilment of the condition. Even according to Dickson J.'s less conventional theory the purchaser under a conditional contract "will not be permitted purposely to fail to perform his obligations in order to avoid the contract".²⁹ His Lordship nevertheless decided that it would not be a good thing to allow the purchaser to waive. Instead he advocated allowing the contract terms to prevail. As conceded above, that may well lead to denial of a right of waiver in cases where the condition provided that in the event of nonfulfilment the contract shall be null and void. In many cases, however, there is no such provision yet the same result has been reached.

The Supreme Court's approach appeared at least to have been consistent in the cases looked at. In *Beauchamp v. Beauchamp*,³⁰ however, even that consistency went by the board. Gale C.J.O. in the Ontario Court of Appeal³¹ had said that the condition he was construing was not governed by *Turney and Turney v. Zhilka*. The condition said:

²⁸ See *Longlands Farm v. Superior Development Ltd*, [1968] 3 All E.R. 552.

²⁹ *Supra*, footnote 1, at p. 247.

³⁰ (1974), 40 D.L.R. (3d) 160.

³¹ (1972), 32 D.L.R. (3d) 693.

This sale is conditional for a period of 15 days from date of acceptance of same upon the Purchaser or his Agent being able to obtain a first mortgage in the amount of Ten Thousand Dollars (\$10,000.00) bearing interest at the current rate otherwise, this offer shall be null and void and all deposit monies shall be returned to the Purchaser without interest or any other charge. This offer is also conditional for a period of 15 days from date of acceptance of same upon the Purchaser or his Agent being able to secure a second mortgage in the amount of \$2,500.00 for a period of five (5) years, bearing interest at the current rate, otherwise, this offer shall be null and void and all deposit monies returned to the Purchaser without interest or any other charge.

The purchaser arranged a first mortgage of \$12,000.00 and then sent a note to the vendor notifying him that the condition had been met and that the transaction would close as per the agreement. The Court of Appeal rejected the argument that the purchaser could not obtain specific performance because there was a condition precedent which had not been complied with. It was pointed out that the condition was solely for the protection of the purchaser (said to be irrelevant in *Turney*) and that all the vendor was interested in was receiving \$15,500.00 in cash. The court, therefore, concluded that the purchasers had either met the condition or were waiving it. *Turney and Turney v. Zhilka* was said not to be appropriate to the circumstances, which were said to be distinguishable as the conditions were not of the same kind. Precisely what was seen to be the difference? The court did not say specifically. However, as already mentioned, the court did point out that the condition was solely for the protection of the purchasers and that all that the vendors were interested in was receiving the purchase price of \$15,500.00 in cash. This was clearly an important factor in the court's judgment. But it was a factor which the Supreme Court, in the cases so far discussed, had dismissed as being irrelevant. Yet when the case came before it on appeal the Supreme Court merely dismissed the appeal without hearing argument from counsel for the purchaser, on the ground that the Court of Appeal had reached the proper conclusion. No exception was taken to the emphasis placed by the Court of Appeal upon the question of the relative interest of the two parties in the condition.

Thus the Supreme Court appeared to have lapsed into inconsistency. However, in *Barnett v. Harrison*, Dickson J. sought to explain *Beauchamp v. Beauchamp* as being a case in which the condition precedent was satisfied rather than waived. It is true that Gale C.J.O. in speaking for the Ontario Court of Appeal had said that the purchasers had met the condition or alternatively were waiving it but Dickson J.'s purported explana-

tion is far from satisfactory. It fails to take account of the apparent reason why the Court of Appeal thought that the condition was either satisfied or waived. Both of those alternatives rested upon the finding that the condition was for the benefit of the purchaser alone and that the interest of the vendor was in receiving the purchase price stipulated for and, perhaps, in knowing within fifteen days of the acceptance of the offer whether or not he would receive it. It scarcely needs pointing out again that this reasoning is inconsistent with that developed in the line of cases stemming from *Turney and Turney v. Zhilka* and particularly with that exhibited by Dickson J. himself in *Barnett v. Harrison*.

Laskin C.J. with the support of Spence J. dissented in *Barnett v. Harrison*. The dissent is well worth reading as it canvasses the authorities extensively and also contains an analysis of the fundamental nature of conditions in contracts in general as well as the specific contract under consideration.

The Chief Justice insisted upon two "vital" distinctions.³² The first involved the difference between a party having merely "some" interest in a condition precedent, on the one hand, and a party for whose sole benefit that same condition was actually introduced into the contract, on the other hand. Where, for example, a condition relates to the purchaser obtaining finance within a given period of time it is of some interest to the vendor since the condition thus governs the time during which the vendor will have to withhold the land from the market so as to await the purchaser's notification. Nevertheless, if the condition has been inserted by the purchaser for his "benefit" alone he may waive it unilaterally as the interest of the vendor in the condition is not thereby in any way threatened. Indeed, it is assured.

The second distinction or proposition held vital by Laskin C.J. is that the mere involvement of a third party in the fulfilment of a condition does not of itself make a condition one which cannot be waived. With this the writer must agree. What magic is there in the involvement of a third party? The "externality" of a condition has been regarded as important in Anglo-Commonwealth law to be sure, but its significance has been with respect to the right to rely upon the condition so as to avoid the contract, not with respect to waiver.³³ It is not clear to the writer just

³² *Supra*, footnote 1, at pp. 230-231.

³³ See for example, *Barber v. Crickett*, [1958] N.Z.L.R. 1057 in which Cleary J. said that in the case of a contract containing a clause to the effect that the contract shall be void upon the happening of an event

what distinction Laskin C.J. drew between *Barnett v. Harrison* and *Turney and Turney v. Zhilka* on this point. His Lordship set forth what he termed "a homely example" of a condition involving a third party but in respect of which waiver would be permissible. The example was of a condition inserted by the purchaser relating to the obtaining of mortgage financing within a fixed period. His Lordship went on to say:³⁴

In principle, there is no difference between the foregoing situation and one where the duty of one of the parties to the contract arises only upon the act of a third party, as for example, the obligation to pay money upon the certificate of an architect or engineer.

As the Chief Justice added, surely the fact that the party may insist upon the production of the certificate before being obliged to pay does not mean that he could not waive that condition upon his obligation to pay? It is clear from Laskin C.J.'s judgment that he regarded the important question as being, for whose benefit was the condition inserted into the contract, or in other words, is it a condition which qualifies the obligation of one of the parties or of both of the parties?

Laskin C.J. purported to distinguish *Turney and Turney v. Zhilka* from *Barnett v. Harrison* by taking at face value Judson J.'s assertion in the former case that the condition affected the obligation of both parties. However, he felt constrained to disapprove of *F. T. Developments v. Sherman*³⁵ and *O'Reilly v. Marketers Diversified*.³⁶ He would not have been prepared to hold that the conditions in those cases affected the obligation to perform on the vendor's part as well as the purchaser's. They were, in the Chief Justice's opinion, conditions for the benefit of the purchaser alone and therefore were waivable by him.

Finally Laskin C.J. drew attention to two particular points of difference between his view of the law and that of Dickson J.³⁷ First, the Chief Justice did not regard a waiver as a rewriting of an agreement. It is merely a matter of foregoing some of the

over which neither of the parties has control then the word "void" would be given its plain meaning, thus bringing the contract to an end whether the parties so desire or not. Whereas in the case of a clause rendering the contract void upon the happening of an event which either can by act or omission bring about, then the party by whose act or omission the event is brought about cannot be permitted to insist upon the clause or to compel the other party to insist upon the clause.

³⁴ *Supra*, footnote 1, at p. 231.

³⁵ *Supra*, footnote 3.

³⁶ *Ibid.*

³⁷ *Supra*, footnote 1, at p. 240.

benefits bargained for. Secondly, he did not accept the argument that a vendor is unduly prejudiced by having to wait possibly until the completion date to learn whether the purchaser will withdraw from the contract by taking advantage of a condition inserted for his benefit or will complete the contract, possibly waiving the protection of a condition in so doing.

As to the first point it has to be conceded that waiver is a difficult concept to come to grips with. Decided cases and texts exhibit a certain amount of confusion, especially with respect to the distinction between waiver and variation of contract in the context of the Statute of Frauds. Nevertheless there is a respectable body of authority which supports the Chief Justice's position.³⁸

As to the second point surely the Chief Justice's position is unassailable. If in an arms length bargain the vendor allows the purchaser some time in which the purchaser may achieve the fulfilment of the condition upon which the purchaser's obligation rests, how is the vendor any further prejudiced by the possibility that even at the last moment of the period allowed, the purchaser may choose either to rely upon the condition and escape from the contract or waive the protection of the condition and be bound by the contract. The only possibility of injustice to the vendor would be if the purchaser could indicate that he was waiving and then later refused to be bound by the now "unconditional" contract on the ground of lack of consideration for the waiver. This raises some very difficult questions of legal theory which are beyond the scope of this article but the authorities cited earlier³⁹ suggest that the courts will treat such a waiver as binding and will not allow the purchaser to escape.

Laskin C.J.'s judgment, though concurred in by Spence J., was the minority judgment. Dickson J.'s judgment, affirming the proposition that a condition depending for its fulfilment upon the actions of a third party is a true condition precedent which cannot be unilaterally waived, was the majority judgment. Should one presume therefore that the question has been laid to rest?⁴⁰

³⁸ *Hickman v. Haynes* (1875), L.R. 10 C.P. 598; *Morris v. Baron & Co.*, [1918] A.C. 1; *Levey & Co. v. Goldberg*, [1922] 1 K.B. 408.

³⁹ *Ibid.*

⁴⁰ It was recently asserted in a note, *op. cit.*, footnote 9, at p. 90 that "[t]he decision in *Barnett v. Harrison* should keep the question out of the courts for a long time to come".

It is submitted that it would be dangerous to so presume. *Barnett v. Harrison* is merely one in a line of cases commencing with *Turney and Turney v. Zhilka* in which the Supreme Court has said the same thing. *Turney* did not settle the question. Many lower courts, in a number of cases, have still taken a contrary approach thus requiring the Supreme Court on appeal to reiterate its standpoint. This state of affairs is unlikely to change, especially in view of Laskin C.J.'s strong dissent. It has been submitted that the Supreme Court's approach is unsound, both on the basis of authority and as a matter of common sense. This in itself is going to produce lower court decisions which are not consonant with the Supreme Court approach. Furthermore, Dickson J.'s purported distinction of *Beauchamp v. Beauchamp* in *Barnett v. Harrison* is far from convincing and renders it very likely that the Supreme Court will yet be called upon to resolve questions arising in this area.

It is time then to look at the manner in which the courts of the provinces have coped with the pronouncements of the Supreme Court.

III. *The Provincial Courts Puzzle.*

What have the provincial courts made of all this? The answer is, many different things. A few examples should suffice.

In British Columbia one trial judge, Aikins J., said in *G & R Construction v. Southern Slope Holdings Ltd and Pacific Holdings Ltd*⁴¹ that it was unnecessary to determine whether a condition was introduced into the contract for the benefit of the purchaser alone because, even if it was, it could not be waived because it was a condition precedent. The condition related to "obtaining \$140,000.00 mortgage from Imperial Life, 25 year term at 7% with satisfactory mortgage advances". Thus the Supreme Court majority view in *Turney, F. T. Developments*, and *O'Reilly* was adhered to.

In the course of the judgment reference was made to an Ontario case, *Jackson v. Farwell Estate*⁴² in which the purchaser made an offer expressly conditioned on the land being rezoned by a municipal corporation or a planning board before a certain date, otherwise the offer was to be null and void. Roach J.A., speaking for the Court of Appeal said:⁴³

⁴¹ (1968), 63 W.W.R. 65.

⁴² [1961] O.R. 322, 27 D.L.R. (2d) 275.

⁴³ *Ibid.*, at p. 328 (O.R.).

I think it is clear that in the first place the purchaser made his offer subject to that condition for his own benefit but I do not think that fact enabled him to later waive it. The vendor accepted the offer subject to that condition and it became an integral part of the agreement between them so that either party could treat the contract as null and void in the event of the condition not being fulfilled. That condition was a true condition precedent, on the fulfilment of which the whole contract depended. It was not a condition to be performed by either of the parties to the contract. The judgment of the Supreme Court of Canada in *Turney v. Zhilka* . . . is decisive of the matter.

By way of comment in passing, one does not have to dispute that the condition is an integral part of the contract in order to disagree that it inevitably follows that either party could treat the contract as null and void in the event of the condition not being fulfilled. Nevertheless, the acceptance of *Turney* in these two cases is obviously complete. However, another trial judge, Bouck J., of the British Columbia Supreme Court said in *Matrix Construction Ltd v. Chan*⁴⁴ that there are two kinds of condition: one that goes to the root of the contract and cannot be unilaterally waived; another that is inserted for the sole benefit of one party and may be waived by the person for whose benefit it was inserted. This was said notwithstanding *Turney*, *F. T. Developments* and *O'Reilly v. Marketers Diversified*.

The Court of Appeal⁴⁵ has subsequently reasserted *Turney* in rejecting Bouck J.'s view and applying *Barnett v. Harrison* but the fact remains that these cases show that differences of opinion still exist even amongst the judiciary about the law which should be applied to conditional contracts.

Again, in Ontario, it has been held on the one hand that a clause making an offer conditional upon the purchaser being able to obtain an acceptable offer on his property which was already up for sale was a condition precedent which could not be waived. The condition provided that in the event the condition could not be fulfilled the offer would be null and void.⁴⁶ On the other hand, Laskin J. (as he then was) in *Aldercrest Developments v. Hunter*⁴⁷ held that although certain conditions relating to subdivision approval and the like were true conditions precedent the vendor committed a breach of contract in failing to help achieve fulfilment of the conditions. His Lordship held that although neither party had promised at the time of "contracting"

⁴⁴ (1975), 51 D.L.R. (3d) 284.

⁴⁵ [1976] 2 W.W.R. 764.

⁴⁶ *Lestrangle v. Juda* (1973), 31 D.L.R. (3d) 684.

⁴⁷ [1970] 2 O.R. 562.

to bring about fulfilment of the conditions the vendor had subsequently undertaken to make efforts to that end. Indeed, notwithstanding that the condition had not been fulfilled, specific performance was denied only because the court could not compel the third party, the Town Council, to reach a decision in favour of the purchaser. In *Genern Investments Ltd v. Beck et al.*,⁴⁸ Hartt J. was able to distinguish *Turney and Turney v. Zhilka* because the contract confronting him contained an express right of waiver. This express right had the dual effect of guaranteeing the ability to waive unilaterally and indicating clearly that the condition was not a "true condition precedent". It was not a condition affecting the existence of the contract, nor the obligations of both parties.

There was an express right of waiver also in the contract considered by Holland J. in *Metropolitan Trust Co. of Canada v. Pressure Concrete Services Ltd.*⁴⁹ The important conditions were as follows:

3. THIS OFFER by the Purchaser to purchase the Subject Property is conditional upon each of the following conditions, which conditions, having been inserted for the benefit of the Purchaser, may be waived by it at any time by notice to the Vendor. In the event that each of the said conditions has not been fulfilled and complied with within the time specified for fulfilment and compliance, or has not been waived by the Purchaser, then this Agreement shall be null and void, the deposit money shall forthwith be returned to the purchaser without deduction, and neither party shall have any further rights or obligations hereunder:

- (e) The Vendor shall deliver to the Purchaser within ten (10) days of its execution of this Agreement, the consent of the mortgagee of the Second Mortgage to the surrender of the existing Lease of the Subject Property made the 1st day of June, 1966, between Joseph Y. Robichaud, George L. Roberts and the Vendor, as lessors, and Associated Freezers of Canada Limited, as lessee, which consent shall be conditional only upon the completion of the purchase of the subject property by the Purchaser.

...

5. If each of the conditions as set out in Paragraph 3 hereof shall have been fulfilled and completed within the time limited for the satisfaction thereof, then, subject to the conditions set out in Paragraph 7

⁴⁸ (1969), 3 D.L.R. (3d) 611. Note that in *Gaywood Hall Developments v. Wilkes* (1972), 23 D.L.R. (3d) 505, Addy J. held that an express right of waiver must be exercised within the period allowed for fulfilling the condition if the contract does not specify otherwise. See also *Dennis v. Evans* (1972), 23 D.L.R. (3d) 625 (Ont. H.C.).

⁴⁹ [1973] 3 O.R. 692. Since reversed on appeal on another point.

hereof, this Agreement of Purchase and Sale shall be completed on or before the 14th day of August 1970, (which day is herein referred to as the "Closing Date").

...

7. IT IS A CONDITION of the closing of the sale and purchase of the Subject Property that a new Lease (hereinafter referred to as the "Head Lease") of the Subject Property be entered into by the Purchaser, as landlord, and Associated Freezers of Canada Limited, as tenant, which Head Lease shall have effect from and after the Closing Date. It is a condition to the execution of the Head Lease by the Purchaser that the Vendor deliver to the Purchaser on or before the Closing Date a subordination of existing Leases to Dominion Stores Limited and A. & P. Food Stores Limited, in favour of the Head Lease.

...

15. At such time as the conditions contained in Paragraph 3 hereof have been fulfilled or complied with or have been waived by the Purchaser, this Agreement shall constitute a binding contract of purchase and sale.

Holland J. decided that condition 3(e) was a true condition precedent notwithstanding the express right of waiver. The reason for this decision was that the specified consent of the second mortgagee to the surrender of the existing lease and its replacement by a new head lease was in fact and in law essential to the fruition of the transaction. Without it nothing could be achieved. Waiver was, therefore, an impossibility and the condition was a true condition precedent. Nevertheless, Holland J. pointed out that the vendor had undertaken to obtain the consent and could not be permitted to repudiate the contract because the condition was unfulfilled when he had failed to make any more than minimal efforts to bring about its fulfilment. Furthermore, the delivery of consent was a contractual obligation undertaken by the vendor. Specific performance of that contractual obligation was withheld apparently because the consent of a third party was required and that was something which the court could not compel. Consequently judgment for damages was awarded against the vendor for the breach or omission with respect to procuring the necessary consent.

It would seem then that the mere fact that the condition was a true condition precedent did not preclude specific performance but the legal necessity of obtaining consent which rendered it a true condition precedent did make specific performance a remedy which, in the exercise of its discretion, the court would not order. It is clear that Holland J. held that there were contractual rights and obligations between the parties notwithstanding the non-fulfilment of the condition precedent. However, the contractual obligation breached was that under 3(e)

relating to the obtaining of consent, not the ultimate obligation to complete the transaction. The matter of assessment of damages was then referred to the Master, with some guidance supplied by Holland J.

The judgment appears to be consistent with *Turney and Turney v. Zhilka* while yet allowing recovery of damages. This is possible because in *Turney* itself attention was drawn to the fact that neither party had promised the fulfilment of the condition thus suggesting that there might be rights to be waived even prior to fulfilment in a case where such a promise had been made. However, certain aspects of the judgment are not so readily reconciled with either the dicta or the underlying philosophy of *Turney and Turney v. Zhilka*, and perhaps they underscore an inconsistency in that latter case. The inclusion of a promise by one or other party to attempt to achieve the fulfilment of a condition may well mean that there are rights and obligations between the parties prior to the fulfilment of the condition. However, can it mean that the ultimate rights and obligations with respect to completion of the transaction are already in existence, whereas they would not be without such a promise? Surely not, yet it was apparently only the inability to compel the third party which caused Holland J. to deny specific performance in *Metropolitan Trust v. Pressure Concrete*. His Lordship quoted approvingly, *Gilchrist v. Commodore*,⁵⁰ in which the Ontario Court of Appeal had granted specific performance of a conditional contract where the condition had not been fulfilled because one party had neglected to make reasonable efforts to obtain fulfilment. The report of that case is exceedingly brief but it does not appear that there was any promise to achieve fulfilment. But even if there had been it is submitted that the existence or non-existence of the "primary" contract cannot be made to depend upon that fact.

One of the problems facing some of the provincial court judges seems to be that they regard the Supreme Court majority view as illogical. Furthermore, not all of their cases have involved waiver. In such other circumstances the illogicality of an approach which denies the existence of an enforceable contractual relationship becomes even more obvious. Some judges on the other hand, appear quite happy with the position. Take for example, the decision of Cowan C.J.T.D. of the Nova Scotia Supreme Court in *N.S. Tractors & Equipment Ltd v. McArthur Estate*,⁵¹ where the

⁵⁰ (1931), 40 O.W.N. 577.

⁵¹ (1975), 13 N.S.R. (2d) 448.

vendor contracted to sell the only piece of land he owned (in fact the transaction was an option rather than a sale). The contract contained the following sentence:

The said consideration [for the option] is repayable by the Owner to the Purchaser if the said property is not zoned either commercial or industrial.

The property was in fact zoned "residential". The purchaser decided to use the land for residential purposes and sought to waive. Cowan C.J.T.D. quoted extensively from *Turney* and subsequent Supreme Court cases, even from *Matrix Construction Ltd v. Chan*. He then said:⁵²

In the present case, however, I am of the opinion that the evidence as to who required the clause in question to be inserted and for whose benefit it was inserted, is irrelevant since, on the interpretation of the Option Agreement of June 11, 1973, I am of the opinion that the clause in question set out a condition precedent which was not waivable by either party.

That interpretation is particularly hard to follow as the court decided that the condition as to zoning related to the existing zoning category, not to a future re-zoning. Thus it was not a case requiring action by a third party but was rather a case in which, in effect, precise performance by the vendor would require transfer of a parcel of industrial land. The purchaser was merely agreeing to accept property which was in an important respect different from that for which he had bargained. The only basis upon which the vendor might have wanted such a condition inserted is if the property could have been sold for a higher price as residential property. Not only was there no evidence led to that effect, but the court, as has been noted, dismissed evidence on such matters as being irrelevant.

The Nova Scotia court's mechanical application of the *Turney and Turney v. Zhilka* and *Barnett v. Harrison* formula may be contrasted with the approach taken by McDonald J. of the Trial Division of the Supreme Court of Alberta in a recent unreported case. In *Roy F. Dales and Dalewood Rentals Ltd v. Edmonton Radiator Works Ltd*,⁵³ the facts were that in the course of a land assembly programme the plaintiff entered into a contract to purchase the defendant's lands. The contract contained the following condition:

The foregoing offer is subject only to my being able to make satisfactory arrangements for the assembly of the adjoining lots 13, 14 and

⁵² *Ibid.*, at p. 458.

⁵³ 1976, S.C. No. 86918, not yet reported.

14A, block 2, plan 226 P.L. If such arrangements can not be made, you shall return my deposit to me.

The plaintiff was unable to obtain a commitment to sell from the owner of lot 13A. However, he was "subjectively" satisfied by the tenor of negotiations that the assembly could be completed, and he indicated to the vendor that he would complete the transaction. The vendor refused.

McDonald J. held that the condition was complied with as long as the plaintiff was subjectively satisfied with the arrangements. However, His Lordship went on to consider the possibility of waiver on the part of the plaintiff in case his first finding was in error. In doing so, he applied *Morell v. Studd and Millington*,⁵⁴ *Hawksley v. Outram*,⁵⁵ *Beauchamp v. Beauchamp*,⁵⁶ *Matrix Construction Ltd v. Chan*⁵⁷ and the following quotation from *Turney and Turney v. Zhilka* itself:⁵⁸

...one party to a contract may forego a promised advantage or may dispense with part of the promised performance of the other party which is simply and solely for the benefit of the first party and is severable from the rest of the contract.

In view of the fact that *Morell v. Studd and Millington* and *Hawksley v. Outram* were distinguished in *Turney*; that *Beauchamp v. Beauchamp* was restrictively interpreted in *Barnett v. Harrison*;⁵⁹ that Bouck J.'s trial decision in *Matrix Construction Ltd v. Chan* was reversed on appeal,⁶⁰ and that Judson J. refused to apply the principle contained in the quotation above to the facts in *Turney and Turney v. Zhilka*, the reliance upon those cases might raise eyebrows. However, McDonald J. held that the case was distinguishable from *Turney* on the facts, quoting the following words of Judson J.:⁶¹

...here there is no right to be waived. The obligations under the contract, on both sides, depend upon a future uncertain event, the happening of which depends entirely upon 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 depends. Until the event occurs there is no right to performance on either side.

⁵⁴ *Supra*, footnote 8.

⁵⁵ *Supra*, footnote 7.

⁵⁶ *Supra*, footnote 30.

⁵⁷ *Supra*, footnote 44.

⁵⁸ *Supra*, footnote 2, at p. 583.

⁵⁹ *Supra*, footnote 1.

⁶⁰ *Supra*, footnote 45.

⁶¹ *Supra*, footnote 1, at pp. 583-584.

Unfortunately His Lordship does not make clear precisely what the factual difference was. It could be that the condition did not affect the obligations under the contract *on both sides*, as a matter of construction. It could be that His Lordship meant that the happening of the event did not depend entirely upon the will of a third party but largely upon the subjective satisfaction of the plaintiff, an argument which is similar to that upon which he based his first reason for decision.

It is also not clear just how the condition differs from that contained in the contract involved in *O'Reilly v. Marketers Diversified*⁶² whereby the "above offer" was subject to:

Purchaser being able to purchase lot No. 8 (described as adjacent to Lot 7, James Bay, Prevost Island) owned by Mr. DeBerg on terms and conditions satisfactory to purchaser prior to September 1, 1966.

It would seem that there is still a good deal of room for speculation and manoeuver with respect to conditional contracts for sale. It should be noted, however, that *Barnett v. Harrison* was not referred to in the *Dalewood Rentals Ltd* case.

Barnett v. Harrison was referred to in a recent Ontario High Court decision, *Brooks v. Alker et al.*⁶³ The contract under discussion in that case was made subject to a condition as follows:

Notwithstanding the aforesaid it is made a condition of this Offer that if the Purchaser is unable at his own expense within 10 business days from the date of acceptance hereof to obtain a first mortgage on the property herein wherein the principal amount is not less than ninety percent of the purchase price and the interest rate does not exceed 9¼ % per annum, then in this event the Contract herein is to become null and void and the deposit is to be returned without any deduction whatsoever.

The purchaser did not arrange a mortgage as contemplated in the condition but did obtain funds from another source and was ready to complete on the closing date. His solicitor notified the vendors that the condition had been met. The vendors refused to complete arguing that the failure to fulfil what was a condition precedent voided the contract.

Henry J. disagreed with the vendors' contention. Presumably he disagreed that the condition was a condition precedent as well as that the failure to fulfil it voided the contract. His Lordship said that the condition was solely for the benefit of the purchaser

⁶² *Supra*, footnote 3, at p. 632.

⁶³ (1975), 60 D.L.R. 577.

and that all the vendors were entitled to by way of performance was the balance of the purchase price in full on completion. The situation was equated with that which obtained in *Beauchamp v. Beauchamp*. The report of *Barnett v. Harrison* became available to Henry J. after the trial had concluded and he drew support from the fact that Dickson J. had distinguished *Beauchamp v. Beauchamp* from *Turney and Turney v. Zhilka* and had, in his words, "expressly endorsed" *Beauchamp*.

In the light of this brief analysis of lower court decisions it may be said that the Supreme Court's pronouncements have done little to improve predictability of the outcome in conditional contract cases where waiver is attempted. Numerous unreported cases further attest to this.

Some mention has been made of decided cases in other jurisdictions. We will turn now to examine some of these authorities as they provide a useful contrast to the approach taken by the Supreme Court. Furthermore, some of the cases involve issues other than waiver and may point up difficulties with the Supreme Court approach to which the courts in Canada have not yet had to face up.

IV. *Conditional Contracts in Other Jurisdictions.*

Courts in other jurisdictions have for the most part taken a very different approach to conditional contracts from that taken by the Supreme Court of Canada. As Laskin C.J. pointed out in *Barnett v. Harrison*⁶⁴ this is the case in England, Australia, New Zealand and the United States. Although in recent years there have been some decisions in England and Australia which run counter to the general line of authority,⁶⁵ the courts of these countries have been very consistent in holding that a party who inserts a condition into a contract for his benefit may waive that condition and insist upon the performance of the contract as though the condition had never existed. Nor have they balked at taking this approach when the conditions have said that in the event of non-fulfilment the contract shall be null and void.

For example, in *Gange v. Sullivan*⁶⁶ the Australian High Court considered a condition whereby the contract was subject to the purchaser obtaining development approval from the ap-

⁶⁴ *Supra*, footnote 1, at p. 234.

⁶⁵ *Lee-Parker v. Izzet (No. 2)*, [1972] 1 W.L.R. 775; *Grime v. Bartholomew*, [1972] 2 N.S.W.L.R. 827.

⁶⁶ (1966), 116 C.L.R. 418.

propriate council. The condition went on to say that if the council had not granted the approval by a specified date the contract should be deemed to be at an end and all moneys paid by the purchaser to the vendor should be refunded.

Barwick C.J. noted that the vendor had not retained any interest in the land nor in any other land that could be affected. His Honour then said that the expression "[t]his contract is subject to . . ." meant in that contract "[t]he performance of this contract by the purchaser is subject to . . .".⁶⁷ Consequently the contract would not automatically terminate so as to release both parties if the development approval was not forthcoming by the specified date, notwithstanding the express words of the contract. And because the condition was for the purchaser's benefit, he could waive it and require the vendor to complete.

Taylor, Menzies and Owen JJ. did not comment upon the possibility of waiver (no waiver had been attempted) but they also were prepared to hold⁶⁸ that the non-fulfilment of the condition rendered the contract voidable rather than void. They explained their approach thus. First, they asserted that in every case the effect of a condition depends upon the language in which it is expressed so that a decision upon the meaning of one condition cannot determine the meaning of a different condition. Nevertheless, it was noted that the authorities revealed a disposition on the part of the courts to treat non-fulfilment of conditions as leading to voidability rather than voidness. The reason for this being that they wished to prevent any party to a contract from gaining an advantage from his own misconduct with respect to the non-fulfilment of the condition.

Windeyer J. in the same case said⁶⁹ that because the condition was inserted primarily for the purchaser's benefit he could waive but only if he did so prior to the date set down for obtaining the council's approval. This latter proviso being stated because the time element in the condition was for the benefit of both parties and not merely the purchaser.

The overall approach taken in that Australian case was very similar to that adopted by the Supreme Court of Wisconsin in *Godfrey Co. Ltd v. Crawford et al.*,⁷⁰ which was quoted from by Laskin C.J. in his dissent in *Barnett v. Harrison*. The condi-

⁶⁷ *Ibid.*, at p. 429.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*, at p. 443.

⁷⁰ (1964), 126 N.W. 2d 495.

tion in *Godfrey* involved a zoning revision and provided that the contract was to be null and void if the zoning revision was not achieved. The court saw advantage or benefit deriving to both parties. It protected the buyer in the obvious way. Non-fulfilment of the condition cancelled his liability and enabled him to recover any payments made. However, it also protected the seller in that, at a definite point in time, it enabled him to know whether he was under any further liability under the contract. Simple non-fulfilment of the condition without more would also free him from liability. But the purchaser could waive prior to the date for fulfilment of the condition because in so doing he was giving up a benefit which was his alone and provided that he did so prior to the date for fulfilment of the condition he did not in any way interfere with the protection which the condition afforded to the vendor. The latter's interest simply being to know at that date whether the buyer is absolutely bound or whether the contract is terminated so that he is free to sell to someone else.

In *Turney and Turney v. Zhilka*, Judson J. had said that the purported waiver was not a renunciation of a right, but a unilateral attempt to write a new contract. In *Godfrey* the court said that it was not rewriting the contract in allowing waiver but merely giving effect to "the well recognized principle that a party may waive a provision inserted in a contract for his own benefit".⁷¹

It is also interesting to note the Wisconsin court's response to the argument that the contract specifically authorized waiver of title defects but did not so authorize waiver of the zoning revision condition. While the court might have been persuaded by this difference in a borderline case, where the attribution of benefit was more evenly balanced, it was not so persuaded in this case where it was clear that the main purpose of the condition was to benefit the buyer.

A goodly number of cases attest to the fact that the principle that a party may waive a provision inserted into a contract for his own benefit is indeed well recognized in the United States.⁷²

⁷¹ *Ibid.*, at p. 498.

⁷² *Fun-N-Fish, Inc. v. Parker* (1960), 103 N.W. 2d 1; *Richardson v. Snipes* (1959), 330 S.W. 2d 381 (Tenn.); *Miracle Construction v. Miller* (1958), 87 N.W. 2d 665 (Minn.); *Creith Lumber Inc. v. Cummins* (1955), 126 N.E. 2d 323; *Major v. Price* (1954), 84 S.E. 2d 445; *Funke v. Paist* (1947), 52 A. 2d 655; *Bu-Vi-Bar Petroleum Corporation v. Krow* (1930), 40 F. 2d 488.

The principle appears similarly well established in Australia,⁷³ and in New Zealand.⁷⁴

The dicta in the New Zealand case of *Donaldson v. Tracy* are particularly interesting. The condition related to obtaining approval from a licensing commission so that a licence to dispense alcoholic beverages upon the subject premises might be obtained. The court said that it was not concerned with interpretation of the contract in any narrow sense of the word interpretation. What it was concerned with was determining for whose benefit the condition was inserted into the contract. Furthermore, it regarded evidence of the surrounding circumstances as properly admissible as an aid to answering that question.

It is also interesting to note that the court did not accept the proposition that the mere fact that the condition originated in the purchaser's offer was conclusive proof that it was for the purchaser's benefit. It was said that it may only have been there because without it the offer would not have been accepted. Nevertheless, the surrounding circumstances did indicate to the court that the condition was inserted for the protection of the purchaser.

The English authorities are referred to last because there may be an opposite trend now emerging there, though the picture is far from clear as yet. It is intriguing that while Laskin C.J. in *Barnett v. Harrison* equated the English position with that pertaining in Australia, New Zealand and the United States, he does not discuss any English authority except to briefly mention *Heron Garage Properties v. Moss*.⁷⁵

Heron Garage Properties v. Moss is a case which raises some doubts as to the direction in which the English courts may be going and contains dicta which detract from rather than support Laskin C.J.'s position. First, however, the proposition that, in English law, a party may unilaterally waive a condition inserted for his own benefit is supported by *Hawksley v. Outram*,⁷⁶

⁷³ *Maynard v. Goode et al.* (1926), 37 C.L.R. 529; *Suttor v. Gundowda Pty Ltd* (1950), 81 C.L.R. 418; *Raysun Ltd v. Taylor*, [1971] Qd. R. 172. See also *Lombards v. Morgan*, [1957] V.R. 153; *Zieme v. Gregory*, [1963] V.R. 214; *Charles Lodge Pty Ltd v. Menahem*, [1966] V.R. 161 and *G & S Koikas v. Green Park Construction Pty Ltd*, [1970] V.R. 142.

⁷⁴ *Donaldson v. Tracy*, [1951] N.Z.L.R. 683; *Barber v. Crickett*, *supra*, footnote 33.

⁷⁵ [1974] 1 W.L.R. 148.

⁷⁶ *Supra*, footnote 7.

Morell v. Studd and Millington,⁷⁷ and possibly by *Wood Preservation Ltd v. Prior*.⁷⁸ *Heron Garage Properties* does not directly contradict that proposition, indeed in an indirect fashion it supports it. However, if strictly applied it would have the effect of greatly restricting the circumstances in which waiver would be permitted.

The condition in that case was a fairly special one which read as follows:

7. This agreement is expressly conditional upon the purchaser obtaining detailed town planning consent for the redevelopment of the property as a petrol filling and service station together with a car wash in accordance with plans and drawings to be submitted to the local town planning authority by the purchaser such consent to be either unconditional or subject only to conditions acceptable to the purchaser. The purchaser shall immediately notify the vendors or their solicitors of receipt by it of a copy in writing of such unconditional or conditional consent. In the event of conditions being imposed the purchaser shall then have 28 days from the receipt of such conditional consent to notify the vendors or their solicitors whether it accepts the same. If the purchaser shall fail to notify the vendors within such period that it does not accept the said conditions then it shall be deemed to have accepted the same. In the event of town planning consent in such terms as above not being granted within six months from the date of the first local town planning authority meeting after the date hereof (or within such extended time as the parties hereto may agree in writing) then after the expiration of such period (or such extended period) either party may by notice in writing to the other party determine this agreement whereupon the deposit paid hereunder shall forthwith be returned to the purchaser without interest and subject thereto this agreement shall be thenceforth be [sic] null and void and of no further effect.

Brightman J. proceeded upon the basis that a party could waive a condition inserted for his own benefit but only where the condition is "...in terms for the exclusive benefit of the party seeking to eliminate it". His Lordship held that the terms of the above condition showed that the condition was fundamental to the enforceability of the agreement as a whole and was not expressed as being precedent only to the liability of the purchaser. Indeed, it expressly conferred a right upon the vendor to determine the agreement if the condition was not fulfilled. His Lordship deduced all of that from the condition itself and expressed reluctance to "travel outside the terms of the agreement" to look at surrounding circumstances. However, he said that if

⁷⁷ *Supra*, footnote 8. Cf. Judson J.'s analysis of those cases in *Turney and Turney v. Zilka*, *supra*, footnote 2.

⁷⁸ [1969] 1 W.L.R. 1077.

he were permitted to do so he would still conclude that the required consent was not for the benefit of the purchaser alone as it could well be important to the maintenance of the value of the land retained by the vendor.⁷⁹

Consequently Brightman J. said that unless the benefit of the condition is obviously vested in one party alone by the contract or is by inevitable implication for it alone, that party will not be permitted to unilaterally waive it. The presumption thus will be that the condition is for the benefit of both parties. The possibility of waiver is recognized but the likelihood of its being permitted is reduced.

A number of the cases have centred upon issues other than waiver of conditions. The Australian cases, *Charles Lodge Pty Ltd v. Menahem*⁸⁰ and *G. & S. Koikas v. Green Park Construction Pty Ltd*,⁸¹ were concerned with the right to rely upon non-fulfilment of the condition so as to avoid the contract. That was also the issue raised in the New Zealand case of *Barber v. Crickett*.⁸² Where it is the vendor who seeks to rely upon the condition to escape from the contract the issues are essentially those presented by a purported waiver on the part of the purchaser. Where it is the purchaser who seeks to rely upon the condition the issues are somewhat different.

The approach taken by the courts outside Canada has differed greatly from that which would probably be taken by the Supreme Court of Canada. Whereas the Supreme Court talks invariably in terms of conditions precedent these other courts, with few exceptions, talk in terms of conditions subsequent. There is a contract in existence. It is one which binds the vendor to transfer title upon payment being tendered. It also binds the purchaser to pay the purchase price by a given date or within a reasonable period of time, subject to his being able to obtain specified mortgage financing or to some other stipulated factor. The purchaser, so the courts say, can avoid the contract if he is unable to obtain the financing called for. However, he must make reasonable efforts to obtain financing or else he will not be allowed to escape from the contract by relying upon the condition. To allow him to do so in the absence of reasonable efforts on his part would be to allow him to take advantage of his own

⁷⁹ *Supra*, footnote 75.

⁸⁰ *Supra*, footnote 73.

⁸¹ *Ibid*.

⁸² *Supra*, footnote 33.

"default" and to defeat the original expectations of the parties. Thus the courts, as already noted, interpret a condition declaring the contract to be "null and void" upon non-fulfilment as meaning voidable by a party not in default. Because of this it seems to follow that positive steps must be taken to avoid this contract, probably by the date, if any, specified for fulfilment of the condition, otherwise by the closing date. If avoidance is not communicated the contract remains on foot and the purchaser can no longer escape the obligation to pay. However, some judges would conclude that the contract was off unless a waiver was communicated by the date for satisfying the contract on the ground that the time element in such conditions is for the benefit of both parties.⁸³

If, on the other hand, it is the vendor who wishes to avoid the contract the court will enquire whether the contract gives him the right to avoid. The questions to be asked are obviously those that these same courts would ask if confronted with a disputed waiver by the purchaser. For whose benefit was the condition inserted? If for the purchaser's benefit alone then the vendor cannot rely upon it to avoid the contract. If for the vendor's benefit as well then he also may rely upon it. If it is not clear one way or the other then there may be a presumption that it is for the benefit of both.

It follows that if the vendor should receive a better offer subsequently to his acceptance of the purchaser's offer he will be in breach of contract if he sells to the second offeror. There is a contract in existence and even though the condition may not yet have been satisfied this sale will constitute an anticipatory breach of contract.

It is not suggested that the overall approach of these extra-Canadian courts is without difficulties. The characterization of conditions as subsequent rather than precedent is rarely explained. Often some violence must be done to the language of the contract, particularly with respect to the phrase "null and void". Few, if any, contracts contain an explicit undertaking by the purchaser to make reasonable efforts to obtain financing or whatever else may be called for. What may constitute "benefit" to either party is not conclusively defined. Nevertheless this approach permits problems to be disposed of in what appears to be a commonsense fashion, paying due attention to the expectations of the parties as discovered from the contract, the surrounding circumstances or,

⁸³ *Supra*, footnote 66.

where necessary, common understanding. It is more satisfactory than the Canadian approach.

The conclusions drawn from all of this are as follows. The courts in these other jurisdictions are not completely *ad idem* on questions involving conditional contracts, nor even on the classification of conditions as precedent or subsequent. However, in general they are prepared to permit waiver by a party where the condition was inserted for his sole benefit. They are not deterred from doing so by the mere fact of some third party involvement in the fulfilment of the condition. Finally, they tend to regard stipulations that contracts are to be void if the condition is not fulfilled as being less than automatic in their operation, with a pronounced inclination to treat them as meaning that the contracts are voidable at the option of a party not in default where those conditions do not depend entirely for their fulfilment upon the will of a third party. In general, they regard the question, for whose benefit was the condition inserted into the contract, as the essential question and they are prepared to draw distinctions between degrees and kinds of benefit where conditions have something to offer both parties.

V. *The Canadian Doctrine Contrasted.*

The difference between the approaches to questions of waiver has been sufficiently commented upon. What might be the Supreme Court of Canada's approach to these various issues raised in cases where waiver is not the central issue?

Some of the issues would simply not arise. For example, a vendor who wished to be free of the original bargain would not have to show that the condition was also for his benefit. He would not have to take any positive steps to bring the transaction to an end. The arrangement between the parties would automatically be at an end if the period allowed for satisfying the condition elapsed without fulfilment of the condition. This follows from the approach of Judson J. in the earlier cases and that of Dickson J. in *Barnett v. Harrison*.

This conclusion is proffered in respect of a contract which is simply made "subject to" or "conditional upon" some specified thing occurring or not occurring. Clearly this conclusion can be avoided if the condition is differently worded. However, the mere inclusion of an express right of waiver in favour of the purchaser would not affect this conclusion, although exercise of the right to waive would prevent the other party from avoiding the contract for non-fulfilment of the condition.

If the condition provided one or both parties with the right to avoid if the condition should prove unfulfillable then surely some positive steps to avoid would be necessary and the contract should not automatically come to an end upon the expiration of the period allowed for fulfilment of the condition.

What would be the decision in a case where the contract was simply subject to a finance condition; the purchaser failed to obtain the necessary finance, and this was, at least in part, due to the vendor's hindrance? If Judson J.'s words are taken at face value there is no contract to be breached until the condition is fulfilled. It may never be fulfilled. How then can the vendor's hindrance be focussed upon? This kind of problem certainly appears to be more difficult to cope with according to the Canadian doctrine than the other approach. Nevertheless there is some evidence that the Supreme Court would not permit a vendor to prevent the purchaser fulfilling the condition and yet himself rely upon the purchaser's failure to fulfil the condition to extinguish or emasculate his own "obligations" under the contract. This evidence is found in remarks made by Judson J. in *O'Reilly v. Marketers Diversified*.⁸⁴ There appears to have been some suggestion by counsel in that case that the vendor's interference had prevented the fulfilment of the condition. This, however, had not been formally put in issue. Judson J. said that had it been pleaded and proven the result might have been different. His Lordship did not specify in what way it might have been different but the case was one in which the purchaser was claiming the right to waive the condition and was seeking the remedy of specific performance. The Supreme Court denied that remedy. Presumably Judson J. was contemplating the possibility that specific performance might have been granted had hindrance by the vendor been pleaded and proved?

On what basis might such a different result have been achieved? The only possible basis is that there was indeed a contract to be breached or, rather, to be enforced. Yet Judson J. had said that, without performance of the condition, neither party had an enforceable contract. How would Judson J. have overcome that difficulty; by resort to estoppel? It is suggested that a considerable amount of linguistic and mental gymnastics is needed to reconcile Judson J.'s conclusion that no enforceable contract exists with his assertion that the matter might have been resolved differently if it had been shown that the vendor

⁸⁴ *Supra*, footnote 3.

had prevented fulfilment of the condition. This difficulty is avoided by the approach taken by the English, Australian, New Zealand and many United States courts.

What if it is the purchaser who wishes to rely upon the condition so as to escape the contract? If he has made reasonable attempts to fulfil the condition there will be no problem. His "obligations" will simply fall with the expiry of the time period allowed for fulfilment of the condition. If the purchaser has not made reasonable attempts, what then? If there is no contract capable of being enforced can he not simply escape scot free? Application of the Canadian doctrine would seem to lead to that conclusion. He has not promised to fulfil the condition so there is no obvious basis upon which to fix him with some obligation. Yet in *Barnett v. Harrison* Dickson J. said⁸⁵ that the purchaser would not be allowed to purposely fail to perform his obligations in order to avoid the contract. A desirable result, surely, but on what legal theory is it to be achieved, given the Supreme Court's starting point?

Finally, what would the Supreme Court do if faced with a vendor who had simply resold property already covered by a conditional agreement notwithstanding that the time for fulfilment of the condition had not elapsed? Certainly it would not permit such conduct to pass unremedied but in order to give a remedy it would have to find a contractual obligation in circumstances in which it is now saying that there is none.

VI. *Some Conclusions and Suggestions.*

It is submitted first that a desirable approach to the interpretation of conditional contracts would be to recognize that the effect of a condition must depend upon the language in which it is expressed with the result that conditions must be subjected to individual scrutiny. A decision as to the meaning of one condition will not then determine the meaning of any other condition. Additionally it is suggested that the New Zealand court was wise, when in *Donaldson v. Tracy*⁸⁶ it rejected the proposition that the mere fact that the condition originated in the purchaser's offer was conclusive proof that it was for the purchaser's benefit. There are other possible explanations for its presence there and they may contradict such an assumption. The location of the condition should, thus, not be treated as conclusive, though it is clearly a factor to be taken into consideration.

⁸⁵ *Supra*, footnote 1, at p. 247.

⁸⁶ *Supra*, footnote 74.

The writer would not argue strenuously with the proposition that some presumptions as to benefit may be necessary or at least desirable. They should, nevertheless, be examined carefully with a view to testing their consistency with common sense.

Common sense suggests that parties in the position of the vendor and purchaser who execute the common "offer to purchase and interim agreement" with respect to residential premises intend thereby to bind one another in a contractual relationship. They are no longer free to do as they wish. They have rights and obligations which are enforceable. It is very unlikely that they intend to become bound only at some date in the future. In order for such a transaction to be completed as contemplated certain things will have to be done and it is expected that they will be done or at least that reasonable attempts will be made to do them. Conversely, it is expected that these reasonable attempts, perhaps involving expense or financial commitment can safely be entered upon in the knowledge that the other party must await their outcome and cannot act so as to frustrate the contract.

With that starting point it should be possible to view conditions in their true light and to recognize that the question of whom they are intended to benefit is a crucial one. It should be stressed that the benefit to be looked for is an intended one, not one which arises fortuitously, and that distinctions should be drawn between kinds and degrees of benefit or protection from liability.

Conditions are usually designed to protect someone from having to perform under the contract unless specified events occur; perhaps because it would be disadvantageous or even disastrous to have to perform otherwise; perhaps because it will be of added benefit if the specified events occur.

Determination of intended "protection" or "benefit" will not always be easy, indeed, it will often be difficult. Presumptions may be necessary in this area and these should not be harmful provided that they always remain mere presumptions. For example, conditions relating to the obtaining of finance in a particular manner or from a particular source (other than the vendor) can be presumed to be for the protection of the purchaser. It can fairly safely be said that the vendor's concerns are to receive the purchase price and, quite probably, to do so by a given date, or at least within a reasonable time. Ordinarily the source of finance should not concern him.

It should follow from this reasoning that the purchaser may waive the protection he has sought because in so doing he does not prejudice the rights of the vendor at all.

If, notwithstanding appearances, the situation is otherwise it then falls to the vendor to adduce evidence to show that the condition is in the contract partly or wholly at his insistence and thus partly or wholly for his protection.

What should happen where such an initial presumption cannot safely be operated upon? For example, in the case of a condition relating to rezoning of property or some similar action. One approach might be in line with that of Brightman J. in *Heron Garage Properties v. Moss*.⁸⁷ That is to adopt a presumption that where unilateral benefit is not obvious on the face of the contract there shall be a presumption of mutual benefit. Another might be to adopt a presumption that a condition is inserted for the protection of the party who actually inserted it. Both approaches present some difficulty.

With respect to the first approach Brightman J. expressed unwillingness to go outside the contract documents to determine where benefit lay. Dispute might well be entered into on the narrowness of this approach. On the other hand, with respect to both approaches but with particular relation to the second approach there will likely be evidentiary problems involved. These difficulties are not insurmountable and surely are the very kinds of issues the courts are intended to resolve.

Once having determined the protection or benefit issue the remaining questions can be readily dealt with. If the intended protection is for one party only then it follows that his performance only is conditioned by the protective provision. He may thus waive the protection without in any way affecting the obligations of the other party. If the provision was intended to protect or benefit both parties then obviously unilateral waiver is not permissible as it will involve the alteration of the other party's obligations.

A few other issues remain to be dealt with. What is the effect of failure, despite reasonable efforts, to achieve the fulfilment of the condition? The wording of the condition may obviously affect the answer to this question. But what of the condition which states merely that the contract (or offer) is subject to finance being arranged or that the contract shall be

⁸⁷ *Supra*, footnote 75.

null and void if finance cannot be arranged? In the latter case the choice is between giving the words their literal meaning or reading them to mean that the contract shall be voidable at the option of a party not in default. For reasons set out previously⁸⁸ it is believed that this approach is more desirable notwithstanding the violence it does to the language used. In the former case there can hardly be any objection to treating the contract as voidable rather than automatically void.

If these suggestions were adopted it would mean that positive steps would always have to be taken in order to determine any contract, and, incidentally, that waiver would no longer be an issue.

Whatever conclusions others may reach as to the merits of these suggestions it is believed that they raise issues worth thinking about which the Supreme Court majority has not grappled with and has indeed strenuously avoided. The consequence has been a great deal of confusion amongst practitioners and their clients and amongst the judiciary. Confusion can always be dispelled by adopting a prescribed formula but the Supreme Court's formula does not achieve clarity partly because it is not based upon a common-sense approach to ordinary contracts for sale of land, and partly because its own decision in *Beauchamp v. Beauchamp* rests upon an opposed philosophy (though the court does not appear to recognize this). A thorough rethinking of the whole area is sorely needed.

⁸⁸ *Supra*, see text between footnotes 27 and 28.