A PRACTITIONERS' GUIDE TO CONDITIONS PRECEDENT AND SUBSEQUENT

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In spite of the cri de coeur by Richardson J. in Hunt v. Wilson[1] that the "nature and effect of conditions of various kinds have been the subject of almost endless discussion by Judges and academic writers", it probably remains true that a practitioner faced with a dispute centering on a condition precedent or subsequent in an agreement for sale and purchase will be in a quandary as to the exact legal position of his client at the time, and as to the steps he must take to achieve the result his client desires. It would be presumptious to assume that one short paper will, or could, resolve all the difficulties, but it may be useful to help identify issues involved and direct inquiry along appropriate paths.

Precedent or Subsequent?

In Hunt v. Wilson Cooke J. said:[2]

> "I venture to think that the ambiguous labels 'precedent' and 'subsequent', when applied to conditions, are seldom of real help in solving issues in this branch of contract law."

Certainly, on the authorities as they stand at present, the labels are used too loosely to be of any help at all and, indeed, are only confusing. But if clear definitions were given to the terms, and if the most useful definitions were chosen as those to be given, the terms could be of great assistance. It needs to be remembered that, like many such terms in the law, they are merely shorthand ways of stating sets of detailed rules. If the circumstances which call for different rules were clearly differentiated and if the most apposite sets of rules were devised for those circumstances, there is no reason why the shorthand labels should not perform the same useful function that such labels commonly perform in legal language. After looking briefly at the present state of the New Zealand authorities with regard to the use of these particular labels, more precise definitions or usages of each will be suggested and the detailed rules of operation of each category then examined with regard both to our present understanding and to changes either required by logic or suggested by the usefulness of their practical operation.

As Cooke J. goes on to observe in Hunt v. Wilson,[3] the meaning of the terms 'precedent' and 'subsequent' must be made specific "by explaining to what the condition in question is seen as precedent or subsequent". The terms may be used in regard to the existence of contractual relations or to the obligation to perform one or more promises within an existing contract. In the New Zealand decisions of the last 20 years, the precise sense in which the condition is classed as precedent or subsequent has rarely been made unambiguously explicit. Primarily, when a condition is described as 'precedent', it is rarely, if ever, clearly stated whether it is precedent to the very existence of the contract, or to one, some, or even all the promises within an existing contract.[4]

In Griffiths v. Ellis[5] North J. described the condition as a "condition precedent in the strict sense of the term" which suggests that it is precedent to the existence of the contract. However, when the judgment is read more carefully, it is clear that his Honour accepted that there was an existing contract between the parties and that some obligations within it were current and not subject to the condition precedent.

The condition was therefore not treated as precedent in the strict sense of the term, and would, had the contracual relationship itself been the focal point of the labelling, have more correctly been described as subsequent, although its description as precedent was more useful in the circumstances of the case, because the emphasis was on the obligation to perform.

In Barber v. Crickett,[6] however, in a judgment given about 5 weeks after that in Griffiths v. Ellis, but without mentioning the earlier Court of Appeal decision and perhaps without knowing of it, Cleary J. in the Supreme Court found that a finance condition was a condition subsequent. This was largely based on the degree of control over the outcome of the condition which the purchaser had and the Australian approach to such a situation which is to class the condition as subsequent.[7] While the end result accords with the view proposed in this paper, it is suggested that a better basis for labelling the condition as subsequent would be simply that there is a contractual relationship between the parties to which the operation of the condition is subsequent and that

that relationship is the focal point in regard to which the condition is viewed. The finding in Barber v. Crickett that the condition was subsequent was followed, on the basis of an agreement between counsel, in both Knotts v. Gray[8] and Martin v. Macarthur.[9]

In the next case to arise, Mulvena v. Kelman,[10] Henry J. reverted to the view of North J. in Griffiths v. Ellis and preferred to regard the finance condition as a condition precedent. This conclusion was based on the fact that the purchaser had made a conditional offer to purchase which was accepted by the vendor. But, regardless of the label used, it is evident from a closer reading of the judgment that Henry J. regarded the parties as contractually bound before the outcome of the condition was known. The reliance upon Griffiths v. Ellis fails to take account of the way in which North J. actually used the term 'precedent' in that case, i.e., as precedent to performance, so that it is inappropriate when, as in Mulvena v. Kelman, the contractual relationship is the focus of attention. In addition, the reasoning used by Henry J., relating to the terms of the offer and acceptance, is invalid in that, because any acceptance must be of an offer exactly as made if a contract is to result, all conditions, precedent to performance or subsequent to contract, must be contained in the offer. Those intended to be precedent to the contractual relationship itself might be separated off from those which are within an existing contractual relationship by an intention that, although there has been an agreement as to terms by offer and acceptance, there should not be a binding contract unless and until the circumstances described by the condition should have come about. The labelling of the condition in Mulvena v. Kelman as precedent is therefore, it is submitted, based on an incomplete analysis and understanding, and, in the light of the immediately preceding decisions which labelled the same type of condition as subsequent, is confusing, giving an appearance of randomness to the labelling process. Given that the importance of the condition in the case was its bearing on the contractual relationship, it would have been more accurately labelled as subsequent.

Nevertheless, similar reasoning was adopted by the majority of the Court of Appeal in Scott v. Rania[12] in attaching the label 'precedent' to the finance condition in that case, thus lending the weight of that Court to the perpetuation of the confusion and establishing in New Zealand law an unhelpful view of conditions. North P., who had earlier decided Griffiths v. Ellis, labelled the condition as precedent on the basis of the same reasoning as had Henry J. in Mulvena v. Kelman, i.e. that the condition was contained in the offer, and is subject to the same criticism. McCarthy J. felt that the wording of the condition was closer to that in Griffiths v. Ellis than that in Barber v. Crickett and on that basis labelled it precedent rather than subsequent thus apparently taking no account of the way in which the condition was intended to operate in regard to the contractual relationship. Also, as in Griffiths v. Ellis and Mulvena v. Kelman, it is evident from the judgments as a whole that both North P. and McCarthy J. regarded the parties as in a contractual relationship which had to be terminated on the non-fulfilment of the condition. Thus again, a condition was labelled 'precedent' which was in fact operating as subsequent to the contractual relationship it affected.

With the majority judgments in Scott v. Rania reported litigation ended for some years, and in Auckland at least, a finance clause was included in the standard form agreement for sale and purchase incorporating the law as apparently settled by those judgments. In the two later decisions which there have been, the Courts did not attach a label to the conditions involved, but in each case certainly treated the finance condition as being a part of an existing contract. In Gardner v. Gould[13] it can be assumed that the condition was regarded as subsequent since it was found that an obligation to take all reasonable steps to fulfil the condition could be imposed only by an implied term in an existing contract. In Barton v. Russell[14] the problem ultimately centred on the interpretation to be placed on the word 'void' in the finance condition in the contract, but the use of this word can be traced back to the reliance upon the majority reasoning in Scott v. Rania.

Thus it is evident that, whatever the potential of the shorthand labels 'precedent' and 'subsequent' to assist in the discussion of

conditions, this potential is far from realised in the New Zealand cases to date. Rather, the primary impression is one of somewhat vague and confused use of the terms leaving someone seeking the solution to a problem with no clear statement or understanding of the law. Nevertheless, it is suggested that there are a couple of clues in the New Zealand judgments to workable definitions of each term.

I have argued elsewhere[15] that, to achieve clear thought and communication when the terms 'precedent' and 'subsequent' are used, there must be some agreement as to the temporal point to which the terms are related and that the most useful point to choose is the time of the creation of the contract.

There are several reasons for this. First, the suggestion has the virtue of simplicity.[16] Secondly, most disputes involving conditions are concerned in some way with whether there ever was a contract or whether the contract has been or can be determined, which focuses attention on the existence of the contract. Thirdly, the existence and substance of the condition are factors which should in any event be considered in determing "the intention of the parties as to the time when and the manner in which they will become bound by contract".[17] If this time were also chosen as the reference point for the terms 'precedent' and 'subsequent', the fixing of this time would decide whether the condition were precedent or subsequent to the contract. Fourthly, because the operation of a condition is quite different according to whether it precedes or is a part of the contractual relationship, the proposal makes more obvious the inconsistences in our present understanding of the operation of conditions, clarifies how the rules might be improved, and enables us to formulate a workable set of rules for the operation of each kind of condition which would then be inherent in the use of the labelling terms.

If the time of creation of the contract is taken as the reference point, there would then be only two kinds of conditions: those which are precedent to the existence of contractual relations, i.e. there is no intention to contract unless and until the condition is met; and those which are subsequent to the existence of contractual relations, i.e. which are terms of existing contracts. It is acknowledged that

a condition which is a term of an existing contract may, in addition to being subsequent to the contractual relationship, also be precedent to the obligation to perform some or all of the basic promises within that relationship,[18] but to describe a condition in this twofold way is not helpful unless the primary and secondary aspects of the description are distinguished. When, as is often the case, the basic concern is with whether the condition can be used by one of the parties to escape from the contract, or perhaps with whether there is a contract, the primary aspect of the condition must be that it is subsequent to the contractual relationship. This approach to conditions has some judicial support[19] but it has never been strongly accepted up to now in New Zealand, and even less have its implications been fully and logically followed through. The major effect of the adoption of the approach on earlier New Zealand decisions would be that the conditions in issue in Griffiths v. Ellis, Mulvena v. Kelman, and Scott v. Rania would be labelled more clearly and helpfully as conditions subsequent to the contractual relationships.

Adopting the terms precedent and subsequent with the meanings suggested for them above, each of the two kinds of condition will now be looked at separately with detailed reference to the major aspects of their operation.

Conditions Precedent

If, by the term 'condition precedent', is meant a condition precedent to the very existence of the contractual relationship, so that there is no intention to contract unless and until the condition is met, it must be admitted that such conditions will be rare. This would inevitably be so if the intention of the parties were determined in the light of the manner in which such a condition must necessarily operate. Because there would be no contract before the fulfilment of the condition, either party would be free to withdraw before that time or to re-open negotiations as to terms; there could be no obligation on either party to take any steps to achieve the fulfilment of the condition; and neither party could have any right to waive the condition so as unilaterally to impose a contract on the other.

If the condition were fulfilled by the specified time, time being of the essence, the contractual relationship would automatically arise. If the condition were not fulfilled by that time, the contract dependent upon it would simply not come into being. These are the logical results of there being no contract between the parties and, clearly, an intending purchaser under such an arrangement would have far less security than under an option to purchase acquired for valuable consideration. The only way to avoid these results within the structure of a condition precedent, as defined, would be to set up a collateral contract, but this seems a cumbersome and unnecessary process when either an option or a contract of sale with the obligation to perform some of the terms suspended could be entered into. It is therefore supposed that such conditions precedent would be intended only very rarely by the parties and that, in current New Zealand conveyancing practice, this might be an appropriate classification only for some solicitor's approval conditions.

The New Zealand decisions on solicitor's approval conditions to date have not provided any very clear guidance as to their effect. The first two decisions arose out of the introduction of this type of condition into the conveyancing practice for the making of agreements for sale and purchase in Christchurch. This involves the agent obtaining the signatures of the prospective parties to an offer and acceptance form. In Buhrer v. Tweedie[20] the purchaser had made an offer on such a form. The vendor then changed two of the terms of the offer, signed an "acceptance" and added after his signature that the "acceptance is subject to final approval by my solicitors". Such an acceptance is, of course, a counter-offer and the solicitor's approval qualification attached to the offer was construed by Wilson J. as making the offer unavailable for acceptance until the solicitor's approval had been given. The prospective vendor was taken merely to have indicated the terms on which he would make an offer if his solicitor approved. If the approval were given, a firm offer would still have to be made and accepted before there would be a contract. It is difficult to imagine that the solicitors for either party, let alone the parties themselves, would have foreseen the need for this ritual in the light of what had already passed between them.

In this case, then, the condition attached to the vendor's offer prevented an effective offer from being made until the condition was fulfilled. Clearly the purchaser's purported "acceptance" in such a situation was not an acceptance of the offer in contractual terms, but could only be an indication that he would await the outcome of the solicitor's decision. Such an interpretation of the events which occurred in Buhrer v. Tweedie is perfectly feasible in law and is clearly distinguishable, as Wilson J. pointed out, from a condition precedent to a contract, though his Honour's view of a condition precedent is different from that suggested here.

The second decision, which also came out of the Christchurch process of contract formation, was Frampton v. McCully[21] in which, again, the purported "acceptance" was expressed to be "subject to Mr. Frampton [the vendor's solicitor] approval". Clearly, a conditional acceptance cannot bring about a contract so that it was readily found that this "acceptance" had never resulted in a contract between the parties. As to the obvious possibility of treating the "acceptance" as a counter-offer, because the Court of Appeal, in its judgment delivered by Cooke J., did not consider that any restrictions could be placed upon the grounds on which the solicitor could refuse his approval, given the facts of the particular case, the Court thought that it would be "unreal to treat the conditional acceptance as a counter-offer capable, if itself accepted, of giving rise to a conditional contract of sale". The vendor was therefore taken merely to have indicated the terms on which it would accept if its solicitor approved.

On analysis, there appears to be very little difference between these two cases. Both properly concluded that an "acceptance" subject to solicitor's approval cannot operate as an acceptance to form a contract but can be treated only as a counter-offer. In Buhrer v. Tweedie it was construed, not as an offer capable of acceptance, but only as an indication of the terms of the offer which would be made if the solicitor approved. However, the prospective purchaser had written under the "acceptance" the words "I agree" followed by his signature and the date. From the discussion on p.520 of the report,

Wilson J. clearly regarded a condition precedent as being necessarily a part of a binding contractual relationship which would prevent either party from withdrawing while awaiting the outcome of the condition. He made no reference to the relation between such a condition and the scope of the grounds for withholding approval. It is suggested that had Wilson J. conceived of a condition precedent operating outside of and precedent to the contractual relationship itself, this might have provided an equally acceptable alternative interpretation of the facts before him.

A similar view may be taken of the facts in Frampton v. McCully. The Court of Appeal does not appear to have considered the possibility that the parties might have agreed on terms but not intended to be contractually bound until the approval was given. Instead, it rejected the view that there might have been a counter-offer which had been accepted giving rise to a contract subject to a condition precedent of the solicitor's approval, because the grounds on which that approval might be withheld could not, on the facts, be restricted. Given the view of a condition precedent on which this reasoning is based, i.e. that the parties are bound by contract while awaiting the outcome of the condition, the inability to restrict the scope of the approval is a valid reason for rejecting the interpretation. But again, if a condition precedent is seen as operating outside of and precedent to the contractual relationship itself, so that neither party is contractually bound unless and until the approval is given, there is no reason why there should be any restrictions at all on the scope of the matters subject to the approval or even on the ability of the client to instruct the solicitor to withhold approval. In Frampton v. McCully the issues would then have been, first, whether an offer intended to be capable of acceptance was being made; if it was, secondly,whether it had been accepted; and, thirdly, because intention is a third and separate element in the making of a contract, whether the time when and the manner in which the parties intended to become contractually bound was dependent on the vendor's solicitor's approval. The giving of such approval would then have been the event which caused a contract on the agreed terms to become automatically binding on both parties. It is suggested that the results in both of these cases might be attributed, first, in part to the written offer and acceptance process of contract making used in Christchurch which directs attention to the offer and the acceptance and away from the contract, and, secondly, in part to the restricted view of a condition precedent taken by the Court in each case.

However, Boote v. R.T. Shiels & Co. Ltd.,[22] the third case to at least contain obiter reference to the interpretation of a solicitor's approval clause, also came from Christchurch. The Court of Appeal, in a judgment again delivered by Cooke J., felt that there was no difficulty in regarding the condition as a term of the contract; it did not prevent an effective offer and acceptance. In the written offer made by the purchaser was the clause, "This offer is subject to my solicitor's approval within seven days from acceptance date". It therefore clearly contemplated an effective acceptance before the outcome of the condition was known. The Court did not have to consider the operation of this condition as a part of the ratio of its decision, but it did comment, obiter, that "we think that the solicitor's approval could not be withheld capriciously or merely on the instructions of his client, but was meant to ensure that the conveyancing aspects of the transaction were satisfactory from the purchaser's point of view".[23]

Several comments may be made on this. The Court made no attempt to label the condition as precedent or subsequent, though the similarly worded finance condition in Scott v. Rania,[24] which required the purchaser to find the finance "within 14 days of acceptance hereof", had been labelled "precedent" by the majority of the Court. In terms of the analysis suggested above, the question is whether the parties intended to be bound before, or only when, the particular condition was fulfilled. In the case of a finance condition it is suggested that they would probably intend to be bound before the outcome of the condition was known. On the definitions of the labels proposed in this paper, the condition would then be described as subsequent to the contractual relationship, though it might also be precedent to the obligation to perform some of the promises. In the case of the solicitor's approval condition, however, it is not so clear. The parties might intend an effective offer and acceptance but might not intend to be contractually bound unless and until the approval was given,[25] in which case

the condition would be precedent on the suggested terminology.

Whatever label Cooke J. might have placed upon the condition, he clearly saw it as a condition operating within an existing contractual relationship. Hence the constraints upon the solicitor's power to withhold approval. With respect, it is agreed that, given this premise, such constraints are necessary. Freed from the unusual factor in Frampton v. McCully (the vendor's solicitor was also the registered proprietor of the land as trustee for the vendor) the wording of the condition might also permit the imposition of the constraints. However, in Frampton v. McCully Cooke J. had spoken of "the unrestricted wording of the condition" as the other reason for being unable to impose constraints, and the wording of the condition in Boote v. R.T.Shiels & Co. Ltd. is no different in substance. More important, however, is the unquestioned premise that the parties in Boote v. R.T. Shiels & Co. Ltd. had intended to be contractually bound before the outcome of the condition was determined. This might not have been their intention at all, and if it was not, there was no reason to place any constraints upon the solicitor's power to withhold approval. Indeed, it would not have been possible to do so and "the unrestricted wording of the condition" would have been given its full effect. It is therefore suggested that it would have been equally possible to regard the solicitor's approval condition in Boote v. R.T.Shiels & Co. Ltd. as a condition precedent to the existence of the contractual relationship with no constraints upon the solicitor's power to withhold approval and that this might have been more in accord with the parties' intention.

Similar comments may be made about the judgment of Holland J. in Provost Developments Ltd. v. Collingwood Towers Ltd.[26] The agreement, which was in the form used in the Auckland area, was subject to the approval of the solicitors of both parties. The vendor's solicitor withheld consent "primarily because he felt confident that his client was able to get an agreement on better terms." Holland J. found that the parties had concluded an immediately binding, but conditional, contract. Thus, the solicitors had to "act honestly and reasonably, and not from mere caprice". This is perhaps a narrower, and certainly

a more positive, requirement than that of "not capriciously" suggested in Boote v. R.T. Shiels & Co. Ltd. However, Holland J. construed the term "conveyancing aspects", as used in Boote v. R.T. Shiels & Co. Ltd., very widely to mean""arising out of the duties and obligation owed by a solicitor to his client when acting for that client and advising concerning a conveyancing matter". That must include, in most cases, a considered view or opinion as to the transaction the client is entering into as a whole". In the circumstances the solicitor for the vendor was entitled honestly to withhold his approval because a better offer was available to his client. The only requirement was that it be the solicitor's own decision. With respect, the width of the matters to which the approval was seen to extend was so great that it is difficult to read the condition so interpreted consistently with the existence of a binding contract. If such an interpretation of the condition is correct, it raises clearly the question, unasked in the judgment, whether the parties had intended to be contractually bound at all pending the outcome of the condition. In the light of the interpretation it might have been more realistic to find that they did not so intend. The finding of Holland J. certainly comes very close to the situation of a bilateral contract binding only one party, which is a legal impossibility.

Some time has been spent discussing solicitor's approval conditions for two reasons. First, they are still largely unexplored territory, though very common in practice, so that some thought needs to be given to exactly what is intended when they are used. Secondly, it is contended that they are probably the only example of a condition in common use in New Zealand which could, and perhaps frequently should, be seen as a condition precedent in the sense in which that term is used here. It is the probable intention of the parties when the substance of the condition is something other than their solicitors' approval that they do intend to be immediately bound and that the condition is to operate within the contract, to be, in my terms, a condition subsequent.

Conditions Subsequent

If the test is accepted as being "when and how do the parties intend to become bound in contract", it is suggested that where the substance

of the condition is something other than solicitor's approval, something such as finance, sale of another property, or the approval of an independent third party, there is a high probability that the condition is one within an existing contract. It may be precedent to the performance of certain of the promises within the contract, though certainly not to the operation of other parts of the contract (such as the obligation to pay the deposit or the running of time under the requisitions clause), but it is subsequent to the creation of binding contractual relations. The principle New Zealand decisions which have labelled such conditions as precedent were examined above - Griffiths v. Ellis, Mulvena v. Kelman and the majority judgments in Scott v. Rania. It has been seen that in Griffiths v. Ellis the relevance of the condition was in regard to the obligation to perform certain promises in the contract. In that respect it was properly described as precedent, but, although it was not relevant to mention it, there was an existing contract to which the condition was subsequent. In the other two cases the relevance of the conditions was in regard to the existence of the contract and it is clear that in each case the Court believed that the parties were contractually bound, so that the conditions would have been more accurately and usefully described as subsequent. There was a failure to distinguish clearly between conditions precedent to contract and precedent to performance. Therefore, when one looks at how the conditions have been seen as operating, rather than the labels given to them, the New Zealand cases have consistently treated such conditions as subsequent to contract.

If this is correct, each condition is, regardless of its substance, subject to the same set of rules, unless of course, the parties have made their own by the terms of the contract. It is then a matter of what are the rules prescribed by law. It is proposed to examine here three of the basic matters which have frequently arisen: first, the obligation to take all reasonable steps to achieve the fulfilment of the condition; secondly, what happens if the condition is not fulfilled; and, thirdly, waiver of the condition.

If all of these conditions are within existing contracts, there is no problem about the obligation to take all reasonable steps to

achieve their fulfilment. It is accepted that a party cannot take advantage of the non-fulfilment of a condition in order to escape from a contract if the non-fulfilment has come about through his own default. The Courts have expressed this in positive terms by placing an obligation on one of the parties to take all reasonable steps to fulfil the condition, but there has been difficulty in finding a theoretical basis for imposing the obligation. The two viewpoints put forward to date have been, first, that it can be done only by an implied term in a contract, or secondly, by the application of the broader principle that no man can take advantage of his own default. The first of these is merely a narrower view of the second, based on the view that the only default available for the application of the principle is a breach of contract. In Gardner v. Gould[27] the Court of Appeal was unanimously of the opinion that the narrower view was the correct one.

This means that the condition must be one which is operating within a contract before the obligation can become an implied term of the contract; in terms of the present analysis, the condition must be subsequent to contract. However, if virtually all conditions in conveyancing agreements do operate in this way, there is no problem about implying a term. At present, the lack of differentiation between conditions precedent to contract and precedent to performance has led to a belief that the obligation cannot be imposed in the case of a condition precedent as in Scott v. Rania.[28] But if it is recognised that the condition in Scott v. Rania, regardless of the words used to describe it, was precedent only to performance and, in fact, subsequent to contract - these being merely different aspects of the operation of the same condition - then clearly there is a contract into which the obligation may be implied. The correct width of the principle then, perhaps, becomes a matter of only theoretical, academic importance; it certainly need not dictate the labelling of conditions.

The second important issue is the effect of the non-fulfilment of the condition. Although the rules as to the effect of non-fulfilment appear well settled, it will be argued that the confusion over the

term "precedent" has again caused error to creep into our understanding. However, one preliminary point is clear: if the condition specifies a date for its fulfilment, time is of the essence as to that date without any need expressly to make it so.[29] The consequences of non-fulfilment therefore occur immediately and automatically on the specified date.

If a condition precedent to the contract should fail, the contract simply never comes into being. The parties have stated their intention as to how and when there is to be a contract between them. If the circumstances described in the condition do not come into being, neither does the contract.

Conditions described as subsequent are said to give rise on their non-fulfilment to a right to avoid the contract. The non-fulfilment of the condition, therefore, merely brings this right into being; a party wishing to exercise the right must then make a positive act to do so, and thus terminate the contract, before the right is lost. Dealing with non-fulfilment in this way both allows for those cases in which the outcome of the condition can be affected by the conduct of one party, and gives greater flexibility to the parties than would exist if the contract were automatically terminated. With regard to the former, if one party brings about the non-fulfilment of the condition by his conduct, the other party alone may avoid the contract; but if neither party is responsible for the non-fulfilment, then each has the right.[30] These rules appear sensible and satisfactory. They dovetail with the obligation to take all reasonable steps to fulfil the condition and they leave both parties some further room for manoeuvre if the condition is not fulfilled within the time.

Again, however, difficulty arises because of the failure to distinguish in the use of the term "precedent" between precedent to contract and precedent to performance. It is understood that if a condition described as "precedent" is unfulfilled at the time specified for fulfilment, the contract is immediately and automatically terminated,[31] unless the condition has failed because of the default of one party having an obligation to take all reasonable steps to achieve its fulfilment, in which case the contract is voidable at

the option of the innocent party.[32] This is a peculiar and illogical amalgam of the two sets of rules discussed above in relation to conditions precedent to contract and conditions subsequent. The present concern is with conditions precedent to performance. It is difficult to see why a condition precedent to performance should, on its non-fulfilment, have the effect of rendering the contract automatically void. However, when it is remembered that the effect of the non-fulfilment of a condition precedent to contract is that automatically the contract cannot come into being, the source of the automatic avoidance rule is evident. If this is carried across logically to a condition precedent to performance, the result of non-fulfilment is only that the obligation to perform does not arise; from its classification as precedent to performance it has no logical effect on the contract itself. Indeed, if the condition is intended to have effect on the contract itself, it is as a condition subsequent, so that the rules regarding them which are set out above would apply. Further, if this is correct, it has serious consequences for the validity of the reasoning of the majority of the Court of Appeal in Scott v. Rania.[33]

Once the right to avoid has arisen, it continues to exist in spite of the facts required for the fulfilment of the condition coming about after the time specified for fulfilment.[34] If this happens and the party having the benefit of the condition then wishes the contract to proceed, the proper course is to waive the condition.[35] The right to avoid the contract may, of course, be exercised, or it may be lost in any of three ways. First, it may be lost by the party having the right electing, either by words or by conduct, to affirm the contract.[36] Secondly, even in circumstances where the party having the right cannot be said to have elected to affirm, the right may be lost by estoppel, as was found to have happened in Barton v. Russell.[37] Thirdly, if, after the fulfilment date, one party has the right to waive the condition and does so, the waiver will be effective to destroy the other party's right to avoid the contract.

This raises the third and last basic issue regarding the operation of conditions - the possibility of waiver. There are two main questions about waiver: who has the right to waive and when may the right be exercised?

The simple answer to the first is that where the condition is exclusively for the benefit of one party, that party may waive the condition and render the contract fully binding on both parties.[38] The difficulty is to know what is meant by "benefit". That is a necessary first step to knowing when the benefit is exclusively one person's. However, the cases give no clear answer. In some the benefit is seen to be the protection from contractual liability afforded to the person(s) requiring that protection.[39] In others, it is seen to be the right to obtain freedom from legal obligation to perform contractual promises upon the non-fulfilment of the condition.[40] If the former is the correct view, waiver will be available in a much greater number of cases than if the latter is adopted. The latter would restrict waiver to those few cases in which the condition operates in no other way than as precedent to the liability of one party. If it also has potential effects as a condition subsequent to the contract so that, subject to the contract itself restricting the right to avoid to one party,[41] it might give the other party a right to avoid the contract, and thereby in these terms confer a benefit upon him, it would make waiver impossible by the party having the benefit in the first sense given above. There is as yet no judicial resolution of this division of views.

It does seem, however, that where the condition is "inextricably mixed up with other parts of the transaction"[42] from which it cannot be severed, as when the terms of the condition fix the settlement date, waiver is not possible. This may also show that the condition operates partly for the benefit of the other party.[43]

There are also conflicting opinions as to whether evidence of the surrounding circumstances is admissible to show that both parties were intended to benefit. Such evidence has been accepted in New Zealand,[44] but might not be admitted in England.[45]

The effect of the two basic views as to benefit stated above upon the two kinds of condition identified in this paper needs now to be considered. The effect upon a condition subsequent has already been stated: the first view of benefit would permit waiver in a wide range of cases, while the second would restrict the right to waive to a very narrow range of cases. The accepted position with regard to waiver and a condition precedent to contract is that such a condition cannot be waived.[46] Certainly neither of the above views of benefit would allow the waiver of such a condition. Waiver of a condition operating within a contractual relationship assumes that the parties are contractually bound, but that it is a part of the agreement that if a certain situation does not come about, one or either may terminate the contract. If the party who sought that protection decides to forego it, he can do so by waiver. But, in the case of a condition precedent to contract, the parties have agreed that if a certain situation does come about, they will be bound by contract. They have defined the time and the manner of the creation of the contractual relationship, a definition which can be altered only by agreement. The operation of the condition is so different that waiver is no longer logically possible. The second view of a benefit, the right to freedom from legal obligation, clearly does not apply because until there is a contract there is no obligation from which to obtain freedom. Waiver, therefore, applies only to conditions subsequent, and then only according to the view taken of benefit.

As to when the right of waiver may be exercised, again the simple answer is that it must be exercised before the termination of the contract. This reinforces the opinion that waiver has no application to conditions precedent to contract because there is then no contract to terminate. Waiver is available only to save a contract from termination, not to create a contract.

When conditions subsequent, as described in this paper, are considered, again difficulty arises with the use of the term "precedent" in the New Zealand decisions, and particularly in the majority judgments in Scott v. Rania.[47] It has been seen that in those judgments it was found that, having labelled the condition as "precedent", the contract automatically terminated when the condition had not been fulfilled by the specified time. Any waiver of the condition, to be effective, had also, therefore, to occur before that time. But if the analysis suggested in this paper, which basically agrees with the dissenting judgment of Hardie Boys J. is correct, the condition was precedent to performance, not to contract, and was therefore subsequent to contract with non-fulfilment giving rise to a right to avoid the contract. If waiver is effective at any time before the termination of the contract, the statement by the purchaser's solicitor that finance had been arranged and that the contract was unconditional would have constituted a waiver which, on the facts, preceded what could have been construed as the vendor's exercise of the right of avoidance - all of which accords with the judgment of Hardie Boys J.

Where the condition has been labelled as "subsequent", if it is correct that there is a right to waive until the contract is terminated, the right exists not only before, but after, the date specified for the fulfilment of the condition and until the contract is terminated by a party with the right to do so. Clearly the right to waive exists before the fulfilment date. But most of the problems occur when the facts satisfying the condition come about after that date. In doing so, they do not technically satisfy the condition, time being of the essence as to its fulfilment, and the right to avoid the contract continues regardless.[48] The only way for the person having the benefit of the condition then to insure that the contract remains on foot is to waive the condition. For this purpose it appears that a statement of fulfilment is sufficient,[49] but an unequivocal statement of waiver is perhaps more advisable. Although the cases seem to accept that waiver of a condition subsequent is possible after the fulfilment date, it should perhaps be pointed out that, at this stage, what is being waived is not the benefit of the condition, but one's own, and presumably the other party's, rights of

avoidance. Seen in this way, this is clearly more than an election to affirm the contract for oneself, thereby dest roying one's own right of avoidance; it is a waiver which does this and destroys the other party's right of avoidance. It may well be questioned whether a waiver at this point is of a benefit belonging exclusively to the party waiving it - if it is not, then Scott v. Rania may have been right after all.

Lastly with regard to waiver, it must be remembered that it is difficult to distinguish waiver both from variation[50] and from promissory estoppel.[51] In the present context such issues generally arise when there has been an extension of the time for the fulfilment of the condition. Because there is an adequate discussion of these points elsewhere,[52] it is not repeated here.

Conclusion

I believe it is impossible to accept all of the decisions, even in New Zealand since 1958, as correct, because some are basically irreconcilable with others. The only satisfactory way to resolve this is to attempt an analysis from first principles. This I have done with regard, insofar as I have had to use the labels "precedent" and "subsequent" and give them meanings, to what is most useful in practice. I have then examined the decisions and the operational rules in the light of the structure which emerged from the analysis. It is impossible to forsee or to answer all of the questions to which conditions might give rise, but I hope that the foregoing does provide at least the basic structure for their consideration.

FOOTNOTES

1. [1978] 2 N.Z.L.R. 261 at 278, CA.

2. Ibid at 267, CA.

3. Idem.

4. A very recent discussion of this distinction may be found in Nyhuis v. Anton [1980] Qd. R. 34 at 37-40, FC, and see 9 Halsbury's Laws of England (4th ed. 1974) 143, para 264, and 353, para 511.

5. [1958] N.Z.L.R. 840, CA.

6. [1958] N.Z.L.R. 1057.

7. Suttor v. Gundowda Pty. Ltd. (1950) 81 C.L.R. 418.

8. [1963] N.Z.L.R. 398.

9. [1963] N.Z.L.R. 403.

10. [1965] N.Z.L.R. 656.

11. As in Buhrer v. Tweedie [1973] 1 N.Z.L.R. 517.

12. [1966] N.Z.L.R. 527.

13. [1974] 1 N.Z.L.R. 426, CA.

14. [1975] Butterworths Current Law 307, para. 1109, CA.

15. (1980) Otago Law Rev.

16. See Hunt v. Wilson [1978] 2 N.Z.L.R.261 at 273, CA, per Cooke J.

17. Carruthers v. Whitaker [1975]2 N.Z.L.R. 667 at 672, CA, per Richmond J.

18. It might even be only so precedent and so not intended in any circumstances to have any effect on the contractual relationship itself, but it is submitted that such is not the case with any of the New Zealand decisions to date concerning these kinds of conditions in a vendor and purchaser context.

19. Maynard v. Goode (1926) 37 C.L.R. 529 at 540, per Isaacs J.; Scott v. Rania [1966] N.Z.L.R. 527 at 540-541, CA, per Hardie Boys J.; Hunt v. Wilson [1978] 2 N.Z.L.R. 261 at 268, CA, per Cooke J.

20. [1973] 1 N.Z.L.R. 517.

21. [1976] 1 N.Z.L.R. 270, CA.

FOOTNOTES (Continued)...

22. [1978] 1 N.Z.L.R. 445, CA.

23. Ibid., at 451, CA, per Cooke J.

24. [1966] N.Z.L.R. 527, CA.

25. This approach was adopted in Henning v. Ramsay (1963) 81 W.N. (Pt. 1) (N.S.W.) 71, in which Taylor J., with Walsh J. concurring, regarded the condition as placing the case in the third category identified by the High Court in Masters v. Cameron (1954) 91 C.L.R. 353 at 360: "the intention of the parties is not to make a concluded bargain at all unless and until they execute a form of contract".

26. [1979] Butterworths Current Law 193, para. 815. An appeal to the Court of Appeal is pending.

27. [1974] 1 N.Z.L.R. 426, CA.

28. [1966] N.Z.L.R. 527, CA.

29. Hinde, McMorland & Sim, Land Law, 1010, para 10.011, n 1, where the situation when no time is specified is also discussed.

30. Suttor v. Gundowda Pty. Ltd. (1950) 81 C.L.R. 418.

31. Scott v. Rania [1966] N.Z.L.R. 527, CA.

32. Suttor v. Gundowda Pty.Ltd. (1950) 81 C.L.R. 418; Barber v. Crickett [1958] N.Z.L.R. 1057.

33. [1966] N.Z.L.R. 527, CA.

34. Gilbert v. Healey Investment Pty. Ltd. [1975] 1 N.S.W.L.R. 650.

35. This is discussed more fully below.

36. For a recent discussion of election see Sargent v. ASL Developments Ltd. (1974) 131 C.L.R. 634. See also Barton v. Russell [1975] Butterworths Current Law 307, para. 1109, CA; and Redmond, "The Logical Basis of the Doctrine of Election in Contract" (1963) 3 Alberta L.Rev. 77.

37. [1975] Butterworths Current Law 307, para. 1109, CA.

38. Scott v. Rania [1966] N.Z.L.R. 527 at 534, CA, per McCarthy J.; Valley Ready Mix Ltd. v. Utah Finance and Development (NZ) Ltd. [1974] 1 N.Z.L.R. 123.

39. Donaldson v. Tracy [1951] N.Z.L.R. 684; Valley Ready Mix Ltd. v. Utah Finance and Development (NZ) Ltd. [1974] 1 N.Z.L.R. 123.

40. Heron Garage Properties Ltd. v. Moss [1974] 1 W.L.R. 148.

41. An interpretation of the condition in this way by Barrowclough C.J. at first instance in Scott v. Rania ([1966] N.Z.L.R. 176) caused concern at the time (Fox, "Subject to Finance Again" [1966] N.Z.L.J. 426), because one party would then be held to the contract almost at the pleasure of the other, and so was rejected by the Court of Appeal ([1966] N.Z.L.R. 527) which saw it as a matter of law that

such conditions give a right of avoidance to both parties.

42. Hawksley v. Outram [1892] 3 Ch. 359 at 375, CA., per Lindley L.J.; applied in Heron Garage Properties Ltd. v. Moss [1974] 1 W.L.R. 148.

43. Daubney v. Kerr [1962] N.Z.L.R. 319.

44. Donaldson v. Tracy [1951] N.Z.L.R. 684; Valley Ready Mix Ltd. v. Utah Finance and Development (NZ) Ltd. [1974] 1 N.Z.L.R. 123.

45. Heron Garage Properties Ltd. v. Moss [1974] 1 W.L.R. 148 at 153, per Brightman J.

46. Turney v. Zhilka (1959) 18 D.L.R. (2d) 447; Coote, "Agreements "Subject to Finance"" (1976) 40 Conv. (N.S.) 37 at 44.

47. [1966] N.Z.L.R. 527, CA.

48. Gilbert v. Healey Investment Pty Ltd. [1978] 1 N.S.W.L.R. 650.

49. Scott v. Rania [1966] N.Z.L.R. 527 at 542, CA, per Hardie Boys J. dissenting; Beauchamp v. Beauchamp (1972) 32 D.L.R. (3d) 693; affd. (1974) 40 D.L.R. (3d) 160. The statement of fulfilment in Gilbert v. Healey Investment Pty Ltd. [1975] 1 N.S.W.L.R. 650 could not be treated as a waiver because the right of termination vested in the other party was seen as a benefit so that the condition was for the benefit of both parties.

50. See Watson v. Healy Lands Ltd. [1965] N.Z.L.R. 511 at 513, per Woodhouse J.; and Boviard v. Brown [1975] 2 N.Z.L.R. 694.

51. See Boviard v. Brown [1975] 2 N.Z.L.R. 694.

52. Hinde, McMorland and Sim, Land Law, 1008, para. 10.010.