## SCOTT v. RANIA [1966] N.Z.L.R. 527 (C.A.)

*Scott v. Rania* adds another "subject to finance" case to the law reports – the seventh in nine years.(1) However, in this case the fact that only the narrow point of condition precedent/subsequent was argued prevented consideration of wider questions arising from the facts. This note is concerned with these wider questions.

The clause here was simple:

> This offer is subject to my being able to arrange mortgage finance .... within 14 days of acceptance hereof.

Rania made diligent efforts, all the while remaining in contact with Mrs Scott's solicitor, but, because the property was zoned Industrial, was unable to find the money by the magic hour of 5 p.m. on Friday the 2nd April when all the solicitors went home. On the following Monday Rania was still attempting to find finance. First thing next day (the 6th) Rania's solicitor rang Mrs Scott's solicitor to say that finance was almost secured and asking for an extension until later that day; he was told that Mrs Scott would have to be consulted as to the extension. At 2.15 p.m. Rania's solicitor confirmed that finance had been secured. Only then was contact made with Mrs Scott. She had sold elsewhere at 10 a.m. that day.

Sir Harold Barrowclough C.J., at first instance held that the clause was for the purchaser's benefit solely, that he had chosen not to avail himself of it, and accordingly that Rania was entitled to specific performance. The Court of Appeal (North P. and McCarthy J, Hardie Boys J. dissenting) allowed Mrs Scott's appeal.

It is not intended to consider at length the nature of conditions precedent and subsequent, for the clause involved here was clearly a condition precedent; however, two short points are relevant.

First, Hardie Boys J. held that the condition was a condition subsequent for

1. The other cases are:

   *Barber v. Crickett* [1958] N.Z.L.R. 656 (C.A.),
   *Griffiths v. Ellis* [1958] N.Z.L.R. 840 (C.A.),
   *Eastmond v. Bowis* [1962] N.Z.L.R. 954 (Richmond J.),
   *Knotts v. Gray* [1963] N.Z.L.R. 398 (McCarthy J.),
   *Martin v. MacArthur* [1963] N.Z.L.R. 403 (Richmond J.),
   *Mulvena v. Kelman* [1965] N.Z.L.R. 656 (Henry J.).

the oft-repeated but doubtful reason that:

> I have not been able to find a case where the non-fulfilment of a conditional clause which lay within the ability of one of the parties rather than a third party to fulfil and accomplish, has been treated as the sort of condition precedent that was upheld in the *Aberfoyle* case[2] as resulting in there being no contract at all. (at 540)

It is respectfully submitted that there is no material distinction between finance clauses (as here) and the "consent" cases referred to by Hardie Boys J. (such as *Suttor v. Gundowda Pty Ltd* (1950) 81 C.L.R. 418). The mortgage finance depends just as much on the third party's "consent" as an official's "consent" does on the applicant's diligence.

Secondly, there is to a large extent no practical difference between conditions precedent and subsequent. They both have the following effects:

(A) Vendor promises not to sell elsewhere before the date set; purchaser promises to take all reasonable steps to secure the finance.

(1) If finance is secured by the due date the contract becomes binding ipso facto.

(2) If finance is not secured by the due date then:

(a) if the purchaser has not taken reasonable steps he cannot rely on the condition, but the vendor may either repudiate or affirm the contract,

(b) if the purchaser has taken reasonable steps then both parties have the choice of repudiation or affirmation.[3]

Only at this stage does the really important distinction arise. With a condition subsequent there is a presumption that the contract is subsisting – "it's on till it's off", viz. *Suttor v. Gundowda Pty Ltd* (supra). On the other hand, with a condition precedent the contract is "off till it's on", viz. *Aberfoyle Plantations Ltd v. Cheng* [1960] A.C. 115 (P.C.). Thus, in deciding whether a condition is precedent or subsequent the Court is not concerned solely with interpreting words, but rather with whether the words and the surrounding circumstances disclose an intention that

2. *Aberfoyle Plantations Ltd v. Cheng* [1960] A.C. 115 (P.C.)

3. This analysis is not based on any one case but is taken from all seven New Zealand cases together with the Australian cases.

the agreement should continue after breach until express notice of repudiation, or otherwise.

Since the instant clause is a condition precedent, it was incumbent on Rania to show some election, waiver or estoppel by or against Mrs Scott. The Court then held that on the facts of the case there was no difference between the three, that waiver must be established to have taken place before the due date, that no contact had been made with Mrs Scott over the critical period, and hence that no waiver had been established.(4)

In arriving at this conclusion the Court cited the *Aberfoyle* case (supra) that the date could not be extended by equitable principles and concluded that once the date was past without a waiver, there was no contract existing which could affect the parties. To say that there is no contract is both true and untrue. It is true in the sense that the parties' mutual obligations disappear, and untrue in that the contract continues to exist "in another world". By definition either party could have continued the contract despite the breach. This decision may be communicated by plain word, by positive conduct, by failure to act in circumstances that demanded some action, or by mere lapse of time. Until one of these things happens the contract remains in the other world; once one of them occurs the decision applies retrospectively. By its nature waiver must be made before the due date; by its nature election cannot be made till after the due date, for until then there is nothing which can be elected; the act on which an estoppel is based may be prior to the date ("waiver by indirect conduct") or after the date ("election by indirect conduct"). In the present case it was found that there was no waiver before the date – and this is indisputable, nor was there any election after the date. Moreover, the failure of Mrs Scott's solicitor to make contact with Rania on the Monday could not possibly constitute an estoppel by mere lapse of time. If Rania was to succeed, then, he had to show estoppel by either positive conduct or failure to act when action was required. Furthermore, since there was no contact with Mrs Scott over the period, that estoppel had to be based on the conduct of her solicitor.

For such conduct of her solicitor to be sufficient that solicitor must have been his client's agent.(5) Where the matter is contentious it is clear that the solicitor is an agent in the fullest sense – *Strauss v. Francis* (1866) L.R. 1 Q.B. 379 per Blackburn J. Thus the opposing party is entitled to assume that the solicitor has authority for everything he does, and "If it turns out that the solicitor has not done his duty [and secured his client's authority] that should not affect the [other

4. The kernel of the decisions on this point can be found at 532 (North J.) and 536-7 (McCarthy J.).

5. For fuller treatment see *Cordery on Solicitors* (5th Ed. 1961) at 107ff.

party] who acted on the faith of his authority." – *Griffiths v. Evans* [1953] 1 W.L.R. 1424 per Denning L.J. at 1431.

Where the matter is not contentious the question is more difficult, but the result is that in practice he is an agent to some extent. The characteristics of an agent are: 1) he represents his principal, 2) he accepts notice which is then sufficient notice to his principal, 3) he can bind his principal. It is a commonplace to say that the solicitor "represents" his client, and this representation is even clearer here where all the contact with Mrs Scott over the critical period was through her solicitor. That notice to the solicitor is notice to the client is recognised by the Property Law Act 1952 s.58 which enacts that such notice must be received in that particular transaction.(6) As to power to bind, there is no general power to bind in a non-contentious matter unless it is explicit or implicit in the retainer – *Gavaghan v. Edwards* [1961] 2 Q.B. 220. There is, however, a limited power arising from practice. It is best stated from the other party's view: if a solicitor assents to a request for, or himself requests a variation in a term of the contract for sale, the other party is entitled to assume that he has his client's authority so to act. This is much the same as the statement in *Griffiths v. Evans* (supra) though in a much restricted area. The conclusion that the solicitor is in fact an agent is supported to some extent by the phrase "solicitor or other agent" used in s.58 of the Property Law Act 1952.

The agency of the solicitor has two effects, first it means that the actions of the solicitor may estop his client, and secondly the other party can expect the solicitor to be acting under instructions a reasonable time after notice is given him.

Was there an estoppel arising from the actions of Mrs Scott's solicitor? McCarthy J. at 535 defined the requirements thus:

> ... to establish election, waiver or estoppel (certainly in the case of a condition precedent such as existed here) some intentional unequivocal act of selection performed with knowledge of the choices open must be proved. ... or it must be shown that there was an occasion when a duty to speak arose and that the failure to speak justifiably led the other party to act in a certain way.

Taking first the "intentional unequivocal act". In *Steedman v. Drinkle* [1916] 1 A.C.

6. The section is one of those that do not apply to "land and instruments" under the Land Transfer Act 1952, but it is submitted that the section would apply to notice of the kind given here since it has nothing to do with registration being notice under that Act. Even if it does not apply the section represents the common law position- *Bailey v. Barnes* [1894] 2 Q.B. 25 (C.A.).

275, 280 it was said that there must be an act unequivocally showing an intention to forego the right concerned, and in *Petrie v. Dwyer* (1954) 91 C.L.R. 99 it was formulated as an act which is inconsistent with the idea that the party wishes to rely on the strict letter of the condition. In the latter case it was held, following *Webb v. Hughes* (1870) L.R. 10 Eq.281, that a continuation of negotiations after the due date was such an act. In the case under consideration the relevant notice that Rania was still trying to secure finance was given at least on the 6th April soon after 9 a.m. In addition there may have been a communication the previous day (this is discussed below). It is clear that in neither case was there anything approaching "negotiation", nor was there any "unequivocal" act affirming the continued existence of the agreement.

The question of a duty to speak could arise in two circumstances each dependent on a fact not decided by the Court. The first is the possible conversation on the 5th which seems to have been little more than notice that Rania was still seeking finance. The difficulty is that neither Barrowclough C.J. nor North P. mention it in their judgments. Only Hardie Boys J. found the conversation as a fact (this does not appear in the Report) while McCarthy J. mentions it stating that there was a conflict of evidence on the point and declines to decide either way. The status of the conversation is therefore doubtful.(7) If there was no such conversation then no estoppel can be raised against Mrs Scott by reason of the failure of her solicitor to indicate to Rania's solicitor his instructions as to continuing with the contract. The time at which Mrs Scott's solicitor could be expected to be acting under her instructions would be the 2.15 p.m. conversation by which time finance was arranged. On the other hand, if there was a conversation on the Monday, the solicitor should have been acting under instructions on the Tuesday morning, and the fact that he did not say anything then so that Rania continued his efforts, could constitute an estoppel. Such a failure to speak would appear to come within the statement in *Fuller's Theatre Ltd v. Musgrove* (1923) 31 C.L.R. 524, 539ff : the party in default proceeded to carry on with the performance of the contract with the tacit permission of the innocent party made in the knowledge of the breach.

The second undecided fact (not mentioned in any of the judgments but appearing from the notes of evidence) is, that to the knowledge of her solicitor, Mrs Scott did not intend to allow any extension owing to an unfortunate experience in a previous attempt to sell. If this is so then it is submitted that the solicitor was under a duty to tell Rania this at their first communication after the due date, or at least promptly enquire of Mrs Scott whether she still adhered to this attitude. His failure to do so may

7. The jurisprudential nature of this and the following doubtful fact are outside the scope of this note.

well have formed the basis for an estoppel.

After all this it is still far from certain whether these additional considerations would have affected the end result. It will never be known because the Court confined its attention mainly to the condition precedent/subsequent question. The Court did not direct its attention to the status of the solicitor and the practitioner still does not know his exact position in this type of transaction. Had this question been argued before the Court of Appeal this case could have been an important one for solicitors throughout the common law world, and would have been more than just the eighth case of a series.