

PART IX – TERMINATION FOR NON-FULFILMENT OF A CONTINGENT CONDITION

I CREATION OF RIGHT TO TERMINATE

A *The Nature of a Contingency*

A contingency is something that may or may not occur – an unknown but possible event that may take place in the future and which, if it occurs (or does not occur), is agreed to initialise or deactivate the parties' obligations under a contract.

A distinction is drawn between conditions of performance and formation. The effect of a condition of formation is to prevent any contract from coming into existence prior to its satisfaction. (See further the three types of contingency described in *Meehan v Jones*.) This kind of condition most commonly arises where a contract is said to be subject to the preparation of a formal document, etc.

Conversely, the effect of a condition of performance is to render an existing contract voidable (ie, able to be terminated at the discretion of a party not in default) if it is not fulfilled. Such conditions typically stipulate that, if the relevant event occurs (or does not occur, as the case may be), the contract will be treated as at an end.

Examples involving a purchaser of land:

- The buyer may wish to have the option of escaping liability under the contract if the sale of their existing property cannot be completed in time (*Perri v Coolangatta*);
- The buyer may need to perform conveyancing duties and so make their successful completion a contingency for execution of the sale

The effect of either contingency is to render performance of the contract subject to the condition being fulfilled.

There is an implied obligation that neither party will do anything to obstruct the fulfilment of the condition. Some have characterised this obligation as falling within a broader duty to co-operate in achieving the ends of the contract.

B *Types of Contingency*

1 *Conditions precedent and subsequent*

The common law draws an oft-cited, frequently misapplied, and legally dubious distinction between conditions precedent and conditions subsequent. The precise meaning of these terms will depend upon the point of reference against which fulfilment of the condition is being measured. They are temporally relative labels of convenience used to describe the nature of a contingency.

For example, if the point of reference is the formation of the contract, a condition precedent will be one on which the formation of the contract depends (ie, binding obligations will not come into existence until the condition is fulfilled), while a condition subsequent will be one on which

performance of the contract depends (ie, the contract will come to an end unless the condition is fulfilled; or, more precisely, the contract will come to an end if the condition remains unfulfilled).

In such cases, the question to be asked is whether the condition is a requirement precedent or subsequent to formation. If, however, the point of reference is completion of the contract (eg, settlement, in the case of a contract for the sale of land), the question becomes whether the condition is a requirement of completion or something that can only occur after completion.

2 Contingent and promissory conditions

The type of contingency into which a condition is classed is no longer particularly relevant (certainly not determinative of the outcome). More relevant is the separation of contingent conditions from promissory conditions. If a condition is promissory, it is simply an essential term, breach of which will give rise to a right to damages and termination of the contract.

Conditions of performance are not promissory (though they may contain a promissory component – to take all reasonable steps necessary to fulfil it). For example, in the case of a buyer who makes execution of a contract of sale conditional on their own house being sold, if the house is not sold, the buyer will not be in breach of their contract with the vendor because they are not *required* by the contract to sell it. Performance of the sale is simply conditional on the fulfilment of the condition. By contrast, a promissory condition may warrant a particular state of facts as existing at the time of formation, performance or completion, and so make execution conditional on the truth of the promise (of which the maker would be in breach, if false).

Thus, in *Perri v Coolangatta*, the buyer undertook to take all reasonable steps necessary to bring about the fulfilment of the contingent condition. This is a promissory condition, because if Perri does not take all such reasonable steps, they will be in breach of the contract. The obligation may well be an essential term on which the sellers could rely to terminate for a failure to take all reasonable steps to bring about the condition, and could potentially result in the award of damages for breach of the contract. As an argument ancillary to their claim that the contract was avoided for non-fulfilment of a contingent condition (the sale of the house within reasonable time), then, the sellers could also have argued that the buyers were in breach of the promissory condition (to take all reasonable steps necessary to sell it) by demanding an unrealistically high price for the property.

C Termination for Non-Fulfilment

1 *Is a contract automatically terminated if a condition on which it or its performance is contingent is not satisfied?*

In the event of non-fulfilment of a contingent condition, whether a contract comes to an end automatically depends on the type of the condition and the degree of control which each party could exercise over its fulfilment.

Where one of the parties has some element of control over the condition's fulfilment (eg, if it is their property being sold that is the condition), a contract will not automatically come to an end if the condition is unfulfilled. In these circumstances, no termination results unless the party who has a right to terminate in fact exercises that right. The exercise of this right could be manifested by, for example, bringing an action seeking a declaration that the contract has been validly terminated (as in *Perri v Coolangatta*).

If there is a condition whose satisfaction neither party can influence (eg, 'that it will rain on Sunday'), then its failure to eventuate brings the contract to an end automatically.

Note, however, that even where third party decisions are the subject of a contingency (eg, the decision of a third party regulator, financier or authority), parties will still often have to do something in order to gain their approval and can thus be treated as capable of influencing the condition.

Gange v Sullivan (19xx) HCA:

Facts

- Gange ('G') and Sullivan ('S') enter into a contract for the sale of S' land to G, which G intends to exploit for the purpose of a commercial development
- Sullivan, the seller, attempts to avoid performance, relying on the following condition:
 - '2. This contract is subject to the purchaser obtaining development approval from the Shire Council In the event of the Council not granting approval by 31 May 1965, then this contract shall be deemed to be at an end BUT in the event of approval ... the Purchaser will complete within 20 days ...'
 - The contract's performance is thus rendered subject to G obtaining approval from the council
- 2 April: G receives a letter from the council's town planner advising that the buyer's proposal had been 'approved in principle' but rejecting certain features of the proposed development (the location of the newsagency and residence, and the area of the service station)
- The seller demands completion by 23 April; the buyer requests extension
- The seller declines unless 50% of the price is paid at once and the total price is increased
 - The buyer rejects the first point
- 2 June: the seller's solicitor writes: 'As you have intimated that the first of these terms is unacceptable, we must therefore treat the contract as at an end'
- G sues for specific performance of the contract

Issues

- To what extent can parties regulate the termination of their own obligations?
- Can a party choose to terminate for *any* non-fulfilment of a contingent condition?

Reasoning

- The Court overrules the parties' intentions, supplanting the terms of cl 2 with court regulation of contingencies
 - Though approval was obtained, the condition was not fulfilled
 - However, the contract is not unequivocally terminated by failure
 - Waiver of benefit: buyers waived benefit of condition and denied the seller's right to terminate
 - Clause 2 appears to provide for automatic termination in the event of the contingency
 - The seller argues that the contract comes to an end automatically
 - However, this doesn't happen automatically
 - The seller must decide to exercise their right to terminate before the contract can be treated as at an end
 - Here, the seller did this
 - Therefore, the contract is at an end
- Any contingent condition is an essential term, failure of which gives rise to an immediate right to terminate
 - The expression of a term in the form of a condition 'endows it with essentiality'

- Normally, a term must be both substantively and temporally significant before a right to terminate for its non-fulfilment will be conferred
 - Substance: important enough in substance to justify termination
 - Temporality: not performing by a particular time gives a right to terminate
- This is reflected by the maxim ‘time must be of the essence before termination [for failure to perform on time] is possible’
- However, this is not applicable to conditions
 - A party not in default can immediately terminate for non-fulfilment
 - I.e., there is no temporal element required
- However, just because it need not be established that a condition is an essential term or that time is of the essence does not mean that it is unnecessary to show non-fulfilment
 - Failure of the condition is a prerequisite of termination for its non-fulfilment
- Interpretation issues *may* arise
 - Is the ‘town planner’ the same thing as the ‘Shire Council’?
 - If he is an agent for the Council, then the condition is met
 - Otherwise, it is not fulfilled
 - Is ‘development approval’ the same thing as ‘approved in principle’?
 - If not, the condition remains unfulfilled
- Because significant features of the development were not approved, no approval was actually received
- The partial approval was not from the council, either, but from a town planner who was not an authorised agent of the council
- Therefore, the condition was not fulfilled and a right to terminate is conferred upon S

Decision

- The contract was validly terminated

2 *Is the terminating party required to give notice when avoiding a contract for the non-fulfilment of a contingent condition on which it depends?*

Non-fulfilment of a contingent condition gives an immediate right to terminate without notice (*Perri v Coolangatta*).

When the time has elapsed for performance of a condition that is not promissory in nature, and a condition precedent to the obligation to complete a contract of sale, the party not in default can terminate, if the condition has not been waived or fulfilled, without giving notice – regardless of whether the time for completion has been expressly set. The time for completion is not to be extended by reference to equitable principles, whether a time for completion is specified or not.

Perri v Coolangatta Investments Ltd (1982) HCA:

Facts

- 7 April 1978: Perri (‘P’) enters into a contract to purchase land from Coolangatta (‘C’); no time is fixed for completion of the sale
- Special Condition 6 provides that ‘This contract is entered into subject to Purchasers completing a sale of their property ... Lilli Pilli’
 - P is financing their with the proceeds of the sale of their existing property
- 17 July 1978: C issues a notice to complete (by 8 August 1978)

- The sale of P's old property was still not completed by that date
- 10 August 1978: C gives notice rescinding the contract
- 29 September 1978: C seeks a declaration that the contract has been validly rescinded
- 27 February 1979: P waives the benefit of Special Condition 6 and seeks completion of the contract of sale by 15 March 1979
 - C refuses, claiming that the contract had been validly rescinded by their 10 August 1978 notice
 - [In reality, C wants to sell their property to someone else because they have received a better offer]
- 21 March 1979: P cross-claims, seeking specific performance of the contract with C
- 13 June 1979: the condition is finally fulfilled, with P completing the sale of their old property, which was sold to a buyer in March 1979
- At trial, Needham J holds that the contract had been validly terminated; he makes the declaration and dismisses the cross-claim
- P appeals unsuccessfully to the Court of Appeal, followed by the High Court of Australia

Issues

- The buyers argue that the sellers' termination was invalid because the notice to complete was not properly served
 - It was premature because a reasonable time had not yet elapsed in which to satisfy the contingent condition
 - [No time was fixed for completion, so a term requiring completion 'within a reasonable time' may be implied]
 - Serving the notice does indeed make time of the essence
 - However, to serve a notice there must already have been a breach of the obligation to perform on time
 - Because, according to Needham J, a reasonable time would not have elapsed until September (after which C did not serve another notice), the notice was invalid
 - The termination is therefore invalid and the contract remains on foot
- Was the sellers' termination valid despite notice being served prior to the elapse of a reasonable period of time in which to satisfy Special Condition 6?

Reasoning

- Gibbs CJ:
 - Special Condition 6 made the sale of Lilli Pilli a condition precedent to the sale of C's land to P
 - The condition was not precedent to the formation of a contract; obligations clearly arose from 7 April 1978 (paying the deposit, etc)
 - The condition was for the benefit of P, who were entitled to waive it, but that took place too late (after the commencement of proceedings)
 - By September 1978 a reasonable time had elapsed by the condition had not been fulfilled
 - Can C terminate without notice for non-fulfilment of a contingent condition?
 - Where a conditional contract of sale fixes the date by which the condition is to be fulfilled, the time allowed is not to be extended by equitable principles (*Aberfoyle Plantations*)
 - Where time is not of the essence, serving a notice would make it so – even if the vendor had not been guilty of delay or default
 - *Gange v Sullivan*: a contract subject to development approval did not automatically come to an end despite the time specified by the contract by which approval was to be obtained elapsing
 - The effect of a condition in every case depends upon the language in which it is expressed

- Non-fulfilment of a condition renders a contract voidable rather than void (in order to prevent a party gaining an advantage from his own conduct in contributing to the non-fulfilment) (Taylor, Menzies and Owen JJ; Barwick CJ in agreement)
 - *Suttor v Gundowda*: non-fulfilment of a condition gave the party not in default a right to avoid the contract; if an attempt to terminate is made only after satisfaction of the condition, it will be too late
 - Both these cases concern contracts that expressly fix a time by which the condition is to be fulfilled
 - Thus: where a conditional contract fixes the date by which the condition is to be fulfilled the contract may be terminated if the condition has not been fulfilled when that date arrives, and it is unnecessary to give notice to that effect (*Suttor v Gundowda*; *Gange v Sullivan*; cited with approval in *Perri v Coolangatta* by Gibbs CJ)
 - Is notice required where no time for fulfilment is expressly set by the contract?
 - No
 - When the time has elapsed for performance of a condition that is not promissory in nature, and a condition precedent to the obligation to complete a contract of sale, the party not in default can terminate, if it has not been waived or fulfilled, without giving notice
 - The time for completion is not to be extended by reference to equitable principles, whether a time for completion is specified or not (ie, whether the condition must be fulfilled by date X or within a reasonable time)
- Gibbs CJ, Brennan and Stephen JJ (majority):
 - There is no need to give notice to complete because this is not a case of breach of contract
 - Instead, it is a case of non-fulfilment of a contingent condition
 - Non-fulfilment of a contingent condition gives an immediate right to terminate without notice
 - Had the condition been fulfilled within a reasonable time (or, at least, before C elected to terminate), the termination would have been invalid
 - However, this was not the case: by the time C instigated proceedings, the condition remained unfulfilled
 - Because the condition was for P's benefit, they could waive its benefit so as to keep the contract on foot; however, they did this after the contract had been terminated, so it was too late
 - The fact that the notice is invalid is irrelevant to the question of whether the contract had been validly terminated
 - A reasonable time had not elapsed at the point the notice of rescission was served
 - Notice is unnecessary, so it doesn't matter whether valid notice was given as to termination
 - By the time the seller had commenced their action (29 September) a reasonable time had elapsed such as to render the contingent condition unfulfilled
 - In doing so, sellers terminated validly:
 - They evinced their intention of terminating by commencing the action
 - The termination is still valid without any notice to complete
- Wilson J: agrees with majority on different grounds
 - Agrees with the majority, but disagrees that notice is not required
 - However, a reasonable time had expired before September, so the contract could be terminated then
 - The condition expired in July, at which point a reasonable time for completion had elapsed

- This means that the notice was valid and the contract was validly terminated
- Mason J (dissenting):
 - There needs to be notice to complete, even though this is indeed a case of non-fulfilment of a contingent condition

Decision

- (4:1) Seller terminated validly; buyers' argument is rejected
- On the facts, a reasonable time for the fulfilment of Special Condition 6 had expired by September 1978
- From this point on it was open to C to avoid the contract without notice
- By instituting the proceedings, C sufficiently evidenced its election to terminate
- At that time, the benefit of the condition had been neither waived nor fulfilled by P
- The termination was thus valid regardless of how or when notice was served

As soon as a contingent condition fails to be met, a right to terminate arises. There is no need to serve notice; however, unless the condition is one over which neither party has control, termination will not be automatic. The contract will not come to an end until the right is actually exercised by the party on whom it is conferred. A period for fulfilment need not have been explicitly specified, but the specified period (or else a reasonable period) must have elapsed before the contingency will be deemed to have occurred.

II RESTRICTIONS ON THE EXERCISE OF THE RIGHT TO TERMINATE

A *Failure to Co-Operate*

A party is disqualified from relying on the non-fulfilment of a contingent condition as a basis for termination if they have not done what is necessary to fulfil the condition. (This is somewhat akin to the requirement of readiness and willingness in the context of termination for breach.) Originally, the duty to co-operate in matters concerning the fulfilment of a contingent condition was an implied obligation; however, the requirement has since crystallised into a substantive rule of law.

If a party fails to co-operate so as not to fulfil a contingent condition on which performance is dependent, they cannot rely on the non-fulfilment to demand termination. Thus, in *Perri*, if the buyers had wanted to terminate (in actuality, it was the seller who wanted to do so, and not the buyer), they would not have been able to because they hadn't done what was reasonably necessary to bring about the fulfilment of the condition (they set too high a price).

The justification for the requirement of co-operation is that it ought not be possible for a party to rely on the fruits of their wrong as a basis for termination.

B *Unjust Forfeiture*

Brennan J in *Perri* noted that '[a] purchaser has an equitable title in land when the contract is made, forfeiture of which may be unjust. However, where the contract is subject to a contingent condition, no such equitable right arises *until* that condition is fulfilled.' This may be compared

with the somewhat contrarian position in *Tanwar*, where it was held that no equitable title exists at all.

On the most lenient view, a fortiori, no equitable interest exists until the condition is fulfilled. However, if the High Court's more recent denial of a buyer's equitable interest in land is to be accepted, no unjust forfeiture is possible at all (except, perhaps, in the limited circumstances there described, and only – presumably – once the condition is fulfilled [???]). In either case, there is very little (or no) scope for unjust forfeiture as a basis for restricting termination for non-fulfilment.

Some commentators have remarked that restricting a right to terminate for non-fulfilment of a contingent condition on the basis that forfeiture of a proprietary interest is unjust would not be logically consistent with the effect of a condition upon the interest itself. As a matter of law, a proprietary interest may only arise once there is a binding obligation to complete; this may not happen until the condition has been fulfilled (as where, for example, the condition is one precedent to formation or performance).¹

C *Unconscionability*

1 *Equity*

The equitable maxim that no legal right may be exercised unconscionably is well established as restricting the exercise of a right to terminate for non-fulfilment of a contingent condition.

Pierce Bell Sales v Frazer (1973) HCA:

Facts

- The buyer alleges that the contract is still on foot notwithstanding the sellers' purported termination because of the non-fulfilment of a contingent condition on which the contract depends
- Clause 14 provides that:
 - '14. If the Vendor shall be unable or unwilling to comply with or remove any objection or requisition which the Purchaser has made ... the Vendor ... shall be entitled ... to rescind this agreement.'

Issues

- Can unconscionability restrict the seller's attempts to terminate for non-fulfilment of the contingent condition to which the contract is subjected in cl 12?

Reasoning

- It would not be unconscionable to terminate the contract on these facts
 - Unconscionability does not restrict the exercise of the right here
 - The seller did not know that the legislation did not permit the transfer
 - The agreement had been prepared by the buyers
 - The reason why the sellers did not want to go ahead with the application required to obtain approval was that they had no money with which to pay for it
 - The corporation should have done something; it is not unreasonable to do what they did

¹ See Seddon and Ellinghaus, above n 1, [20.11].

Decision

- Therefore, it is not unconscionable to terminate

Pierce Bell may be contrasted with *Godfrey v Kanangra*, where it was held to be unconscionable to invoke a similar clause.

It is unclear whether these decisions apply only to clauses involving the phrase 'unable or unwilling', or whether they are of general application to the effect of unconscionability on a right to terminate for non-fulfilment.

Since *Tanwar*, which required some mediating doctrine for the prevention of termination for breach, a shadow has been cast on these cases. It is presently unresolved whether the unmediated application of equitable doctrine is still possible in respect of contingent conditions, or whether a mediating doctrine is required.

2 Trade Practices Act

Sections 51AA, 51AB, 51AC may potentially operate to exclude the termination of a contract for non-fulfilment of a contingent condition. If it would be unconscionable to do within the meaning of any of these sections, s 87 may allow the other party to obtain an injunction preventing the other party from terminating. However, no case law exists in relation to this restriction.

D Implied Obligations

Implied obligations of good faith and reasonability may also restrict the exercise of a right to terminate a contract for non-fulfilment of a contingent condition.

In *Meehan v Jones*, for example, good faith was held to restrict termination for non-fulfilment of a contingent condition. There, a contract was made 'subject to satisfactory finance', a condition precedent to performance.

Similarly, Gibbs J in *Pierce Bell* decides the case on the basis of good faith; the right must not be exercised unreasonably or capriciously.

III LOSS OF THE RIGHT TO TERMINATE

A Election, Affirmation and Waiver

Where the conduct of a party, who has the right to terminate for non-fulfilment of a contingent condition, suggests it will not exercise its right, that party may be prevented from later doing so.

Chiefly, a party will lose the right to terminate where their conduct evinces an election to treat the contract as continuing (*Suttor*). Three issues arise:

1 Self-executing conditions

Where a condition is self-executing, it cannot be affirmed because the contract comes to an end as soon as the contingency arises. A condition will only execute automatically where the parties have no control over its fulfilment (eg, 'if it rains on Monday the contract will be at an end').

However, in all other cases, a party must elect to exercise the right to terminate for non-fulfilment.

2 Type of conduct

If a party does not clearly exercise their right to terminate for non-fulfilment of a contingent condition, they will have affirmed the contract. Failure to exercise a right to terminate can in itself constitute affirmation (*Suttor*).

Suttor v Gundowda Pty Ltd (19xx) HCA:

Facts

- Suttor ('S') contracts with Gundowda Pty Ltd ('G') to sell his outback station
- Clause 12 of the contract provides that:
 - 'In the event of the consent of the Treasurer not being obtained within two months the contract shall be deemed cancelled.'
- The consent of the Treasurer is not obtained within two months
- S subsequently refuses to execute the contract
- G brings an action for specific performance

Issues

- Can Suttor rely on clause 12 to terminate and refuse performance?

Reasoning

- The buyer is entitled to specific performance, and S cannot rely on clause 12
 - The contract was varied to extend the amount of time allowed
 - Despite the wording of the clause, the contract had not come to an end; it simply meant that S had the *right* to terminate
- The seller affirmed the contract by his behaviour after the time had elapsed
 - He continued to treat the contract as on foot
 - The seller behaved in such a way as to indicate that the contract was still in existence
 - If a party does not clearly exercise their right, they will have affirmed the contract
 - In this way, a failure to exercise a right to terminate can in itself constitute affirmation
 - The Court thus takes a very strict view about what constitutes affirmation

Decision

- *Suttor* is mostly concerned with the right to specific performance, and will arise again in the context of equitable remedies
- The contract remains on foot and S is obliged to complete the sale

3 Subjective affirmation

The extent to which a subjective intention to affirm a contract is required by the party on whom a right to terminate for non-fulfilment of a contingent condition is conferred is unclear. *Sargan* suggests that, providing a party know the facts on which the right is based, it is not required they are aware of the right to terminate for them to lose it. However, *Immer* represents a departure from this objective approach to affirmation, requiring conscious choice.

Sargan v ASL Development (19xx) HCA:

Facts

- A contract for the sale of land to a developer
- A clause gives the seller the right to terminate if the land is affected by a local planning scheme
- The land is affected by the scheme
- The contingency arises, so the seller has the right to terminate
- However, the seller had not read the contract and did not know about the term conferring the right
- For three years, the seller accepted payments, seemingly affirming the contract
- The seller is now approached by another developer, who offered a much better price for the land
- The seller goes to see his solicitor, who draws the clause to his attention
- The seller purports to terminate for non-fulfilment of the condition

Issues

- Has the seller affirmed the contract?

Reasoning

- Although the seller was not aware of the clause, accepting payment nevertheless constitutes an affirmation of the contract
- The court adopts a very objective approach to the loss of the right to terminate
- It is not required that a person know they have a right to terminate for them to lose it
- All that is necessary is that the party know the facts on which the right is based

Decision

- Here, the seller knew that the land was affected by the planning scheme
- The seller therefore knew the fact on which the right was based (despite not knowing of the right to terminate conferred by the condition)
 - The seller need not know he has a right to terminate in order to lose it
- The seller subsequently affirmed the contract by accepting payment, and lost the right to terminate for non-fulfilment; the contract stands

The objective approach adopted in *Sargan* appears to have since been rejected (or at least distinguished). A contract will be affirmed only if the terminating party, at the time at which it elects to not to exercise its right to terminate, is subjectively aware that it has a choice between affirmation and termination (*Immer v Uniting Church*).

Immer v Uniting Church (19xx) HCA:Facts

- Immer is building a property in the vicinity of a building owned by the Uniting Church ('UC'); he wants to buy floor space from UC
- The Council allows the transfer subject to the condition that UC's restoration of their own building be completed
- UC is attempting to deny Immer's right to terminate for non-fulfilment on the basis that Immer affirmed the contract in their conduct after 01.04.1989
- 14.09.1988: Council writes to UC: the transfer of floorspace is approved subject to completion of the restoration
- 14.10.1988: a deed of transfer is drawn up providing for the transfer from UC to Immer
 - Clause 7: 'In the event that approval is not granted by 01.04.1989, then the Purchaser may at any time thereafter rescind this Deed by notice in writing.'
 - Completion is specified as being within 7 days of the Council's final approval
 - Immer pays a deposit and applies for approval
- 29.03.1989: Council solicitor writes to Immer solicitor:
 - Approval 'recommended' subject to certain conditions, not including completion of restoration
- 01.04.1989: Immer does not terminate the contract
- 24.04.1989: UC solicitor to Immer solicitor:
 - All conditions satisfied, restoration not required, request completion without delay
- 09.05.1989: Another letter requesting completion, reiterating restoration not required
- 29.05.1989: Immer solicitor sends to UC solicitor an assignment form required by statute
 - Immer makes no threat to rely on cl 7, even though the date specified had passed
 - Instead, Immer sends a statutory form required to complete the transaction to UC
 - This seems to suggest Immer is treating the contract as on foot
- 21.06.1989: Council direct to UC: transfer conditional on completion of restoration
- 23.06.1989: UC solicitor (unaware of this letter) telephones Immer solicitor to press for completion
 - Immer solicitor (also unaware) agrees to send draft deed of assignment 'immediately' and to arrange for settlement 'soon'
- 26.06.1989: Immer solicitor (still unaware) sends draft deed (reciting approval), with letter stating 'I am awaiting instructions as to the final date for completion.'
 - Immer believes that the Council has actually approved the transfer (wrongly, since 21.06.1989)
 - Immer also believes that the transfer has occurred in time (ie, before the date set by clause 7)
 - This suggests that the contract is still on foot (evidences affirmation, argues UC)
- 29.06.1989: UC solicitor and Immer solicitor (now aware) discuss letter of 21 June by telephone
 - Immer solicitor: 'settlement might still take place next week, Immer is waiting on its financier, I will chase the matter up'
 - Representations to Council follow
 - Immer's solicitor makes representations to the Council requesting immediate approval
- 14.08.1989: Council resolution affirming restoration is condition of approval
 - In response to the 29 June representations: no, the restoration must be completed before approval will be granted
- 25.08.1989: Immer serves notice of rescission under clause 7, claims return of deposit
- 25.09.1990: Council approves transfer

Issue

- What is the subjective element required to evince an intention to affirm the contract, despite the availability of a right to terminate for non-fulfilment of a contingent condition?

Reasoning

- Was the contract objectively affirmed by Immer?
 - Majority: yes
 - Immer's conduct objectively counts as conduct which a reasonable person would infer constitutes a choice to affirm the contract despite the failure of the condition
 - This is not merely a case of non-exercise of a right to terminate for non-fulfilment (unlike *Sutton*)
 - Many acts indicate that Immer is still treating the contract as being on foot
 - Brennan J:
 - Immer argued that the 26 June 1989 deed had assumed that approval had been given
 - Immer cannot be affirming what was an untrue assumption, UC's argument proceeds on an erroneous footing
 - Accepts the argument

- To what extent is a subjective choice between affirmation and avoidance required?
 -
 - This is because there is a subjective element to affirmation, which Immer did not possess
 -
 - It may be supposed that Immer was unaware of their right to termination until 26 June 1989, and thought that approval was 'just around the corner'
 - However, they *did* know of the facts that gave rise to that right (1 April had passed without approval)
 - So surely, according to *Sargon v ASL*, Immer affirmed the contract; they lost the right even though they didn't know about it because they knew the relevant facts giving rise to the right
 - No; the High Court does *not* apply *Sargon*
 - Affirmation has to be an element of conscious choice
 - A contract will be affirmed only if the terminating party, at the time at which it elects to affirm, is subjectively aware that it has a choice (between affirmation and termination)
 - Here, Immer thought that approval was just a formality
 - Immer did not make a conscious choice to affirm the contract when acting after 1 April 1989

Decision

- There is *no* affirmation by Immer because, in believing approval was a secondary formality, they were not aware of the Council's refusal to grant the transfer until UC completed restorations
- Immer held this belief until they were availed of it by the Council directly, whereupon they purported to exercise their right to terminate
- Until this point, it was not possible to make a conscious choice to affirm
- At this point, they elected not to affirm but to terminate; therefore, that termination is valid

Is *Sargon* irreconcilable with *Immer*? Arguably not. In *Sargon*, Callinan J notes that the terminating party's motivation for attempting to rescind the contract was that they could obtain

more money elsewhere. This was a somewhat unconscionable motivation. In *Immer*, by contrast, Immer is in a position where their own construction project is being delayed at significant expense to themselves by the floor space rights being held up on account of Uniting Church's failure to complete their renovations. Uniting Church was also less than forthcoming to Immer about the requirements for approval by the Council, and the delays associated therewith.

The parties seeking termination are thus in completely different positions. This is, however, the only real distinguishing feature between the cases.

As a result of *Immer*, the subjective element of affirmation remains in doubt. The *Sargan* rule was at least clear; now, it is far from apparent which is to be applied. At a minimum, it seems that 'conscious choice to affirm' is now required. This suggests that knowledge of the facts essential to the choice is also necessary.

B Waiver of Benefit

If a contingent condition is designed for the protection *primarily* (*Perri*) or *solely* (*Sandra Investments*) of one of the parties, the party so protected is entitled to waive the benefit of that condition so as to prevent the other party terminating for its non-fulfilment.

***Sandra Investments v Booth* (1983) HCA:**

Facts

- Sandra ('S'), a development company, buys land from Booth ('B'), on which they intend to construct a subdivision
- The contract is made subject to a contingent condition:
 - 'This contract is subject to and conditional upon the approval of the Beaudesert Shire Council to a plan of subdivision and engineering plans on terms and conditions satisfactory in all respects to the Purchaser within six (6) calendar months from the date hereof. In the event that such approval is not obtained then the Purchaser may at their option cancel this contract ...'
- The contract also provides for the majority of the price to be payable in instalments over a period of 18 months from settlement, to be secured by a mortgage taken out by the buyers
 - Payment is to be expedited on the sale of any lot in the subdivision
- The condition is not fulfilled (approval is not obtained within 'six (6) calendar months')
- S writes to the seller, waiving the condition so that B won't be able to cancel the contract
 - S probably does this in order to prevent B from taking up a better offer elsewhere

Issues

- Is the condition primarily or solely for the benefit of Sandra Investments such as to allow them to waive its benefit and prevent Booth terminating the contract for failure of the condition?

Reasoning

- The condition expressly confers a right upon S to cancel at their discretion
- An interpretative issue arises: is the condition available to the vendor to allow them to terminate?
 - No; the condition only gives a right to the purchaser
 - It is necessary only to point to the wording and not to waive the right (the implication being that the vendor has no right to rely)

- Cater cestro: only purchaser
- Even if the condition is available to both parties, is this primarily or solely for the benefit of S?
 - This is a situation where it is evident that the effect of the clause is to protect the purchaser by ensuring that a subdivision is able to be created
 - It guarantees that S is able to use the land for the purpose they envisaged
 - Although clearly for the protection of S, it does impact upon B – successful subdivision means B is more likely to receive instalments
 - The plain implication is that if S chooses not to terminate the contract under the clause then B has no right to treat it at an end (Gibbs CJ)
- Does it have to be 'solely' or simply 'primarily for S' benefit'? [???]
 - Consider whether the clause is so inextricably linked to other parts of the contract that it could not be severed
 - Not the case here
- If it is, has S successfully waived the benefit by writing the letter to B?
 - Yes, S has done so successfully

Decision

- The contract expressly provided for the consequence

For example, in *Perri*, completion of the sale was subject to the purchaser's sale of Lilli Pilli. This condition was inserted for Perri's benefit (it ensures they won't be left in a position where they will be contractually obligated to render payment for Coolangatta's transfer without having available the proceeds from the sale of their existing property). Consequently, the buyers could have been entitled to waive the benefit of the condition such as to prevent Coolangatta from relying upon it to terminate the contract. However, though it was held that the benefit was primarily inserted for the protection of the buyers, Perri did not elect to waive the condition until after it had been relied upon by Coolangatta to terminate. As the contract was already at an end, there was no longer any condition to waive.

The party for whose benefit a condition is inserted can only waive its benefit such as to prevent the other party, not in default, from relying upon it as a basis on which to terminate the contract if they do so at a point prior to the other party's termination (*Perri*).

However, in the absence of waiver, the party not in default will be able to terminate the contract for failure of the condition despite it being primarily or even solely for the benefit of the other, non-terminating party (*Perri*).

C *Estoppel*

A party who engages in conduct inducing the assumption in the other party that they will not utilise their right to terminate may be estopped from departing from this assumption.

This kind of an argument could possibly have been applied in *Immer* (in respect of representations made by Immer to Uniting Church), but for the fact that Uniting Church suffered no detriment in reliance on the assumption that the right would not be exercised.