SUPREME COURT OF QUEENSLAND

CITATION:	*Donaldson & Donaldson v Bexton & Bexton* [2006] QCA 559
PARTIES:	**KYLIE JEAN DONALDSON** (first plaintiff/first appellant) **SHANE LESLIE DONALDSON** (second plaintiff/second appellant) **v** **CAROLINE SUSAN BEXTON** (first defendant/first respondent) **MARK WILLIAM BEXTON** (second defendant/second respondent)
FILE NO/S:	Appeal No 4703 of 2006 SC No 2074 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	22 December 2006
DELIVERED AT:	Brisbane
HEARING DATE:	20 October 2006
JUDGES:	Jerrard and Keane JJA and Philip McMurdo J Separate reasons for judgment of each member of the Court, Jerrard and Keane JJA concurring as to the orders made, Philip McMurdo J dissenting
ORDER:	**1. Appeal dismissed** **2. Appellants to pay the respondents' costs of the appeal**
CATCHWORDS:	CONTRACTS - CONSTRUCTION AND INTERPRETATION OF CONTRACTS - OTHER MATTERS - contract for the sale of land - respondent vendor and appellant purchaser entered into written contract - special condition made contract subject to the appellants selling other land owned by them within 30 days - "failing which this contract will be at an end" - respondents asserted that contract was at an end by reason of failure of special condition - appellants adduced evidence that they had waived benefit of special condition - common ground that special condition rendered contract voidable by either party - appellants contended special condition was provision for their benefit and thus could be waived by them and was waived - respondents contended that non-compliance with special condition made contract voidable by them and that they had lawfully terminated contract - appellants commenced action for

specific performance - whether right of termination which arose in respondents upon non-fulfilment of special condition was lost because appellants indicated to respondents that appellants wished to complete contract before respondents purported to terminate contract

Amber Holdings (Aust) Pty Ltd v Polona Pty Ltd [1982] 2 NSWLR 470, considered
Associated Developers (Aust) Pty Ltd v Allied and General Pty Ltd (1994) Q ConvR 54-458, cited
Barooga Projects (Investments) Pty Ltd v Duncan [2004] QCA 149; (2004) Q ConvR 54-603, considered
Bedroff Pty Ltd v Rennie [2002] NSWSC 928; No 4323 of 2002, 22 October 2002, considered
Blue Moon Grill P/L v Yorkey's Knob Boating Club Inc [2006] QCA 253; Appeal No 7754 of 2005, 13 July 2006, cited
Charles Lodge Pty Ltd v Menahem [1966] VR 161, considered
Equuscorp v Glengallan (2004) 218 CLR 471; [2004] HCA 55, cited
Excel Quarries Pty Ltd v Payne (1996) Q ConvR 54-473, cited
Gange v Sullivan (1966) 116 CLR 418, considered
Havenbar Pty Ltd v Butterfield (1974) 133 CLR 449, cited
Hawksley v Outram [1892] 3 Ch 359, cited
Homburg Houtimport BV v Agrosin Private Ltd [2004] 1 AC 715, cited
Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW) (1992 – 1993) 182 CLR 26, cited
Koikas v Green Park Construction Pty Ltd [1970] VR 142, cited
Meehan v Jones (1981-1982) 149 CLR 571, cited
Pacific Carriers Pty Ltd v BNP Paribas (2004) 208 ALR 213; [2004] HCA 35, cited
Perri v Coolangatta Investments Pty Ltd (1982) 149 CLR 537, considered
Re Wickham Developments (Australia) Pty Ltd v Feros & Ors, Unreported, Supreme Court of Queensland, QS No 232 of 1994, Thomas J, 6 April 1994, cited
S.C.N. Pty Ltd v Smith [2006] QCA 360; Appeal No 6215 of 2006, 22 September 2006, cited
Sandra Investments Pty Ltd v Booth (1983) 153 CLR 153, considered
Sargent v ASL Developments Pty Ltd (1974) 131 CLR 634, cited
Suttor v Gundowda Pty Ltd (1950) 81 CLR 418, considered
Toga Development No 10 Pty Ltd v Gibson (1973) 2 BPR 9260, considered
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165; [2004] HCA 52, cited
Willing v Baker (1992) 58 SASR 357, cited
Woodward v Nagel [2003] QSC 100; SC No 3000 of 2003, 11 April 2003, considered

COUNSEL: A J Macklin for the appellants
M R Bland for the respondents

SOLICITORS: O'Dwyer & Bradley for the appellants
QBM Lawyers for the respondents

[1] **JERRARD JA**: In this appeal I have read the reasons for judgment of Keane JA and Philip McMurdo J, and respectfully adopt their Honours' description of the relevant facts. I agree with Philip McMurdo J that most of the dicta in the High Court judgments supports the appellants' position. But I agree with Keane JA that upholding the respondents' right to avoid the contract is the result closest to the position for which the parties bargained or agreed. It was common ground on the appeal that special condition 21.3 should be construed to make the contract voidable by a party who had not contributed to the non-fulfilment of the condition, despite the terms of special condition 21.3(A) which describe the contract as being "at an end" if the buyer failed to achieve a sale of the buyer's other property. That construction follows from the decisions of the High Court in *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418, particularly at 441, and in *Gange v Sullivan* (1966) 116 CLR 418 at 442.

[2] Recent decisions of the High Court have emphasised that parties are bound by the terms of the contract into which they enter, as understood by a reasonable person, taking into account the surrounding circumstances known to the parties and the purpose and object of the transaction.[1] The appellants and respondents agreed the appellants would buy the respondents' property at Canungra, setting a date for completion; and agreed that if the appellants could not sell another property they owned by 27 December 2005, the contract between them was at an end. Obviously, the appellants as intending purchasers had a considerable interest in that term of the contract, which protected their interests. It was a condition precedent to their duty to perform their obligations under the contract as purchasers. The vendors also had an interest in the term, as it ended their contractual obligation to sell to nominated purchasers who might be unable to complete.

[3] A reasonable person knowing the circumstances would conclude that before the date 27 December 2005, the appellants as intending buyers could forego or waive the condition in their favour, and the vendors would not be disadvantaged. The latter would then have a contract binding the buyers to complete, irrespective of whether the buyers sold their other property, or won the casket, or where they got the money. The joint judgment in *Suttor v Gundowda Pty Ltd* requires a further construction of these parties' agreement, to which a reasonable person knowing the surrounding circumstances and object of the transaction may also have come, namely that if the non-sale of the appellants' property happened without any default by the appellants (or respondents), then either party had the right to avoid the contract, but neither need do so.[2]

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1 See for example *Pacific Carriers Pty Ltd v BNP Paribas* (2004) 208 ALR 213 at 221; [2004] HCA 35; S585 of 2003, 5 August 2004, *Equuscorp v Glengallan* (2004) 211 ALR 101 at 108; (2004) 218 CLR 471; [2004] HCA 55; B93 of 2003, B94 of 2003, B95 of 2003, B96 of 2003, B97 of 2003, B98 of 2003, 16 November 2004, and *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 211 ALR 342 at 351-352; (2004) 219 CLR 165; [2004] HCA 52; S53 of 2004, 11 November 2004.

2 *Suttor v Gundowda* (1950) 81 CLR 418 at 441.

[4] Where the parties disagreed in their written outline was on the proposition advanced by Mr Macklin of counsel for the appellants, and resisted by Mr Bland, counsel for the respondents. That was that special condition 21.3 was capable of being waived by the appellants on any date after 28 December 2005 on which the contract remained on foot and had not been terminated by the respondents for non-fulfilment of the condition. The respondents contended that the appellants cited no authority for that proposition.

[5] Some authority can be found in observations in the joint judgment in *Gange v Sullivan*.[3] The effect of the decisions in *Suttor v Gundowda* and *Gange v Sullivan* is that the contract – on non-fulfilment of the condition – was, despite its terms, voidable at the instance of either party, once the clause had neither been performed nor waived. In *Suttor v Gundowda*, as it happened, the condition was performed by the plaintiff after the date originally provided for completion of the condition, and before the defendant purported to cancel the contract. The cancellation was therefore too late, as was said in the joint judgment in that case.[4] That view of *Suttor v Gundowda* is supported by the remarks of Gibbs CJ in *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537, where His Honour wrote:

> "In *Suttor v Gundowda Pty Ltd* the attempt to cancel the contract was made too late, since the condition had been fulfilled in the meantime."[5]

[6] Likewise in *Gange v Sullivan*, where the contract was repudiated on 1 or 2 June, the joint judgment records as follows:

> "An examination of what took place on 25th May and the first and second days of June leaves us in no doubt that, unless the condition had been fulfilled by the letter of 2nd April, the contract was brought to an end by the vendor's positive rescission *in the absence of a communicated readiness on the part of the purchaser to complete without some further approval from the council*."[6] [Italics mine].

The italicised words convey that waiver of the benefit of the clause, just like achieving performance of it, occurring after the stipulated date for performance of it, does put an end to the other party's right to avoid the contract because of non-fulfilment of the condition, which had been inserted solely for the benefit of the waiving party. The appellants' argument accordingly has that dicta to support it, as well as the other statements identified by Philip McMurdo J. There seems no reason, on that dicta, to distinguish between fulfilment of a condition after the date specified, and waiver of the benefit of the condition after that date; the result would be that providing either occurs before a purported avoidance of the contract by the other party, the contract remains on foot. The appellants argue that is what happened here.

[7] In *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537 Mason J, in upholding the right in the respondents as well as the appellants to terminate on non-fulfilment of the conditions inserted for the protection of the appellants, added a sentence that supports the appellants. His Honour wrote:

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3 (1966) 116 CLR 418 at 442.
4 (1950) 81 CLR 418 at 442.
5 (1982) 149 CLR 537 at 545.
6 (1966) 116 CLR 418 at 442.

> "This does not necessarily deny a right in the appellants to waive the benefit of the clause, the respondent's right of termination for breach, like the appellants', subsisting so long as there is no waiver by the appellant."[7]

That *obiter*, if describing the position after the date of non-fulfilment of the condition, implies a right in the appellants to waive the clause and bind both parties to the contract. But Mason J also wrote that:

> "...if on non-fulfilment neither party exercises the right to terminate, the contract continues on foot."[8]

[8] The last quoted observation by Mason J in *Perri* accords entirely with the proposition that on non-fulfilment either party could avoid the contract; but it was not – as the parties had declared in their written agreement – at "an end". A recognition that the contract continued on foot after 28 December 2005, as Mason J wrote, means that the appellants' actions on 3 January 2006 were not a waiver of the condition inserted for their protection, which had not been fulfilled by the stipulated date. The appellants simply gave notice thereby that they were electing not to avoid the contract. After the date for completion of the condition had passed, waiver became irrelevant. There was nothing to waive, and the contract still bound both parties, although the condition was unsatisfied. It was simply that the appellants on 3 January 2006 gave notice they agreed to the contract binding them as purchasers without that condition.

[9] The vendors, who had not taken steps by that date either to affirm or avoid the contract, still had an interest in exercising a right to end it. That was because the purchasers had already shown uncertainty about their capacity to pay for the property. I agree with Keane JA that recognising that the respondents had an equal right to end the contract for non-performance of the condition is what a reasonable person would understand by the language in which the parties contracted. Therefore I would dismiss the appeal.

[10] **KEANE JA:** By a contract in writing dated 27 November 2005, the respondents agreed to sell to the appellants vacant land at Canungra. The contract was subject to the sale of land owned by the buyers within 30 days. On 5 January 2006, the respondents asserted that the contract was at an end by reason of the failure of that condition. The appellants did not accept that the contract had come to an end, and commenced proceedings for specific performance of the contract.

[11] In this action, the appellants applied for summary judgment. There was a cross-application for summary judgment by the respondents. The appellants' application was refused by the learned primary judge, as was the cross-application by the respondents. The appellants contend that the judge erred in failing to conclude that, notwithstanding the failure of the condition to which the contract was subject, the appellants were entitled to enforce the contract because the respondents had expressed an intention to complete the contract prior to 5 January 2006. A brief summary of the proceedings at first instance will suffice to explain how this contention comes to be made. I will then turn to the arguments made before this Court. I will then discuss the leading authorities before expressing my view on the construction of the term of this contract.

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7 At 149 CLR 553.

8 (1982) 149 CLR 537 at 554.

The proceedings at first instance

[12] Special Condition 21.3 of the contract was in the following terms:

> "(A) This contract is subject to and conditional upon the Buyer's entering into a binding and enforceable contract of sale on terms satisfactory to them for the sale of their property located at 116 Veivers Road, Cedar Creek, Qld, 4207, within thirty (30) days from the date of this contract herein, failing which this contract will be at an end, the deposit refunded to the buyer and neither party will have any claim against the other apart from any rights either of the parties will have against the other as a result of any breach of this contract. ['the special condition']
>
> (B) In the event that sub-paragraph (A) is satisfied this contract is subject to the settlement of the sale of that property by settlement date."

[13] It was a term of the contract that it was due for settlement on 27 January 2006. Time was expressed to be of the essence of the contract.

[14] On the appellants' application for summary judgment, they adduced evidence to the effect that they had purported to waive the benefit of the special condition on or about 28 December 2005. The primary judge was not prepared to regard this evidence as excluding the possibility of a conclusion adverse to the appellants upon a trial. There has been no appeal from this aspect of the primary judge's decision.

[15] The appellants also relied upon evidence that, on 3 January 2006, they expressly waived the special condition. The learned primary judge refused to determine the question whether the express waiver by the appellants on 3 January 2006 operated to deny the efficacy of the purported termination by the respondents on 5 January 2006. It is this aspect of the decision below which is challenged on appeal.

The arguments on appeal

[16] The respondents' letter of 5 January 2006 did not, in terms, purport to terminate the contract. It asserted that the contract had come to an end automatically by virtue of the literal operation of the special condition. Both parties accept that this letter was apt to bring the contract to an end if the respondents were entitled to terminate the contract.

[17] Both parties also accepted on the appeal, in deference to the decisions of the High Court in *Suttor v Gundowda Pty Ltd*[9] and *Gange v Sullivan*,[10] that the special condition should be construed as rendering the contract voidable by either party. Neither party contributed to the non-fulfilment of the special condition.

[18] The appellants contended that the special condition was a provision for their benefit, and was, therefore, capable of being waived by them. The appellants contended further that they effectively waived the special condition when, on 3 January 2006, they communicated their wish to complete the contract to the respondents before the respondents exercised their right to terminate the contract.

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9 (1950) 81 CLR 418 at 441.

10 (1966) 116 CLR 418 at 442.

[19] The respondents contended that, upon the non-fulfilment of the special condition, the contract was voidable by them, and that they lawfully terminated the contract on 5 January 2006.

[20] The question which thus arises for determination on the appeal is whether the right of termination which arose in the respondents upon the non-fulfilment of the condition was lost because the appellants indicated to the respondents that the appellants wished to complete the contract before the respondents purported to terminate the contract.

[21] This question must be answered by reference to the contractual intention of the parties.[11] That intention was expressed in the special condition. The authorities to which I shall refer establish principles of construction which aid in the interpretation of the language used by the parties. In the end, however, it is the intention of the parties which is sovereign. In this case, the parties could not have expressed more clearly their intention that, upon the failure of the condition, all parties should be released from the binding effect of the contract. In some cases, inferences drawn by the court as to whether the special condition was for the sole benefit of the appellants so as to be able to be waived by them may afford some assistance in deciding whether the parties' intention was that the contract should be voidable by the appellants only. Once it is accepted, however, as it is here by both sides, that the failure of the condition rendered the contract voidable by either party, then the only question remaining is whether that right of avoidance in the respondents could be defeated by the indication by the appellants of their wish to complete the contract. The appellants contend that the respondents' right could be, and was, defeated in this way. In my respectful opinion, the authorities do not support the contention advanced by the appellants.

[22] Once it is accepted, as it must be in this case, that non-fulfilment of a condition confers a right of termination on either party, then the circumstance that the special condition was inserted for the benefit only of the purchaser does not render the right of the vendor to terminate vulnerable to a higher right in the purchaser to keep the contract on foot. To hold otherwise is, in my respectful opinion, distinctly contrary to the decision in *Gange v Sullivan* where the joint judgment said:[12] "… non-fulfilment of the condition could, in the absence of default contributing thereto, be relied upon by either party as a ground for determining the contract".

[23] In order to explain my reasons for taking this view and for rejecting the contrary view urged by the appellants, it is necessary to examine at some length the authorities on which the appellants relied.

Suttor v Gundowda

[24] In *Suttor v Gundowda*,[13] the plaintiff agreed to purchase land from the defendant. Clause 12 of the contract provided that:[14]

> "in the event of the consent of the Treasurer not being obtained within two months from the date hereof or within such further period

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11 See, for example, *Blue Moon Grill Pty Ltd v Yorkey's Knob Boating Club Inc* [2006] QCA 253 at [21]; *Homburg Houtimport BV v Agrosin Private Ltd* [2004] 1 AC 715 at 737.

12 (1966) 116 CLR 418 at 442.

13 (1950) 81 CLR 418.

14 (1950) 81 CLR 418 at 421.

> as may be mutually agreed upon by the parties hereto, this contract shall be deemed to be cancelled …"

[25] The two month period referred to in cl 12 of the contract came to an end on 20 December 1947. The consent of the Treasurer was not obtained until 5 January 1948.[15] The defendant argued that the contract came to an end on 20 December 1947. The plaintiff replied that there was an agreement to extend the period referred to in cl 12 and, further, that, after 20 December 1947:[16]

> "the defendant by a clear recognition of the continued existence of the contract forbore to assert the provision of cl 12 against the plaintiff and waived the cancellation which that clause might have brought about".

The evidence showed that the plaintiff and defendant:[17]

> "treated the contract as still being on foot, and that the defendant had been informed that the consent would be obtainable within a very short time, and that he had led them to believe that the contract would be completed by him".

The learned trial judge held that "in the light of that conduct by the parties … any cancellation under cl 12 was in fact waived by the defendant".[18]

[26] I pause here at the conclusion of the summary of the part of the case relevant to the decision of the High Court to emphasise three points. First, that the contract expressly provided that the contract would be at an end if the condition as to Treasury approval was not fulfilled. Secondly, that, after the condition failed, the parties continued to treat the contract as being on foot. Thirdly, that was not a case where the plaintiff was said to have waived the benefit of cl 12, but where the defendant was, by reason of his conduct, precluded from waiving the cancellation of the contract under cl 12, ie the defendant by his conduct disentitled himself from terminating the contract as he would otherwise have been entitled to do.

[27] The passage in the reasons of the High Court, which is important for present purposes, is lengthy but its significance is such that it should be set out in full:[19]

> "In the first place McManamey was at Gundowda from 29th November to 8th December 1947 and he gave evidence of conversations between himself and the defendant which his Honour accepted and which are quite sufficient to prove an oral agreement prior to 20th December that the time for the Treasurer's consent should be extended for a reasonable period after that date. This agreement would vary cl. 12 whether that clause originally provided for an automatic cancellation or not. This variation of cl. 12 was expressly alleged in the statement of claim. It was a variation of a contract for the sale of land and therefore a contract which could not have been proved if the Statute of Frauds (now s. 54A of the *Conveyancing Act* 1919 (N.S.W.) as amended) had been pleaded. But the statute was not pleaded and it was therefore open to the plaintiff to prove the variation.

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15 (1950) 81 CLR 418 at 423.
16 (1950) 81 CLR 418 at 423 – 424.
17 (1950) 81 CLR 418 at 425.
18 (1950) 81 CLR 418 at 427. See also 439 - 440.
19 (1950) 81 CLR 418 at 440 – 442 (citations footnoted in original).

In the second place, although cl. 12 in terms provides for an automatic avoidance of the contract on the occurrence of a specified event, that is (even if no agreement for an extension of time were made) by no means the end of the matter. The effect of contractual provisions of this character was discussed and explained in *New Zealand Shipping Co. Ltd. v. Société des Ateliers et Chantiers de France* ((1919) A.C. 1). Lord *Atkinson* said:– 'It is undoubtedly competent for the two parties to a contract to stipulate by a clause in it that the contract shall be void upon the happening of an event over which neither of the parties shall have any control, cannot bring about, prevent or retard. For instance, they may stipulate that if rain should fall on the thirtieth day after the date of the contract, the contract should be void. Then if rain did fall on that day the contract would be put to an end by this event, whether the parties so desire or not. Of course, they might during the currency of the contract rescind it and enter into a new one, or on its avoidance immediately enter into a new contract. But if the stipulation be that the contract shall be void on the happening of an event which one or either of them can by his own act or omission bring about, then the party, who by his own act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself or to compel the other party, who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong, in the one case directly, and in the other case indirectly in a roundabout way, but in either way putting an end to the contract.' ((1919) A.C., at p. 9)

Where the event in question is one which cannot occur without default on the part of one party to the contract, the position is clear. The provision is then construed as making the contract not void but voidable: only the party who is not in default can avoid it, and he may please himself whether he does so or not. In the present case the happening of the event (not obtaining the Treasurer's consent) may be brought about by failure on the part of either party to take certain necessary steps (provision of particulars by the vendor or making of application by the purchaser) to obtain the Treasurer's consent, or it may be brought about without any default on the part of either party. In fact, although there was some argument to the contrary, it was, we think, brought about without any default on the part of either party. Such a case is perhaps not quite so clear as the simpler case where the event cannot occur without default on one side or the other. But we are of opinion that the *New Zealand Shipping Case* ((1919) A.C. 1) requires the same construction to be given to the contract in both classes of case. The provision in question is to be construed as making the contract not void but voidable. The question of who may avoid it depends on what happens. If one party has by his default brought about the happening of the event, the other party alone has the option of avoiding the contract. If the event has happened without default on either side, then either party may avoid the contract. But neither need do so, and, if one party having a right to avoid it does not clearly exercise that right the other party may enforce the contract against him. This is, we think, the view of Lord *Shaw* and

> Lord *Wrenbury* in the *New Zealand Shipping Case* ((1919) A.C. 1), and it is consistent with what was said by Lord *Finlay* L.C. The language of Lord *Atkinson* ((1919) A.C., at pp. 10, 11) may perhaps be regarded as expressing a different view, but we doubt whether his Lordship had in mind the precise point which arises here and which did not arise in the *New Zealand Shipping Case* ((1919) A.C. 1). Although the effect of a provision in a contract may differ according to the events which happen, its construction cannot differ according to the events which happen. If 'void' means 'voidable,' it means 'voidable' whatever happens. It cannot very well mean 'voidable' if an event happens through the default of one party, and 'void' if the event happens without default by either party.
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> McManamey and Allworth were at Gundowda from 27th to 31st December 1947. The construction of cl. 12 which we have adopted is that the clause did not automatically cancel the contract of 20th October 1947 but only brought it to an end if after that date one of the parties exercised its option to cancel it. On 6th January 1948 the defendant's solicitor wrote to the plaintiff's solicitors that cl. 12 of the contract spoke for itself and this may have been intended to be a notice that the defendant considered the contract to be cancelled. But there was no clear statement that the contract was considered by the defendant as cancelled until 15th January 1948 when the defendant's solicitor wrote to the plaintiff's solicitor that 'the consent of the Treasurer was not obtained within the period of two months of the date of the contract and therefore the contract is no longer effective after 20th December 1947.' But this letter was obviously written on the view, with which we do not agree, that cl. 12 effected an automatic cancellation of the contract when the Treasurer had not consented by 20th December 1947. His Honour accepted the evidence of McManamey and Allworth of the events that occurred at Gundowda between 27th and 31st December, 1947, and it is clear from this evidence that the defendant was treating the contract as still on foot although he was asking for certain variations to which McManamey agreed provided the directors of the plaintiff approved. Before the defendant's solicitor purported to cancel the contract the consent in writing of the Treasurer to the transfer had been obtained on 5th January, 1948, and the cancellation was therefore too late."

[28] This passage makes two things clear. The first is that the gloss on the contractual language used by the parties, whereby the word "void", or its equivalent "cancelled", was to be taken to mean "voidable at the instance of a party whose default has not caused the failure of the condition", was said to be justified by the consideration (whether it be a rule of law or a principle of contractual interpretation) that a party should not be permitted to take advantage of his or her own default. The second point is that the last two sentences of the passage cited are not in any way concerned with waiver by the plaintiff of cl 12, but with the loss by the defendant of the right to terminate which would otherwise have been available to him. The defendant's conduct in treating the contract as still being on foot before the Treasurer's consent was obtained meant that, once it was obtained, it was not open to him to rescind on the basis that it had not been obtained whether by 20 December 1947 or at all. The defendant, instead of taking steps available to him to

terminate the contract, continued to act as if it were on foot, and thereby lost the power to terminate for the failure of condition by 20 December 1947. That accords with the approach of the High Court in *Havenbar Pty Ltd v Butterfield*.[20] The fulfilment of the condition requiring the consent of the Treasurer in January 1948 meant that the contract which was still on foot could be completed, there being no basis to hold that it was received too late. What must be emphasised is that no support may be drawn from *Suttor v Gundowda* for the notion that the plaintiff was able to defeat the defendant's right of termination by affirming the contract before the defendant purported to terminate it pursuant to his admitted right to do so.

Gange v Sullivan

[29] In *Gange v Sullivan*,[21] the plaintiff agreed to buy land from the defendant. The contract contained a condition which made the contract subject to obtaining development approval from the local authority for use of the land for specified purposes, and which provided that:[22]

> "in the event of the said Council not granting such approval for the purpose aforesaid by the 31st day of May, 1965, then this Contract shall be deemed to be at an end … but in the event of Council granting the approval aforesaid then the Purchaser will complete the Contract within twenty days of the granting of such consent."

[30] The Council gave what was at least a partial approval to the plaintiff on 2 April 1965. On 1 June 1965, the plaintiff's solicitor told the defendant's solicitor that it was not, in his client's view, an approval from the council in fulfilment of the special condition. There was some discussion of a fresh application by the appellant. On 2 June, the defendant's solicitors wrote to the plaintiff's solicitors terminating the contract.[23] The plaintiff relied on waiver by the conduct of the defendant of its rights of termination.[24] The defendant's contention was that there being no approval under the condition by 31 May:[25]

> "either party has the right to avoid the contract, the clause being for the benefit of each and each having the option. Even if the purchaser is content to go on, the vendor may exercise his right to avoid; or, in the alternative, the purchaser must inform the vendor of his wish to go on before the vendor so exercises his right."

[31] There was some division among the members of the High Court on the principal issues; I shall address each set of reasons in turn. The first point of note in the reasons of the members of the High Court who decided this case is that Barwick CJ expressly rejected the assertion of the defendant that the clause was for the benefit of both parties. His Honour held that the condition was for the benefit of the plaintiff only, but, nevertheless, the defendant was entitled to terminate for failure of the condition. Barwick CJ regarded the condition as one which might be waived by the plaintiff purchaser. His Honour was, however, clearly of the view that the

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20 (1974) 133 CLR 449 at 458; *Sandra Investments Pty Ltd v Booth* (1983) 153 CLR 153 at 158, 164. See also *S.C.N. Pty Ltd v Smith* [2006] QCA 360 at [21].

21 (1966) 116 CLR 418.

22 (1966) 116 CLR 418 at 419.

23 (1966) 116 CLR 418 at 422.

24 (1966) 116 CLR 418 at 423.

25 (1966) 116 CLR 418 at 423 – 424.

benefit of the condition could only be waived before the time fixed for its fulfilment. Barwick CJ said:[26]

> "I agree with the learned trial judge that the special condition was included in the contract for the benefit of the appellant. There is no suggestion that the respondent was retaining any interest in the subject land, or that he had any interest in any other land, or in any other respect which would be affected in the least by what the appellant was able to do, or did do with or upon the subject land. The expression 'This contract is subject to' in the special condition means in this contract, in my opinion, 'The performance of this contract by the purchaser is subject to'. Consequently, as the learned trial judge held, the contract would not automatically come to an end, so that both parties were released from performance, if no approval in conformity with the condition was obtained before 31st May. This is so, in my opinion, notwithstanding the words of the clause deeming the contract in that event to be at an end: cf. *Suttor v. Gundowda Pty. Ltd.* ((1950) 81 C.L.R. 418, at p. 441).
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> But, though the condition was for the benefit of the appellant, it was not, as it were, open ended. The appellant was required to make an application for the requisite approval within a stated time and to complete the purchase within a time computed from the date of receipt of such approval. **Thus, in my opinion, the appellant could not be compelled to complete if no approval conformable to the condition was received by 31st May, if he made the appropriate application within the stipulated time and took all other necessary steps to obtain that approval. If he failed in these respects he could be compelled to complete, unless the respondent had waived the appellant's breach in not having applied in time, or in otherwise failing to take necessary steps. But, being a condition for his benefit, the appellant, in my opinion, could waive it and require the vendor to complete notwithstanding that no approval satisfying the condition had been received in time.**
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> On the other hand, upon grant of such an approval within time, both parties would be bound to perform. The respondent's obligation to complete would not in that event be dependent upon any notification by the appellant nor would the appellant's obligation to do so depend upon his own choice. It would follow that if there were such approval, the respondent would not have been entitled on 2nd June to treat the contract as at an end because of the appellant's default in not having completed within twenty days of the date of that approval. Before the respondent could unilaterally determine the contract for that reason, he would have had to give the appropriate notice to make time for completion of the essence and to fix a reasonable time for such completion. This the respondent did not do. Although the appellant undoubtedly took the stand that no approval in conformity with the special condition had been given at any time, this attitude would not require any finding that the appellant was not in the relevant sense ready and willing to complete: see *Mehmet v.*

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[26] (1966) 116 CLR 418 at 429 – 430 (citations footnoted in original).

Benson ((1965) 113 C.L.R. 295). Therefore if there was an approval given on 2nd April which satisfied the terms of the condition, the appellant was entitled to succeed in the suit, unless the contract had been rescinded." (emphasis added)

[32] Contrary to the view adopted by Barwick CJ, Taylor, Menzies and Owen JJ were inclined to regard the condition as for the benefit of both purchaser and vendor. They shared the view of Barwick CJ, however, that the defendant was entitled to terminate, and had effectively terminated the contract. Their Honours said:[27]

"From the evidence which we have set out, it seems to us that, unless the letter of 2nd April did constitute the granting of approval by the council for the purposes of the special condition, the contract either came to an end when 31st May passed without the council's approval, or was brought to an end by what happened between the two solicitors on the first and second days of June.

As a first step to deciding this decisive question, it is necessary to understand the condition and its significance to the parties. Without doubt, it was intended to safeguard the purchaser by making the continuance of the contract depend upon his obtaining the council's approval for using the land for the three purposes therein set out. Yet, **although the condition was for the protection of the purchaser, it nevertheless affected the vendor, for it obliged the purchaser to make his application for the council's approval within seven days; it provided for the contract coming, or being brought, to an end if the council's approval was not granted by 31st May**; and it fixed the date for the completion of the contract by reference to the only event which could give rise to any obligation to complete – that is, the council's approval.

It was argued for the appellant that the condition did not mean that the contract was brought to an end automatically when the council had not granted approval by 31st May. *Suttor v. Gundowda Pty. Ltd.* ((1950) 81 C.L.R. 418), together with other cases, was relied upon to support the conclusion that non-fulfilment of the condition did not of itself bring the contract to an end but did no more than render the contract voidable at the instance of a party not responsible for the non-fulfilment of the condition. Whilst the effect of a condition must in every case depend upon the language in which it is expressed and a decision upon the meaning of one condition cannot determine the meaning of a different condition, the authorities cited do show a disposition on the part of courts to treat non-fulfilment of a condition such as that here under consideration as rendering a contract voidable rather than void in order to forestall a party to a contract from gaining some advantage from his own conduct in securing, or contributing to, the non-fulfilment of a condition bringing the contract to an end. **Accordingly, notwithstanding that the language of the condition here is susceptible of meaning that the contract came to an end if 31st May passed without the council's approval, we are prepared to treat non-fulfilment of the condition as rendering the contract voidable rather than void. So understood, non-fulfilment of the**

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27 (1966) 116 CLR 418 at 441 – 442 (citation footnoted in original).

> **condition could, in the absence of default contributing thereto, be relied upon by either party as a ground for determining the contract. An examination of what took place on 25th May and the first and second days of June leaves us in no doubt that, unless the condition had been fulfilled by the letter of 2nd April, the contract was brought to an end by the vendor's positive rescission in the absence of a communicated readiness on the part of the purchaser to complete without some further approval from the council**." (emphasis added)

[33] In the present case, the appellants placed considerable reliance on the last sentence of this passage. The appellants suggested that this sentence carried the implication that an expression of a willingness by the plaintiff purchaser to complete the contract, even after the date of non-fulfilment of the condition, would have been effective to defeat a purported exercise by the defendant of his right of termination. That suggestion must be rejected: it makes a nonsense of the other sentences which I have emphasised from this passage.

[34] As to the last sentence in the passage cited, the reasons of Taylor, Menzies and Owen JJ do not explain the basis on which a "late" expression of willingness by the purchaser to complete, notwithstanding the non-fulfilment of the condition, could have overridden the entitlement of the defendant to bring the contract to an end. The basis for that view is apparent, however, from the last paragraph of the passage from the reasons of Barwick CJ which I have set out. As was usually the case in New South Wales, time was not of the essence of the contract. Following the failure of the condition, the defendant could not terminate the contract without giving the plaintiff a notice to complete, thereby affording the plaintiff the opportunity to complete without the approval having been obtained. It was on this basis that Taylor, Menzies and Owen JJ countenanced the possibility that a late expression of willingness to complete on the part of the purchaser might have defeated the right of the vendor to terminate which would only have been exercisable after the expiration of a notice to complete, ie a notice which called upon the other party to complete the conveyance on a fixed date and advised that, if the contract was not completed on that date, the giver of the notice would rescind the contract.

[35] Windeyer J was "not able to concur wholly in either" the judgment of Barwick CJ or that of Taylor, Menzies and Owen JJ. His Honour was content to summarise his views:[28]

> "The special condition of the contract was, I think, inserted primarily for the benefit of the purchaser and could be waived by him. But unless before the date set for obtaining the council's approval of the proposed development that approval was in fact given or the purchaser either expressly waived the condition or expressly accepted the communication which he had received as a sufficient fulfilment of it, the vendor could I think avoid the contract. That is because the time within which the approval must be had was stipulated and unless that stipulation was expressly waived by the purchaser it would enure, I consider, for the benefit of both parties,

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[28] (1966) 116 CLR 418 at 443.

> the vendor being interested to know for how long his liability was to remain unresolved."

[36] It can be seen that Windeyer J regarded the condition as for the benefit of the purchasers but as so affecting the interest of the vendor in knowing for "how long his liability was to remain unresolved" that if the condition was not fulfilled or waived by the vendor by the due date, the vendor was thereupon entitled, evidently without the need for a notice to complete, to terminate the contract. It is important to note that Windeyer J was clearly of the view that, while the vendor's interest was in resolving the uncertainty as to how long his liability under the contract was to remain unresolved, he regarded the vendor as entitled to terminate the contract even if, after the due date for the condition, the purchaser expressed the wish to "waive" the benefit of the condition and complete the contract. That is because the failure of the condition which had not been waived gave rise in its terms to a right of termination.

Perri v Coolangatta Investments

[37] The appellants sought support for their submission in dicta of Mason J in *Perri v Coolangatta Investments Pty Ltd*.[29] Before discussing the observations of Mason J, it is desirable to establish the context. The contract of sale between the plaintiff purchasers and defendant vendors was subject to Special Condition 6 which provided that the contract was "entered into subject to Purchasers completing the sale of their property … [at] Lilli Pilli".[30] No time was fixed for fulfilment of the condition and time was not of the essence of the contract. Some three months after the contract had been made, the vendor gave the purchasers notice to complete within three weeks. The purchasers did not complete in accordance with the notice, and the vendor rescinded the contract. The purchasers sold their Lilli Pilli property about six months later and claimed specific performance of their contract with the vendor. Not surprisingly, even though time was not of the essence of the contract, the purchasers' claim was rejected at first instance, on appeal to the Court of Appeal of New South Wales and by the High Court. The principal argument advanced for the purchasers before the High Court was that Special Condition 6 was a condition precedent to the making of the contract as opposed to its completion. This argument was rejected by the High Court.

[38] In this context, Mason J said:[31]

> "Generally speaking the court will tend to favour that construction which leads to the conclusion that a particular stipulation is a condition precedent to performance as against that which leads to the conclusion that the stipulation is a condition precedent to the formation or existence of a contract. In most cases it is artificial to say, in the face of the details settled upon by the parties, that there is no binding contract unless the event in question happens. Instead, it is appropriate in conformity with the mutual intention of the parties to say that there is a binding contract which makes the stipulated event a condition precedent to the duty of one party, or perhaps of both parties, to perform. Furthermore, it gives the courts greater scope in determining and adjusting the rights of the parties. For these

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29 (1982) 149 CLR 537 esp at 552 – 553.

30 (1982) 149 CLR 537 at 548.

31 (1982) 149 CLR 537 at 552 – 554.

reasons the condition will not be construed as a condition precedent to the formation of a contract unless the contract read as a whole plainly compels this conclusion.

In the present case it is the language of special condition 6 alone which supports this result. By relating the condition to entry into the contract the clause seems to suggest that the formation or existence of the contract itself is dependent upon completion of the sale of the Lilli Pilli property. But the condition is capable of being read as a provision which conditions the performance of the obligations of one or both parties on fulfilment of the condition and the tradition in this Court is to so construe provisions of this kind – see *Maynard* ((1926) 37 CLR 529); *Suttor v. Gundowda Pty. Ltd.* ((1950) 81 CLR 418, at p 443); *Brien v. Dwyer* ((1978) 141 CLR 378, at pp 393, 397-398). Moreover, it is clear enough that the condition was inserted for the protection of the purchasers, to guard against the possibility that they would lack adequate finance. It was certainly not inserted for the protection of the vendor. Consequently, it is a condition which may possibly be capable of waiver by the purchasers, though this is not a point which needs to be decided.

In the Court of Appeal, Mahoney J.A. thought that special condition 6 was not devoid of a promissory element. It relates to an event the occurrence of which, though not probably in the control of the purchasers, is closely affected by their actions and efforts. It would be absurd to suggest that the parties contemplated that the purchasers could refrain from making any effort to sell. That would be to give the purchasers what in substance amounted to an option to withdraw. I am therefore inclined to read the clause as imposing an implied obligation on the purchasers to make all reasonable efforts to sell the Lilli Pilli property.

The conclusion to be drawn then is that the clause expresses a condition which is precedent to the appellants' duty to perform the contract, non-fulfilment of which entitles them to terminate the contract, rather than as a condition precedent to the formation of the contract. Instead of saying that the condition contains a promissory element I should prefer to say that the promise is the subject of an implied term which is associated with the condition, though perhaps not forming part of it.

It seems that in the courts below the parties were united in the view that the vendor, as well as the purchasers, could terminate for non-fulfilment of the condition. On the other hand, as I have said, the clause was inserted for the protection of the appellants and it is probably unnecessary to concede to the respondent for its protection an equivalent right to terminate for non-fulfilment of the condition. It seems to be sufficiently protected by relying on its rights to insist on completion of the contract within a reasonable time and by taking such action as it may in that event. Even so, the fact that the clause draws no distinction between the parties and is not expressed to condition only the purchasers' obligation to complete, together with their implied obligation to make all reasonable efforts to sell the Lilli Pilli property, provide strong ground for thinking that the respondent as well as the appellants had a right to terminate on non-fulfilment of

> the condition. **This does not necessarily deny a right in the appellants to waive the benefit of the clause, the respondent's right of termination for breach, like the appellants', subsisting so long as there is no waiver by the appellant.**
>
> The provision is not one which on non-fulfilment works a termination of the contract of its own force without notice. If the clause were a self-executing provision its operation might cause very great confusion. It is preferable to view it as a provision which entitles the party to terminate by notice in the event of non-fulfilment, so that it has an operation similar to that of the clause discussed in *Gundowda* ((1950) 81 CLR, at pp 440-442). The consequence is that, if on non-fulfilment neither party exercises the right to terminate, the contract continues on foot." (emphasis added)

[39] The appellants relied upon the last sentence of the penultimate paragraph of the passage cited. But this sentence does not assert or imply that the purchasers in *Perri v Coolangatta Investments Pty Ltd* might have waived Special Condition 6 after it had not been fulfilled. No time was fixed for fulfilment of Special Condition 6, and it was fulfilled, albeit late. It was not a case of "waiver" of an unfulfilled condition, or of an attempt to "waive" the consequences of that non-fulfilment. In any event, as the last paragraph of the passage cited makes clear, Mason J did not consider that the non-fulfilment of the condition could justify a termination of the contract without the giving of a notice to complete. If such a notice were given, by the vendor, in the meantime, the purchaser could waive the condition and comply with the notice to complete. A termination by the vendor would be justified by non-completion of the contract after given notice to complete, not by reason of the non-fulfilment of the condition alone. As Wilson J explained,[32] in the case of the failure of a condition upon which completion of a contract is subject where time is not of the essence of the contract:

> "The effect of a notice to complete is to give the purchasers, should they wish to waive the condition, the opportunity to finalize the transaction; alternatively, it serves to crystallize in the minds of both parties a common date on which the contract will come to an end for non-fulfilment of the condition."

[40] Two other points may be made about the dicta of Mason J on which the appellants seek to rely. The first is that his Honour accepted that, even though Special Condition 6 was clearly a provision for the benefit of the purchasers alone, its non-fulfilment gave the vendor a right to terminate, albeit that that right was subject to non-compliance with a notice to complete. The second point is that this was not a case where the contract made express provision for the consequences of non-fulfilment of Special Condition 6. Neither the decision in the case, nor the dicta of Mason J, afford any support for treating the right of avoidance conferred on a vendor by the contract, in the light of *Suttor v Gundowda*, as so infirm as to be entirely defeasible by a simple statement by the purchaser of a wish to complete.

[41] It should also be noted that, in *Perri v Coolangatta Investments Pty Ltd*,[33] Gibbs CJ, after referring to *Suttor v Gundowda* and *Gange v Sullivan*, said:

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32 (1982) 149 CLR 537 at 560.

33 (1982) 149 CLR 537 at 545.

> "The non-fulfilment of the condition gave the party not in default a right to avoid the contract, but if that party did not exercise the right the other party might enforce the contract against him. In *Suttor v. Gundowda Pty. Ltd.* the attempt to cancel the contract was made too late, since the condition had been fulfilled in the meantime ((1950) 81 CLR, at p 442)." (citation footnoted in original)

These observations suggest that Gibbs CJ was of the view that the vendor's attempt to cancel the contract was too late because the contract, of which time was not of the essence, remained on foot. It is important to note that Gibbs CJ does not suggest that the vendor's right of termination was lost by reason of the purchaser's conduct in waiving the unsatisfied condition. The condition **having been satisfied**, albeit late, the contract could no longer be terminated by the vendor.

[42] The final point to be made here relates to the dicta of Gibbs CJ to the effect that, if a party does not exercise the right of termination, the other party might enforce the contract against him. It is well established that the nature of the right to terminate is such that a party who is entitled to terminate a contract is not obliged to exercise that right immediately. The right may be exercised at a time of that party's choosing so long as that party has not disentitled himself or herself from exercising the right and the other party has not been prejudiced by delay in exercising the right.[34] Mere inaction for a day or two coupled with an expression of a wish by the other party to complete the contract has never been said to defeat the right of a party not in default to terminate for failure of a condition on which completion is contingent. Gibbs CJ cannot be taken to have implied the contrary.

Other decisions

[43] At this point I should mention the reliance placed by the appellants upon the dicta of Thomas J in *Associated Developers (Aust) Pty Ltd v Allied and General Pty Ltd*[35] where his Honour said:[36]

> "The circumstance that fulfilment of a condition will resolve uncertainty attending the performance of the contract does not entail such a direct benefit to the vendor that the condition cannot be waived without his agreement. As the majority in *Sandra Investments* pointed out, merely because fulfilment of a condition will 'affect' the vendor, does not mean that he will 'benefit' from the condition, such that it cannot be waived without his concurrence."

[44] The contract in *Associated Developers (Aust) Pty Ltd v Allied and General Pty Ltd* contained a condition which made the contract "subject to and conditional upon the rezoning of the land … on or before 30 June 1994".[37] The contract also provided that "the purchasers agree to settle 28 days after receipt of all approvals referred to … above".[38] The purchasers purported to waive the benefit of the condition on 29 June 1994, ie before the expiration of the time fixed for obtaining the approval. The case was, therefore, not one of a purported "waiver" after the non-fulfilment of the condition. The case was also, it is clear, not a case in which the interpretation of language providing that the contract "shall be at an end" upon the non-fulfilment of

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34 *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 at 641, 646, 656; *Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW)* (1993) 182 CLR 26 at 39.

35 [1994] Q ConvR 54-458.

36 [1994] Q ConvR 54-458 at 59,494.

37 [1994] Q ConvR 54-458 at 59,492.

38 [1994] Q ConvR 54-458 at 59,492.

a condition was in issue. As Gibbs CJ said in *Sandra Investments Pty Ltd v Booth*:[39] "Of course, every case of this kind must depend upon the particular words of the contract in question." This point may be illustrated by reference to the decision of the Full Court of the Supreme Court of South Australia in *Willing v Baker*.[40] In that case, Legoe J pointed out that the contract made express provision for the rights of waiver and termination enjoyed by purchaser and vendor respectively;[41] and Mullighan J observed that the contract in issue there was significantly different from that at issue in *Gange v Sullivan* because, in *Gange v Sullivan*, the contract provided that "if the approval was not obtained by the specified date, the contract was deemed to be at an end. There is no such provision in the contract here."[42]

[45] A conclusion that a condition is for the benefit of one party and may, therefore, be waived by that party does not support the resolution of the different question which arises in this case, namely, whether the first party may defeat a right to terminate which has accrued to the other party in accordance with the terms of the contract as understood in the light of the principles discussed in *Suttor v Gundowda* and *Gange v Sullivan*. In this regard, it may also be noted that, in *Associated Developers (Aust) Pty Ltd v Allied and General Pty Ltd*, Thomas J went on to refer to the following passage from the reasons of Brennan J (with whom Stephen J agreed) in *Perri v Coolangatta Investments Pty Ltd*:[43]

> "The substance of the stipulation is a condition for the benefit of the purchasers and they may waive it if they choose. But the limit of the time within which the stipulation is to be fulfilled ensures [sic] for the benefit of the vendor as well as for the benefit of the purchasers, 'the vendor being interested to know for how long his liability was to remain unresolved' (per Windeyer J in *Gange v Sullivan* (1966) 116 C.L.R. 418, at p 443). **When vendor and purchaser are each under a contingent obligation to complete a contract of sale, the fulfilment of the contingency or the entitlement to avoid the obligation is of equal interest to both parties**." (emphasis added)

[46] It is apparent from the passage cited by Thomas J from the reasons of Brennan J in *Perri v Coolangatta Investments Pty Ltd* that Brennan J accepted the view of Windeyer J in *Gange v Sullivan* that, where a purchaser does not waive a condition inserted for the purchaser's benefit, the vendor enjoys a right of termination which cannot be defeated by a subsequent "waiver" by the purchaser.

[47] To this collection of judicial dicta warranting a sceptical view of the appellants' proposition that a purchaser may "waive" the right of termination which has arisen in the vendor by reason of an occurrence which, according to the contract, renders the contract void, one may add the observations of Wilson J in *Sandra Investments Pty Ltd v Booth*[44] where his Honour said:

> "**There is also the question whether to be effective the waiver must take place *before* the expiry of the relevant period.** Had it been necessary to decide such a point in *Gange v. Sullivan*, both

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39 (1983) 153 CLR 153 at 161.
40 (1992) 58 SASR 357.
41 (1992) 58 SASR 357 at 359, 373 – 374.
42 (1992) 58 SASR 357 at 377.
43 (1982) 149 CLR 537 at 565 (citation footnoted in original).
44 (1983) 153 CLR 153 at 166 (citations footnoted in original).

> Barwick C.J. ((1966) 116 CLR at p 433) and Windeyer J. ((1966) 116 CLR at p 443) would have answered it in the affirmative … Finally, there is the question whether the fact that the date of completion in a contract where time is of the essence is fixed by reference to the date when a condition is fulfilled renders the clause imposing the condition so inextricably mixed up with other parts of the transaction that it cannot be severed … It is not appropriate to pursue a discussion of these matters in the abstract because the facts of a particular case will often be of critical importance in discovering the intention of the parties. **I would merely observe that in undertaking that voyage of discovery one should not lightly imply a right of waiver in one party to the possible prejudice of the other unless it clearly emerges on the face of the contract.**" (emphasis added)

[48] In the light of these observations of Wilson J, it is not to be supposed that only a short time before, his Honour had, as the appellants' argument would have it, expressed a contrary view in *Perri v Coolangatta Investments Pty Ltd*[45] where his Honour said:

> "In my opinion, it is to be implied from the agreement that should the Lilli Pilli property not be sold within a reasonable time, then the fate of the contract will be resolved according to the action which may be taken by either party. The purchasers may elect to waive the condition, it being one wholly for their benefit, and proceed to completion, thereby holding the vendor to its contract. Alternatively, provided that they have acted reasonably in their attempts to sell the property, they may rely on the non-fulfilment of the condition to bring the contract to an end, and recover their deposit. On the other hand, the vendor may force the issue simply by serving a notice to complete. I do not think it appropriate to contemplate a notice to the purchasers requiring them to fulfil the condition, because the time agreed for that will have expired, and in any event it does not lie within the capacity of the purchasers to fulfil it. The effect of a notice to complete is to give the purchasers, should they wish to waive the condition, the opportunity to finalize the transaction; alternatively, it serves to crystallize in the minds of both parties a common date on which the contract will come to an end for non-fulfilment of the condition."

In my respectful opinion, it is clear that what his Honour meant in this passage is that, because the exercise by the vendor of the right of termination which arose upon the non-fulfilment of the condition, could only be exercised after the expiration of a notice to complete, the purchasers had the opportunity to complete the transaction notwithstanding non-fulfilment of the condition. It was only in this context that his Honour described the purchaser's choice to complete the transaction as a waiver of the condition.

[49] In *Re Wickham Developments (Australia) Pty Ltd*,[46] Thomas J expressed the view, as obiter, that he would not have been disposed to uphold a submission that "once time expires even a 'sole benefit' clause is to be treated as one for the benefit of both

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45 (1982) 149 CLR 537 at 560.

46 Unreported, Supreme Court of Queensland, OS No 232 of 1994, Thomas J, 6 April 1994 at 6 – 7.

parties, or at least as raising an interest in the other party sufficient to defeat a unilateral right of waiver".

[50] In *Associated Developers (Aust) Pty Ltd v Allied and General Pty Ltd,*[47] Thomas J said:

> "The present case is typical of a very common contractual situation where the obtaining of a consent from the third party (such as a local council) will enhance the use and value of the land to the purchaser if he or she completes the contract (cf *Koikas v Green Park Construction Pty Ltd* (1970) VR 142, 148). In many such cases there is no disadvantage to the vendor if the purchaser eliminates the condition, and it may truly be said that the purchaser is the sole beneficiary of the condition. The vendor will get the same benefits under the contract, and from its point of view the only effect of waiver of the condition is to make the contract more certain of completion."

[51] Two things may be said about this passage. The first is that it does not affirm the proposition that a conclusion that a condition is for the benefit of a purchaser is determinative of the interpretation of a condition which expressly declares the contract to be at an end upon the non-fulfilment of the condition. A judgment that the vendor will get all that he or she has bargained for if the contract is completed and, therefore, has no "interest" in whether the condition has been fulfilled does not bear upon the construction of a provision which contemplates that the contract may be terminated by either party. Much less does it serve to limit or qualify the vendor's well-recognised right of termination so that it may be defeated by the exercise of a right in the purchaser (not conferred by the contract or any legal principle so far articulated in the authorities) to insist on the completion of the contract. The second point to be made here is that, as Windeyer J said in the passage from *Gange v Sullivan* cited above, if the condition has not been waived by the purchaser before the time limited for its fulfilment has expired, the "stipulation" enures "for the benefit of both parties the vendor being interested to know for how long his liability was to remain unresolved". The very terms of the contract recognise the vendor's interest in being able to free himself or herself from the constraints of the contract in the events which have happened.

[52] In my respectful opinion, in accordance with the statements of Barwick CJ and Windeyer J in *Gange v Sullivan*, of Brennan and Stephen JJ in *Perri v Coolangatta Investments Pty Ltd*, and Wilson J in *Sandra Investments Pty Ltd v Booth*, and there being no authoritative statement to the contrary, once a condition for the benefit of one party has failed, the right of termination the contract is taken to confer on the other party is not defeasible by a subsequent attempt by the first party to "waive" the condition.

[53] Indeed, the suggestion that what is involved here is a "waiver" at all involves a confusion of concepts. The question is not whether the benefit of the condition may be waived after it has failed. The question is whether the right of termination which has arisen under the contract in favour of the vendor may be defeated, not by disentitling conduct on the vendor's part but by the mere expression by the purchaser of a wish to complete notwithstanding the failure of the condition.

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47 [1994] Q ConvR 54-458 at 59,494.

[54] This confusion of concepts was further compounded in the appellants' submissions by the use, in the alternative to "waiver", of the language of affirmation or election to describe the purchaser's indication of a wish to complete the contract notwithstanding the failure of the condition. The appellants relied upon the following passage in the reasons of Thomas J in *Excel Quarries Pty Ltd v Payne*:[48]

> "As either party may avoid the contract I am prepared to assume for the purposes of the present discussion that either party may **bind itself** by affirming the contract for performance notwithstanding that the condition has not been satisfied." (emphasis added)

It is readily apparent from the words highlighted in this passage that Thomas J was speaking of a party **binding itself** by its conduct in affirming the contract. The appellants' attempt to use this passage to support the view that an expression of a desire to complete the contract may serve to **bind the other side** is quite misconceived.

The special condition in this case

[55] In my respectful opinion, once the respondents became entitled to avoid the contract, they could not have lost, and did not lose, that entitlement by the unilateral conduct of the appellants. The respondents were not bound to elect to determine the contract immediately upon becoming entitled to do so. No disentitling conduct on their part intervened between the time when their right to avoid the contract arose and when they exercised it.

[56] It has been said that, in some cases, the circumstance that, properly construed, a condition of a contract is for the sole benefit of one party has been taken to indicate that the right of termination for non-fulfilment is confined to that party. *Koikas v Green Park Construction Pty Ltd*[49] affords an example of such a case. The appellants before this Court do not contend that the specific condition in this case gave rise to a right of termination exercisable only by the purchasers.

[57] One may also note that there is authority for the proposition that, although a condition is primarily for the benefit of one party, it may not be waived by that party. In *Charles Lodge Pty Ltd v Menahem*,[50] a decision of the Full Court of the Supreme Court of Victoria, a conditional contract allowed for a period between the date by which the condition is to be fulfilled and the date for completion. The interest of the vendor in resolving uncertainty as to whether or not the contract would proceed to completion was held to mean that the condition was not able to be waived by the buyer. The Full Court said:[51]

> "In considering these rival contentions it is logical to begin with a reference to the precise words in the condition expressing the result to ensue upon the occurrence of the stipulated event, viz., 'Contract of Sale shall be void and of no effect'. Literally, as we have said, those words provide for an automatic avoidance of the contract on the occurrence of that event.
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> Where the stipulated event is one the happening or non-happening of which lies beyond the control of either party, there is no justification for reading 'void' in any sense other than its natural

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48 [1996] Q ConvR 54-473 at 59,601.

49 [1970] VR 142 at 149.

50 [1966] VR 161.

51 [1966] VR 161 at 164 - 165 (citations in original) (the Full Court comprised Winneke CJ, Pape and Adam JJ).

meaning (see *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418, at p. 440; [1950] ALR 820), but where it is within the power of one or both of the parties by his own acts or omissions to cause the event to happen or not to happen, decisions of the highest authority (*New Zealand Shipping Co Ltd v Societe des Ateliers et Chantiers de France*, [1919] AC 1; [1918-19] All ER Rep 562; *Quesnel Forks Gold Mining Co Ltd v Ward*, [1920] AC 222, and *Suttor v Gundowda Pty Ltd, supra*) establish that the word 'void', when used in a condition of this kind in a contract, is, as a matter of construction, to be read as 'voidable' unless the contract expressly or inferentially excludes such an interpretation. The reason for this rule of construction is to be found in a rule of law designed to prevent a party to a contract from availing himself of his own action or inaction to defeat his contract. As a result of this rule two consequences flow. First, if the event occurs through the action or inaction of one party, the contract is voidable at the option of the other; secondly, if the event is brought about by factors beyond the control of either party, then the contract is voidable at the option of either: see the *New Zealand Shipping Case, supra*, per Lord Atkinson at (AC) p. 9, Lord Shaw at pp. 12-13, Lord Wrenbury at pp. 14-15, and the *Gundowda Case, supra*, at (CLR) pp. 441-2.

In the present case, the condition was of this character, and, for the reasons we have already given, the event stipulated in special condition 3 should be considered to have occurred through the action or inaction of the appellant purchaser which failed to lodge any application for a permit within 60 days. The application of the above-mentioned rule would, therefore, entitle the respondent vendor to avoid, as he purported to do, unless of course the contract expressly or inferentially excluded him from so doing. The right of the vendor to avoid is not excluded in express terms; it remains to consider whether it is inferentially excluded.

The submission that such an inference should be made was rejected by the learned judge in the following terms: 'In the present case it may be inferred that it was the purchaser which was concerned to obtain approval for the erection of the flats and to know if it could obtain such approval before it should become finally and completely liable to complete the purchase by the payment of the purchase money. It may well be that it would be concerned to know whether or not the event had happened, which would give it a right to avoid the contract, at some point of time prior to the date when it might have to face the payment of the balance of purchase money, and therefore, that it would derive a benefit from the stipulation of the time period. But if the position were that when that period expired the purchaser could exercise an option to avoid the contract or allow it to continue in existence as it chose (short of waiving the non-fulfilment of the condition by affirming the contract finally), the vendor could be in a position of uncertainty for some indefinite period as to whether his sale would be completed by the purchaser or not and whether he would be called on to find another home or not. **The stipulation therefore that if the approval were not obtained within the time specified the contract should be null and void,**

> **could well be intended to operate for the purpose of enabling him to resolve the uncertainty, and therefore to operate for his benefit. It is sufficient to say that it does not appear to have been intended to operate exclusively for the benefit of the purchaser. In the absence of such an intention there is no foundation for an implied agreement that the contract should be voidable at the instance of the purchaser alone.**'" (emphasis added)

[58] The significance of the conclusion that a condition is for the exclusive benefit of, and may be waived by, one party is as one indication of the intention of the parties to the contract. The ultimate question remains whether, as a matter of construction of the language which the parties have used to frame their bargain, the terms of the contract support the conclusion that one party should be entitled to enforce the contract, contrary to the wishes of the other party, if the special condition was not fulfilled.

[59] The persuasive authority of the decision in *Charles Lodge Pty Ltd v Menahem* tends, I think, to neutralise the argument that the special condition was solely for the benefit of the appellants and was, accordingly, able to be waived by them.[52] That is because that case involved a condition cast in language closely akin to the special condition in this case. Be that as it may, the crucial consideration in the present case is that the special condition is cast in language which robs the inference that the condition is for the benefit of the purchasers, and so may be waived by them, of significance as an indication of the intention of the parties, in the event that the condition is not fulfilled, as to whether the purchasers may insist on the contract being completed.

[60] The special condition speaks of the contract being "at an end" in the event of non-fulfilment. While it is appropriate to regard that provision, illuminated by *Suttor v Gundowda* and *Gange v Sullivan*, as rendering the contract voidable rather than void, the express terms of the special condition are hardly consistent with the contract being able to be kept on foot by the choice of the purchaser in denial of the conceded right of the vendor to bring the contract to **an end**. The language of the special condition simply does not suggest that the contract may be kept on foot at the option of the buyers.

[61] In this respect, the language of the special condition stands in marked, and instructive, contrast with the terms of the contract considered in *Sandra Investments Pty Ltd v Booth*[53] upon which the appellants also sought to rely. In that case, the contract was expressed to be conditional upon local authority approval of subdivision of the land in question. The condition expressly provided: "In the event that such approval is not obtained then the Purchaser may at their option cancel this contract … and thereafter neither party shall have any claim upon the other."[54] These provisions were held to give the purchaser "a right to choose whether or not the contract should be cancelled if the condition was not fulfilled".[55]

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52 *Charles Lodge Pty Ltd v Menahem* was followed in *Amber Holdings Aust Pty Ltd v Polona Pty Ltd* [1982] 2 NSWLR 470 at 475; *Toga Development No 10 Pty Ltd v Gibson* (1973) 2 BPR 9260 at 9264; *Vakele Pty Ltd v Assender* (1989) 4 BPR 9591 at 9596, and *Bedroff Pty Ltd v Rennie* [2002] NSWSC 928 at [26] – [27].

53 (1983) 153 CLR 153.

54 (1983) 153 CLR 153 at 156.

55 (1983) 153 CLR 153 at 159.

It is, in my view, not possible to read the special condition of present concern as if it provided "… failing which this contract shall be at an end **at the option of the buyers**". Nor, to address more precisely the appellants' argument, is it possible to read the special condition as if it provided:

> "… failing which this contract shall be at an end **at the option of either party, but if at the option of the sellers that option will only be effective if it is exercised before the buyers indicate a wish to complete the contract**."

Summary

[62] In summary, there is no decision which supports the conclusion that the language of the special condition is apt to deny a vendor the exercise of a right of termination which has arisen in favour of both parties if the purchaser indicates a wish to complete the contract,[56] before the vendor's right of termination is exercised.

[63] No doctrine of law or equity, nor any expression of intention by the parties, supports the proposition that the respondents' right of termination was defeasible by the mere indication by the appellants of their wish to complete the contract. It may be the case that the appellants alone could have waived the benefit of the special condition before it failed.[57] It is not necessary to resolve that issue in this case. That is because the appellants cannot deny to the respondents the right of avoidance which arose upon its non-fulfilment. In the events which happened, on the true construction of the special condition, the respondents were entitled to terminate the contract.

[64] To interpret the contract as the appellants contend would do more violence to the language in which the parties have cast their bargain than is warranted by the authorities. That violence would be done for reasons not connected with the principle that a party should be denied the opportunity to take advantage of that party's own default being the principle which informs the decisions in *Suttor v Gundowda* and *Gange v Sullivan*. Indeed, such an interpretation would defeat the evident intention of the parties in a way not required by the authorities. The principles of contractual interpretation established by *Suttor v Gundowda* and *Gange v Sullivan* do not invite, or encourage, a process of judicial adjustment of the parties' rights of termination in accordance with a judicial assessment of whether a vendor has a sufficient interest in the fulfilment of a particular condition to resist a unilateral waiver of that condition by the buyer before it is fulfilled. To sanction such a process is to introduce a further layer of uncertainty into the enforcement of contracts.

[65] In the end, the appellants' argument involves the following steps:

(a) The only purpose of the right of termination which arises in a vendor upon the non-fulfilment of a condition is to resolve the vendor's uncertainty as to whether the purchaser will complete the contract;

(b) That purpose is satisfied when a purchaser "waives" the condition after its non-fulfilment;

(c) Because the purpose of the right of termination is satisfied, the vendor's right of termination ceases to exist if the purchaser indicates a wish to complete the contract.

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56 In *Woodward & Anor v Nagel* [2003] QSC 100 at [3] the point was conceded.

57 *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537 at 565 – 566.

As to the first and second of these steps, the proposition that the only relevant interest of the vendor is in being able to resolve the uncertainty of his position involves the notion that the courts can reject, as an interest worthy of protection, the interest of a vendor in being able to free himself or herself from a contract after the expiration of a period of uncertainty of which the purchaser has taken advantage. Whether or not such an interest is worthy of protection is not a matter for the courts: the parties are free to bargain to obtain such protection if they wish. The question is whether they have done so.

[66] As to the third of the steps in the appellants' argument, the rules of construction by which the terms of the parties' bargain are to be understood do not authorise, or proceed by reference to, a judicial assessment of the reasonableness of the parties' bargain. The language of the special condition was so clear that there can be no doubt that both parties well understood that, in the events which happened in this case, neither party could insist on the completion of the contract against the wish of the other. The courts should be wary of defeating the clearly expressed contractual intention of the parties by reference to judicial views as to what the parties should be content to accept. In the present case, the terms of the parties' bargain expressly released the respondents from the binding force of the contract in the events which happened. That the appellants might have prevented that outcome by waiving the condition before its expiration is no reason for the court to reform the parties' rights under the contract. Such an outcome cannot be justified as a matter of interpretation of the parties' bargain. It can only be justified by a process of judicial control of the parties' bargain by judicial inference as to the extent of the parties' legitimate interests to override the parties' clearly expressed intentions. As Francis Bacon said: "Judges must beware of hard constructions and strained inferences, for there is no worse torture than the torture of laws."[58]

Conclusion and order

[67] For these reasons, I consider that the appeal should be dismissed.

[68] The appellants should pay the respondents' costs of the appeal.

[69] **PHILIP McMURDO J**: By a written contract dated 27 November 2005, the appellants agreed to purchase the respondents' land at Canungra. The agreed date for settlement was 60 days from the date of contract.

[70] A special condition of the contract was as follows:

> "21.3.(A) This contract is subject to and conditional upon the Buyer's entering into a binding and enforceable contract of sale on terms satisfactory to them for the sale of their property located at 116 Veivers Road, Cedar Creek, Qld, 4207, within thirty (30) days from the date of this contract herein, failing which this contract will be at an end, the deposit refunded to the buyer and neither party will have any claim against the other apart from any rights either of the parties will have against the other as a result of any breach of this contract.
> (B) In the event that sub-paragraph (A) is satisfied this contract is subject to the settlement of the sale of that property by settlement date."

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58 Francis Bacon, *Essays*, "Of Judicature".

[71] That period of 30 days from the date of the contract ended on 27 December 2005. Clause 27.2 provided that "[A]ny event that must occur on or before a specified date… which date does not fall on a business day shall be extended to the next business day following the specified date." The 27th of December was not a business day. But it is unnecessary to consider whether cl 27.2 had the result, which each side accepts, that the period of 30 days for the fulfilment of the condition expired on 28 December. The condition was not fulfilled. The appellants did not contract to sell their property by 28 December or subsequently.

[72] By a fax dated 3 January 2006 from their solicitors, the appellants purported to waive the benefit of this condition so as to make the contract "unconditional in all respects". On 4 January the appellants' solicitors sent transfer documents.

[73] On 5 January the respondents' solicitors replied to the fax of 3 January, asserting that by the wording of the special condition, "as at 29 December, 2005 the contract came to an end."

[74] The appellants filed a claim on 10 March 2006, seeking specific performance. The respondents pleaded that they had duly terminated the contract. Each side applied for summary judgment and each application was dismissed by Fryberg J. This appeal is from the dismissal of the appellants' application.

[75] The appellants pleaded alternative bases for their claim. The first was that they waived the condition *within* the period (of 30 days) for its fulfilment, in the course of alleged telephone discussions between the parties through the respondents' real estate agent. The second was that they waived the condition on 3 January 2006, which they say also put paid to the respondents' right to terminate for the non-fulfilment of the condition. In applying for summary judgment, the appellants relied only on that second basis. The appellants had to persuade his Honour that upon the proper construction of the contract, the special condition could be waived by them beyond the period for its fulfilment but prior to any termination by the respondents.

[76] On the respondents' cross application for judgment, they had to demonstrate that neither of the appellants' grounds had any real prospect of success. After hearing oral evidence, Fryberg J held that there were triable issues of fact on the first ground, so he dismissed the respondents' application for judgment.

[77] The appellants' application involved no issue of fact. It involved a question of law, which is whether upon its proper construction, the condition could be waived by the appellants beyond the date for its fulfilment. His Honour declined to answer that question, remarking that the appellants' counsel had cited no authority to support his argument. But his Honour had been referred to a number of cases which guide the construction of such a condition and which are discussed below. His Honour did have the benefit of argument on the question and in my respectful opinion, he ought not to have disposed of the plaintiffs' application for judgment without deciding the one question, which was one of contractual interpretation, which it raised.

[78] On its face, the special condition operated in a self executing way to terminate the contract on the expiration of the period of 30 days, if the condition had not been fulfilled by then. In that event, the contract was to be "at an end", the deposit was

to be refunded and neither party was to have any claim against the other (apart from any right as a result of any breach of the contract). But as the respondents now accept, the condition should not be given that literal interpretation. Instead, its terms are affected by a rule or rules of construction which courts have developed and applied to contracts in similar terms, and which can result in a substantial departure from the words used.

[79] The first of these rules operates to make a contract expressed to be void or at an end in the event of non-fulfilment of the condition, instead voidable. This rule applies where the fulfilment of the condition can be affected by the conduct of one of the parties. In those cases, if a contract came to an end simply by the non-fulfilment of the condition, a party could bring about that result by what it did or did not do to have the condition fulfilled. In interpreting the contract, it is presumed that the parties did not intend to enable one of them to have that advantage. So where the rule applies, the party able to affect the fulfilment of the condition can avoid the contract only if not in "default", meaning that the party has not by his act or omission caused or contributed to the non-fulfilment of the condition. This rule, which in Australia derives from *Suttor v Gundowda Pty Ltd*[59] and *Gange v Sullivan*[60], is now conceded by the respondents to affect the meaning of this contract. It is common ground then that the contract did not come to an end on the expiry of the 30 day period.

[80] The second rule which can affect the meaning of such conditions involves a type of waiver. Where such a condition can be seen to have been inserted for the benefit of one of the parties, the contract has been interpreted as entitling that party to unilaterally waive the condition, so that it no longer forms part of the contract. This can result in a further departure from the literal meaning of the words used, which may say nothing about waiver and which may provide to each party, expressly or by implication, a right to terminate for non-fulfilment of the condition. This might be thought to result not so much from an approach to contractual interpretation, but from the principle that a party is able to unilaterally relinquish a term inserted solely for his benefit.[61] However as I will discuss, in the context of special conditions of the kind in the present case, the contract has been interpreted as providing a right of waiver to one party although the condition has been characterised as being for the benefit of both. That was the interpretation of a like condition in *Perri v Coolangatta Investments*.[62]

[81] In this case, it is common ground that at least within the 30 day period, the appellants had been able to waive the condition. It is also common ground that if the condition was not fulfilled or waived by the appellants within that period, each of the parties became entitled to terminate the contract as soon as the period expired. The issue is whether the respondents' right of termination was subject to a waiver of the condition by the appellants which was made after the period expired.

[82] The clear purpose of the condition was to benefit the appellants as purchasers, so that they would not have to complete without the funds from a sale of their own property. It would appear then that the condition was inserted primarily for the

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59 (1950) 81 CLR 418, 440-442.
60 (1966) 116 CLR 418.
61 *Hawksley v Outram* [1892] 3 Ch 359.
62 (1982) 149 CLR 537.

benefit of the appellants with the result that it could be waived by them. The respondents' concession that within the period, the appellants could waive the condition is rightly made, having regard in particular to *Gange v Sullivan* and *Perri v Coolangatta Investments Pty Ltd*. In *Perri*, the relevant condition was also one for the sale of property owned by the purchasers. The time for fulfilment of that condition was not expressed but by implication, it was a reasonable time. The contract fixed no date for completion. Each of the judgments accepted that the condition could have been waived by the purchasers. The majority held that the vendor had validly terminated the contract for non-fulfilment of the condition, because by then a reasonable time for its fulfilment had expired and the purchasers had not waived the condition. There was a purported waiver by the purchasers, but unlike that in the present case, it was made after the vendor's termination.

[83] If this contract had simply provided for a sale of the appellants' property by the date for settlement, it is clear that they could have waived the condition before or on the date for completion, because in all respects it would have been a term inserted solely for their benefit. But here there is a distinct interval between the end of the 30 day period and the settlement date. According to the authorities which guide the interpretation of such conditions, that interval is significant. The purpose of a stipulation of the time for the fulfilment of the condition as a date prior to the settlement date is to benefit the vendor. It is to permit the vendor to terminate rather than being left in a position in which he would remain bound to complete whilst uncertain as to whether the purchaser would do so. So where there is such a stipulation for fulfilment of the condition by a point in time which is prior to completion, the condition is usually construed as entitling the vendor (as well as the purchaser if not in default) to terminate: *Charles Lodge Pty Ltd v Menahem*[63]; *Gange v Sullivan*[64]; *Perri v Coolangatta Investments Pty Ltd*[65]. Nevertheless, although such a condition benefits both parties by providing each with a right to terminate, it has been held to be capable of unilateral waiver by the purchaser. As Mason J said in *Perri*:[66]

> "[The vendor's right to terminate] does not necessarily deny a right in the [purchasers] to waive the benefit of the clause, the [vendor's] right of termination … like the [purchaser's] subsisting so long as there is no waiver by the [purchasers]."

This then is a right of waiver of a particular kind, whereby one party can waive a condition which also benefits the other party by conferring a right, which is a right to terminate. According to a line of cases in New South Wales, discussed below at [98], there should be no right of waiver in such cases because the purchaser cannot waive a condition which also confers a right on the vendor, as it does even within the period for fulfilment of the condition when that right is not yet exercisable. But on the authority of *Gange* and *Perri* the condition can be waived although it confers a right on the other party, effectively because that right, as Mason J explained, is qualified by the purchaser's right of waiver.

[84] In *Perri*, Brennan J said[67]:

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63 [1966] VR 161, 165-166.
64 (1966) 116 CLR 418, 441, 443.
65 (1982) 149 CLR 537, 553, 565.
66 (1982) 149 CLR 537, 553.
67 (1982) 149 CLR 537, 565.

> "The purpose of the stipulation is to ensure that the purchasers should have the proceeds of the sale of their Lilli Pilli property before their obligation to pay the balance of the purchase price for the Cronulla property becomes absolute. The substance of the stipulation is a condition for the benefit of the purchasers and they may waive it if they choose. But the limit of the time within which the stipulation is to be fulfilled enures for the benefit of the vendor as well as for the benefit of the purchasers, "the vendor being interested to know for how long his liability was to remain unresolved" (per Windeyer J. in *Gange v Sullivan* (96)). When vendor and purchaser are each under a contingent obligation to complete a contract of sale, the fulfilment of the contingency or the entitlement to avoid the obligation is of equal interest to both parties."

Similarly in *Gange v Sullivan*,[68] Windeyer J said of the condition in that case, which was that the purchaser would obtain development approval for use of the land being purchased, that it was "*primarily* for the benefit of the purchaser and could be waived by him" (emphasis added). Of a relevantly similar condition in *Meehan v Jones*,[69] Mason J said that "although the primary object of the condition is to protect the purchaser, it is perhaps difficult to assert that the clause is for his benefit exclusively". The purchaser's right of waiver is not the result then of the condition being solely for its benefit. It is the result of an interpretation of the contract, informed by a realistic assessment of the interests which the special condition is there to protect.

[85] The basis for a right of waiver remains just as relevant, after the date for fulfilment of the condition, as it had been before that date. It remains a condition which is primarily for the purchaser's benefit. Each party has a right to terminate for the non-fulfilment of the condition, but it is apparent that those rights serve different interests. The purchaser's interest is that it might be impossible or too onerous for the purchaser to complete without the benefit of a sale of his own property. The non-fulfilment of the condition does not concern the vendor in the same way, because the vendor's ability to complete the contract is entirely unaffected by it. The non-fulfilment of the condition concerns the vendor because it permits the purchaser to avoid, and the vendor's right to terminate is to meet what would otherwise be his predicament that his property would remain subject to a contract which the purchaser could at any time avoid. But if the purchaser can waive the condition and become unconditionally bound, the vendor's uncertainty is resolved and the purpose for the vendor's right of termination no longer exists.

[86] Neither *Gange* nor *Perri* involved the precise question in this case, which is the effect of a purported waiver after the vendor becomes entitled to terminate but has not done so. There are statements in the judgments, as there are in other cases such as *Charles Lodge Pty Ltd v Menahem*, which appear to suggest one answer or the other to that question. But each must be read in the context of the facts and circumstances of that case.

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68 (1966) 116 CLR 418, 443.

69 (1982) 149 CLR 571, 592.

[87] Perhaps the strongest indication that any waiver by the purchaser must be within the time for fulfilment of the condition is in the judgment of Windeyer J in *Gange v Sullivan* where his Honour said:[70]

> "The special condition of the contract was, I think, inserted primarily for the benefit of the purchaser and could be waived by him. But unless before the date set for obtaining the council's approval of the proposed development that approval was in fact given or the purchaser either expressly waived the condition or expressly accepted the communication which he had received as a sufficient fulfilment of it, the vendor could I think avoid the contract. That is because the time within which the approval must be had was stipulated and unless that stipulation was expressly waived by the purchaser it would enure, I consider, for the benefit of both parties, the vendor being interested to know for how long his liability was to remain unresolved."

In *Gange*, the event the subject of the special condition was the grant of a development approval by 31 May 1965, and settlement was to occur within 20 days of that approval. When that event did not occur, the vendor's solicitor said (on 1 June) that the vendor would not extend the time for approval unless on terms which the purchaser's solicitors then said were unacceptable. On 2 June, the vendor's solicitors wrote to avoid the contract. So the vendor was not entitled to terminate until 1 June, when the vendor's solicitors indicated an intention to terminate which was followed by his termination on the next day. A statement as to a waiver within the period for its fulfilment has to be understood in that context, in which the vendor set about avoiding the contract as soon as he was able.

[88] In the joint judgment of Taylor, Menzies and Owen JJ in *Gange*, there is this passage which might be thought to provide some support for the appellants' argument:[71]

> "Accordingly, notwithstanding that the language of the condition here is susceptible of meaning that the contract came to an end if 31st May passed without the council's approval, we are prepared to treat non-fulfilment of the condition as rendering the contract voidable rather than void. So understood, non-fulfilment of the condition could, in the absence of default contributing thereto, be relied upon by either party as a ground for determining the contract. An examination of what took place on 25th May and the first and second days of June leaves us in no doubt that, unless the condition had been fulfilled by the letter of 2 April, the contract was brought to an end by the vendor's positive rescission in the absence of a communicated readiness on the part of the purchaser to complete without some further approval from the council."

In his judgment in *Gange*, Barwick CJ said:[72]

> "But, being a condition for his benefit, the appellant, in my opinion, could waive it and require the vendor to complete notwithstanding that no approval satisfying the condition had been received in time."

By that statement, Barwick CJ appears to have envisaged an effective waiver after the point at which the condition was unfulfilled.

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70 (1966) 116 CLR 418, 443.

71 (1966) 116 CLR 418, 441-442.

72 (1966) 116 CLR 418, 430.

[89] As already mentioned, in *Perri* the time for fulfilment of the condition was, by implication, a reasonable time. The contract was made on 7 April 1978. On 17 July 1978, the vendor gave a notice to complete by 8 August 1978, and when the purchasers did not then complete, the vendor purported to terminate on 10 August 1978. On 29 September 1978, the vendor sued the purchasers, claiming a declaration that the contract had been terminated on 10 August. At that point the special condition, which made performance conditional upon the sale of the purchasers' property, had not been fulfilled or waived. The purchasers did not sell that property until June 1979, after which they cross-claimed for specific performance. The majority held that a reasonable time for fulfilment of the condition had expired by September 1978 when the vendor commenced his proceedings, and that by doing so, he had validly terminated for non-fulfilment of the condition.

[90] Gibbs CJ said:[73]

> "The condition was in my opinion one for the benefit of the appellants who were therefore entitled to waive it, but since there was no waiver before proceedings were commenced that question need not be further considered."

Mason J, who dissented on a ground not presently relevant, said:[74]

> "… the fact that the clause draws no distinction between the parties and is not expressed to condition only the purchasers' obligation to complete, together with their implied obligation to make all reasonable efforts to sell the Lilli Pilli property, provide strong ground for thinking that the respondent as well as the appellants had a right to terminate on non-fulfilment of the condition. This does not necessarily deny a right in the appellants to waive the benefit of the clause, the respondent's right of termination for breach, like the appellants', subsisting so long as there is no waiver by the appellant".

Wilson J said:[75]

> "In my opinion, it is to be implied from the agreement that should the Lilli Pilli property not be sold within a reasonable time, then the fate of the contract will be resolved according to the action which may be taken by either party. The purchasers may elect to waive the condition, it being one wholly for their benefit, and proceed to completion, thereby holding the vendor to its contract. Alternatively, provided that they have acted reasonably in their attempts to sell the property, they may rely on the non-fulfilment of the condition to bring the contract to an end, and recover their deposit. On the other hand, the vendor may force the issue simply by serving a notice to complete. I do not think it appropriate to contemplate a notice to the purchasers requiring them to fulfil the condition, because the time agreed for that will have expired, and in any event it does not lie within the capacity of the purchasers to fulfil it. The effect of a notice to complete is to give the purchasers, should they wish to waive the condition, the opportunity to finalize the transaction; alternatively, it serves to crystallize in the minds of both parties a

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73 (1982) 149 CLR 537, 543.

74 (1982) 149 CLR 537, 553.

75 (1982) 149 CLR 537, 560.

> common date on which the contract will come to an end for non-fulfilment of the condition."

Wilson J, although joining in the dismissal of the purchasers' appeal, differed from the other judges in the majority in holding that the vendor could not terminate for non-fulfilment of the condition without giving a notice to complete. But his Honour was clearly of the view that the purchasers could waive the condition beyond the (reasonable) time for its fulfilment, and indeed the notice to complete was to give the purchasers the opportunity to then waive the condition.

[91] Brennan J, with whom Stephen J agreed, held that no notice to complete was required and that because a reasonable time for the fulfilment of the condition had expired by the time at which the vendor commenced his proceedings, the commencement of those proceedings was a valid termination of the contract. Brennan J said:[76]

> "Though the stipulation specifies the event upon the occurrence of which the obligations to complete cease to be contingent, the stipulation contains no promise that the event will occur. Until the event occurs or the purchasers waive the benefit of the stipulation (*Gange v. Sullivan* (1966) 116 CLR, at pp 430, 443) neither party is entitled to a decree of specific performance of their respective obligations to complete the sale (*Brown v. Heffer* (1967) 116 CLR 344, at p 350) and the purchasers have no equitable interest in the property which is the subject of the contract (*McWilliam v. McWilliams Wines Pty Ltd* (1964) 114 CLR 656).
>
> Assuming that the contract remained on foot until 27 February 1979, when the purchasers purportedly waived the benefit of the stipulation, the obligations to complete the sale of the Cronulla property did not become unconditional before that date. In the absence of waiver of the stipulation, the obligations to complete remained contingent upon the completion of the sale of the Lilli Pilli property."

From that passage, it appears that had the vendor not terminated (by the commencement of his proceedings) on the expiry of a reasonable time for fulfilment of the condition, the completion of the contract would have remained contingent on the sale of the purchasers' property, subject to their waiver of the condition.

[92] Therefore of the majority in *Perri*, Wilson J was clearly of the view that the purchasers could have waived outside the time allowed for selling their property, and Gibbs CJ and Brennan J each wrote in terms which would appear to indicate the same view.

[93] The appellants' argument has support in the judgments at first instance and on appeal in the South Australian case of *Willing v Baker*,[77] although again the judgments must be understood in context of the particular contract. The agreed date for completion was 25 April 1991. A special condition made completion

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76 (1982) 149 CLR 537, 565-566.

77 Reported on appeal at (1992) 58 SASR 357.

conditional upon the purchaser's entering into a contract to sell his property by 25 March 1991. A further term provided as follows: [78]

> "The party required to comply with any Special Condition set out in the Special Conditions in the Schedule shall make every reasonable endeavour to comply with that condition. If any such condition is not complied with before the date specified … then, (a) if the failure to comply with the condition is not due to the neglect or default of a party to the contract the Vendor or, unless the Purchaser has waived such condition and communicated such waiver in writing to the Vendor or the Agent, the Purchaser, upon giving seven days' written notice to the other party may terminate this contract and upon its termination (unless the condition is complied with in the meantime) all moneys paid under this contract shall be re-paid to the Purchaser and all rights and liabilities under this contract shall cease …"

The purchasers' property was not sold by 25 March 1991 and on 23 April 1991, two days before the date for completion, the purchasers purported to waive the condition. By then, the vendors had not terminated the contract or given the required notice preceding a termination. They argued that the condition was not solely for the benefit of the purchasers and so could not be waived by them. On the basis of *Perri*, the trial judge, King CJ, held that it was a condition relevantly for the benefit of the purchasers who could waive it. There was no argument made to King CJ that the purported waiver was ineffective because it was made beyond the date for fulfilment of the condition. That argument was made on appeal, where it was unanimously rejected. Legoe J[79] held that the express right of waiver (conferred by the term set out above) was neither expressly nor by necessary implication excluded after the date for fulfilment. The rejection of that implication supports the appellants' argument, particularly given his Honour's extensive analysis of the authorities relevant to these conditions and to the right of waiver. Cox J held simply that upon the proper interpretation of the clause set out above, the condition could be waived by the purchasers at any time.[80] Mullighan J said:[81]

> "In my view the special condition is a typical condition inserted for the benefit of the respondents and they were at liberty to waive it at any time within the currency of the contract. Consequently they were not required to waive the special condition by 25 March 1991 … Whether, to be effective, waiver of a special condition must take place before the expiration of the relevant period depends upon the particular circumstances: *Sandra Investments Pty Ltd v Booth* (1983) 153 CLR 153, per Wilson J at 166. Here, there is nothing about the terms of the bargain between the parties to the contract which would require the waiver to be effected by 25 March 1991. The special condition was inserted to enable the respondents to have sufficient funds to settle. The date for settlement was fixed at 25 April 1991, or at an earlier time if the respondents had sold their property and received the proceeds of sale before then. The special condition did not touch the subject matter of the contract, such as may be the case where approval for the subdivision of land is required before settlement can be effected. The respondents were, in my view,

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78 (1992) 58 SASR 357, 359.
79 (1992) 58 SASR 357, 374.
80 (1992) 58 SASR 357, 375.
81 (1992) 58 SASR 357, 377.

> entitled to waive the special condition at any time before the settlement date and they did so by the letter from their solicitors dated 23 April 1991. I have not found anything in the judgments in *Gange v Sullivan* (1966) 116 CLR 418 to the contrary …"

[94] In *Barooga Projects (Investments) Pty Ltd v Duncan*,[82] completion of a contract was subject to council development consent. There was some doubt as to whether that condition had to be fulfilled within 180 days or within a reasonable time. In any case the condition was not fulfilled within either period, after which the vendor, rather than terminating, called on the purchaser to complete on a certain date. The purchaser did not complete on that date and nor did the vendor terminate. But subsequently the purchaser said that it had accepted the Council's conditions of approval and it wished to complete. The vendor then purported to terminate for the purchaser's failure to complete in response to its notice. The court (McMurdo P, White and Fryberg JJ) unanimously held that the vendor's termination was invalid. By earlier calling for completion, the vendor had affirmed the contract and the purchaser's advice that it was content with the council's conditions constituted a waiver of the benefit of the special condition making the contract then unconditional. There was apparently no argument that the waiver was ineffective for its being made beyond the period for fulfilment of the condition, and the point was not discussed in the judgments. Nor was it discussed in a note of the case in (2005) 79 ALJ 19.

[95] The present point arose before Thomas J, but did not have to be decided, in *Re Wickham Developments (Australia) Pty Ltd*.[83] Under that contract there was a condition making it subject to the purchaser's obtaining the approval of the Foreign Investment Review Board to the purchase within 45 days. It was also subject to obtaining a certain approval from the Brisbane City Council within 90 days. The completion date was specified as 21 days from the date of the purchaser's notice of having obtained the Council's approval, or from its waiver of the benefit of that condition. After the date (and an extension of that date) had passed for the obtaining of the FIRB approval, the purchaser notified the vendor that "the contract is now unconditional in respect of (that) special condition". The vendors did not accept that the purchaser had the unilateral right to waive the condition, and a few days later they purported to terminate on the basis of its non-fulfilment. Thomas J held that the condition could be unilaterally waived by the purchaser at any time. He distinguished the case from those: [84]

> "[W]here there is no disadvantage to the vendor if the purchaser eliminates the condition, and it can truly be said that the purchaser is the sole beneficiary of the condition (and where) the vendor will get the same benefits under the contract, and from its point of view the only effect of waiver of the condition is to make the contract more certain of completion."

Thomas J also referred to the vendors' alternative argument, which was that if there was a right to waive the condition, it existed only during the time for its fulfilment. He recognised that the proposition was arguable but said that he would not have been disposed to uphold it, because it seemed to him "that while a contract remains alive for performance, either party may exercise his or her rights under it, whether

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82 [2004] QCA 149.

83 Unreported, Supreme Court of Queensland, 232 of 1994, 6 April 1994.

84 Unreported, Supreme Court of Queensland, 232 of 1994, 6 April 1994, 6-7.

of election or of waiver, unless precluded by his or her own conduct from so doing."

[96] The appellants also seek to draw some support from *Sandra Investments Pty Ltd v Booth*.[85] That case turned upon the particular terms of the contract, which provided that "in the event that such approval is not obtained then the purchaser may at their option cancel this contract and in that event all deposit monies paid hereunder by the purchaser shall be refunded in full to the purchaser and thereafter neither party shall have any claim upon the other." That was construed to give the purchaser an option between terminating the contract and completing it and to provide no right to the vendor to terminate. It supports neither side here.

[97] The appellants also seek some support from decisions of single judges in this court, but in none of them has there been a determination of the present question. In particular, in my judgment in *Woodward v Nagel*,[86] the correctness of the point now argued by the appellants was conceded.

[98] Reference was also made in the appellants' submissions to what was suggested to be a different approach in New South Wales, exemplified by the judgment of Young CJ in Eq in *Bedroff Pty Ltd v Rennie*.[87] The contract in that case was made on 5 October 2001. It was made subject to the purchaser obtaining consent from the local authority within nine months of the contract, and it provided that if consent was not obtained within that time either party might rescind on 14 days notice to the other. It was further provided that the purchaser would notify the vendor immediately upon the consent being obtained and that settlement would occur within 28 days of that communication. On 17 May 2002, ie within the nine months allowed for fulfilment of the condition, the purchaser purported to waive it. On 9 July 2001, ie just after the expiry of that period, the vendor gave a notice to complete. The purchaser responded by saying that the notice was invalid for various reasons. The purchaser did not complete but issued proceedings claiming specific performance. They succeeded because the notice to complete was given prematurely. But the question of the waiver of the special condition was discussed. Young CJ in Eq referred to what was said by Holland J in *Amber Holdings (Aust) Pty Ltd v Polona Pty Ltd*[88] as follows:

> "A question that arises here is whether, although the substance of the condition may be considered as being designed to protect and benefit only the purchaser, the presence of express bilateral rights to rescind on failure of the contingency precluded unilateral waiver by the purchaser. In my opinion, the answer is that it does."

His Honour also cited this passage from the judgment of Mahoney J (as he then was) in *Toga Development No 10 Pty Ltd v Gibson*:[89]

> "There has been no exhaustive statement in the authorities of the kind of benefit to a vendor which will prevent a purchaser relying upon this kind of waiver. The kind of benefit in question includes an actual or potential increase in the value of other property owned by the vendor which may arise from the performance of the condition in

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85 (1983) 153 CLR 153.
86 [2003] QSC 100.
87 [2002] NSWSC 928.
88 [1982] 2 NSWLR 470, 475.
89 (1973) 2 BPR 9260, 9264.

> question … .The relevant benefit is not, however, limited to such financial benefit. It has been held that if a clause operates to enable a party to a contract to 'determine with certainty and without waiting upon the will and acts of' the other party 'what his position under the contract is' that clause confers a benefit upon that party; it has been held that in such a case the purchaser cannot claim that the clause is solely for his benefit in the relevant sense …".

Young CJ in Eq held that the approach from these New South Wales cases should be followed, in preference to what he saw as the contrary decision in *Willing v Baker*, so that the purchaser could not unilaterally waive the condition at any time. As discussed earlier, that approach accords with the proposition that a term can be waived unilaterally only by a party for whose sole benefit it was inserted. But that is inconsistent with the judgments in *Perri*.

[99] There is support for the appellants in *Suttor v Gundowda*. That contract, dated 20 October 1947, was made conditional upon the consent to the sale by the Treasurer within two months or such further period as mutually agreed. It was provided that in the event that the Treasurer's consent was not obtained within that time, the contract should be deemed to be cancelled. The Treasurer's consent was obtained, but not until 5 January 1948. Ten days later, the vendor's solicitor wrote to contend that the contract had ceased to be effective after the expiry of the two month period for fulfilment of the condition. In the judgment of the court, (Latham CJ, Williams and Fullagar JJ) it was said:[90]

> "Before the defendant's solicitor purported to cancel the contract the consent in writing of the Treasurer to the transfer had been obtained on 5th January, 1948 and the cancellation was therefore too late."

So the occurrence of the relevant event put paid to the vendor's right of termination although it occurred beyond the period agreed in the special condition. That result, it may be respectfully observed, involves a substantial tension with the words of the contract. But it is an instance of the approach to the interpretation of such conditions which can give them an effect well removed from their literal meaning. *Suttor* illustrates an approach which would deny a right of termination to a party whose relevant interest has been unaffected by the non-fulfilment of the condition within the agreed time: by the time of their purported termination the vendors had no relevant interest to be protected by a right of termination because by then they had an unconditional contract. That reasoning is relevant here, by its interpretation of the right to terminate by reference to the purpose for which that right was given, and by the cessation of that right where the circumstances made the purpose no longer relevant.

[100] I return then to what I said earlier about the different interests which courts have identified and sought to protect in the interpretation of these conditions. The relevant interest of the vendor in such cases is in being able to resolve the uncertainty of his position. If that uncertainty can be resolved by a waiver which binds the purchaser to perform unconditionally, then the relevant interest of the vendor is satisfied by the waiver, "for if the purchasers could and did waive it the contract would be unconditional and the vendor's concern to have a contract finally binding on the purchasers would have been realised."[91]

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90 (1950) 81 CLR 418, 442; a passage cited by Gibbs CJ in *Perri* (1982) 149 CLR 537, 545

91 *Koikas v Green Park Construction Pty Ltd* [1970] VR 142, 149.

[101] The respondents argue that there is no reason for the implication of a right of waiver beyond the period for fulfilment of the condition. In my view there is such a reason: it is the same for which the purchaser had a right of waiver within that period.

[102] At one point in the appellants' argument, it appeared to be suggested that each side could waive the condition. That suggestion could not be accepted. It was apparently made in order to make it appear that there was no imbalance between the respective entitlements of the parties. As to that, the purchasers' waiver, whether within or outside the relevant period, affects both parties equally in precluding a subsequent termination by either of them. Any imbalance is simply because, as the authorities recognise, only one side has a right of waiver.

[103] In my conclusion the appellants remained able to waive the condition beyond 28 December provided the contract remained on foot. By their waiver, the contract became unconditional at least by 3 January 2006, so that neither party could thereafter terminate. It follows that the appellants should have been given judgment on their claim for specific performance. There was no argument to the primary judge or on appeal that if the respondents' termination was invalid, nevertheless specific performance should be refused.

[104] I would allow the appeal and order that the contract be specifically performed. There should be liberty to apply to a judge of the Trial Division for further orders. The respondents should pay the appellants' costs of their proceedings and of this appeal to be assessed.