## Contingent Conditions

### Background

- (a) Precedent to formation of contract: no enforceable rights unless contingent condition is fulfilled
- (b) Precedent to performance: contract formed but the obligation to perform only arises if contingent condition is fulfilled
- (c) Subsequent to performance: contract formed but will end if contingent condition is fulfilled

### Establishing a contingent condition

**Contingent or promissory:** The test is whether the language expresses a contingency (McTier).

**Precedent to formation or performance:** Generally, a contingent condition precedent to performance is presumed (Perri). This general presumption is not displaced or displaced …

### McTier v Haupt – Language expressing contingency

- GCL.2: ‘This sale is subject to … the property being delivered to the purchaser on the settlement date in their present state of repair’
  - ‘subject to’ indicates contingent condition, words were not promissory i.e. ‘shall’, ‘will’ or ‘must’

### Perri – Look to see if contract exists

- Contract already formed and signed which stipulated the condition so had to be precedent to performance

### Precedent to formation giveaway – ‘subject to formal contract …’

### Time for fulfilment

**Express:** The time for fulfilment is … This time stipulation is essential (Suttor)

**No time stipulated:** No time is stipulated for fulfilment. A reasonable time is implied (Perri). This time stipulation, although implicit, is essential (Suttor)

### Non-fulfilment

**Late:** Late fulfilment is non-fulfilment because … is an essential time stipulation. Thus, the accrued right to terminate is not overtaken

**Substantial:** A contingent condition cannot be substantially performed, either it is performed or it is not (Tricontinental)

### Waiver

A party may waive the contingent condition before the time for fulfilment has passed if it is for their sole benefit (Meehan). The party alleging sole benefit has the onus of proof (Raysun). Here, need for fulfilment eliminated by unilateral waiver …

### Perri - Distinguish between substance and time of condition

- P could waive substance of condition (i.e. selling the house) because for its sole benefit
- P could not have waived the time limit (i.e. kept the part about selling the house but no more time stipulation) because this was for the benefit of both parties
Right to terminate

*General rule:* Generally, non-fulfilment of a contingent condition does not automatically terminate a contract, it makes the contract voidable (Suttor). Either party, if not at default, may elect to terminate the contract (Perri). *Two possibilities below*

*Automatic termination:* Question of construction, termination may be automatic if the words make it clear beyond doubt the parties intended the contract to be immediately void (MK & JA Roche).

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**Suttor v Gundowda – Voidable construction applies most strongly if non-fulfilment mainly occurs due to one party**
- Facts: sale of land, 2 months for obtaining consent expired without causative default, consent obtained on 5 Jan, V seeks to avoid contract on 15 Jan
- cl 12: ‘in the event of consent not being obtained … the contract shall be deemed to be cancelled’
  - contract is voidable not void – *does not lay down principle that parties can never stipulate for automatic termination*

**MK & JA Roche v Metro Edgley – Need clear words**
- many matters outside control of parties could cause non-fulfilment → Suttor principle does not apply at full strength
- use of ‘automatically’ in cl 2A(b) showed intention for contract to be automatically terminated

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**(1) Non-fault based termination:** Termination for non-fulfilment of a contingent condition is not a fault based termination. No breach (not promissory). Purchaser can recover the deposit.

**(2) Fault based termination:** A party may lose their right to terminate if (a) they are at causative default or (b) if there is an estoppel or election

(a) Causative default: This can arise if a breach of an implied promise causes the non-fulfilment. There will be no causative default if the non-fulfilment would have occurred anyway.

(b) Estoppel or election: Words or conduct amounting to an estoppel or election. *Mere delay* – this will not amount to an unequivocal election to affirm or generate an estoppel, party may keep question open as long as delay does not prejudice other side (Mason, Sargent)

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**Types of implied promise**
- Implied promise by purchaser to make all *reasonable efforts* to sell existing house (Perri)
- Implied promise by purchaser to make all *reasonable efforts* to obtain finance (Meehan)
- Implied promise to give *reasonable opportunity*, not prevent fulfilment without just cause, not to act in bad faith to prevent fulfilment (Bournemouth)
- Implied term must not be inconsistent with express terms
Dependency of Promises

**Background** - Where A alleges B is in actual breach, preliminary question as to relationship of A & B’s obligations

The modern presumption is against the independency of promises (Kingston). *Exception*: independence inferred from nature of promises (separation deed), facts (promises in separate documents), one promise is far less significant than the other.

**Waiver**

B’s duty to perform will be activated if B waived A’s obligation by intimating it would be unnecessary or useless for condition to be fulfilled and A acted on it (Peter Turnbull)

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**Peter Turnbull**

- P to give 14 days’ notice of ship and date but V intimated it would not perform contract

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**Order of Performance**

**Sales**

- in sales it is presumed that major promises are due concurrently (i.e. conveyance and acceptance of goods/payment of price) (Kingston) (Foran for sale of land)
- major = condition → apply tests for a strict condition
- so if one party refuses to tender a major performance → other party can withhold tendering performance, other party can sue for damages but cannot claim contract price

**Employment**

- in employment agreements it is presumed that work must be executed before the promise of payment (Automatic Fire Sprinklers)
- if employee works but employer refuses to accept services, cannot sue for wages – remedy is damages for breach

**Leases** - look at contract

If A’s obligation not a condition precedent, substantial performance will activate B’s duty to perform (Boone). A will still be liable in damages.

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**Boone** - V’s ownership of slaves not a condition precedent to P’s obligation to pay annuity; ownership of slaves **not vital so not a condition** but can be compensated in damages

**Bettini v Guy** - B’s arrival 6 days prior to first engagement not a **condition precedent of essential importance** – a long contract, only affects first few performances and so not vital

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**Four possibilities for what fulfilment requires**

- Exact performance at the exact time promised or at substantially the time promised
- Substantial performance at the exact time promised or at substantially the time promised

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If A’s performance fails to activate B’s duty to perform:

(a) *Time for fulfilment not elapsed*: B can withhold performance while condition precedent remains capable of fulfilment after which time B is entitled to terminate

(b) *Time for fulfilment elapsed*: if a condition B can terminate