1. Has the immediate duty of performance arisen?

To decide whether immediate duty of performance has arrived:

1. examine contract to see if it stipulated that time must elapse or other conditions must be fulfilled, before duty to perform particular promise has arisen
2. if contract provides, one must secondly inquire whether the time has in fact elapsed, or the other conditions been fulfilled, and, if not, one must ask whether the need for elapsing of time/fulfilment of conditions has been eliminated

The immediate duty to perform a particular promise may be subject to conditions precedents of differing kinds:

(a) Contingent Conditions Precedent

• Definition: duty to perform a promise arises when fulfilment of some condition which neither side promised would be fulfilled: *Meehan v Jones* (performance subject to X) = assume condition precedent to performance: *McTier v Haupt* [1992].
  o ‘subject to’ = usually contingent condition: *McTier v Haupt*

• Condition precedent to formation: condition precedent to formation – transaction creates no rights enforceable by the parties unless and until the condition is fulfilled. This would normally allow a party to withdraw from the transaction before fulfilment of the condition.

• Condition precedent to performance: binding contract which creates rights capable of enforcement though the obligation of a party to perform depends on fulfilment of the condition and non-fulfilment entitles him to terminate.

• Condition subsequent: operative fact that causes the termination of some previous legal relation. It should be noted that this is a semantic difference to contingent condition precedent and it is sometimes used to describe condition precedent to performance as opposed to condition precedent which is believed to be condition precedent to formation: *Perri v Coolangatta* (Gibbs CJ). Condition subsequent does not normally bring the contract to an end automatically. It merely generates a right to communicate to the other party an election to terminate it: *Suttor v Gundowda*.  

1. General Overview

• The party, for whose benefit the contingent condition precedent was inserted, will not normally come under an immediate duty to perform promise at date agreed unless condition precedent is fulfilled by that time: *Perri v Coolangatta Investments*
  o Above will not apply if party for whose benefit condition was inserted is at fault for non-fulfilment – the party would be in breach if they fail to perform at the original agreed date: *Zieme v Gregory* [1963]

• If relevant contingency does not occur within the time allowed then a party for whose benefit that time limit was in place (normally both parties: *Perri v Coolangatta*), is usually entitled to terminate his/her duty of further performance unless:
  o Party has lost right by their own conduct amounting to waiver or generating an estoppel: (3).
  o Party has failed to observe an implied promise to make appropriate efforts to effect fulfilment: (2).

• Time limit on fulfilment of contingent condition is normally for benefit of both parties – so upon non-occurrence of condition by stipulated time, either party can state that his executory promise will never be due for performance and permanently discharge from obligation to perform BUT note termination is not automatic and notification of termination is needed: *Perri v Coolangatta Investments* (prior notice is needed where reasonable time passes and one party wants to terminate): *Perri v Coolangatta Investments*.

**McTier v Haupt** [1992]

• FACTS: P entered contract for sale of house with furniture included. Deposit paid. Before balance was payable, two people broke into house and burnt it beyond repair. P refused to proceed with sale because contract said ‘sale subject to property and
chattels being delivered in present state of repair, but failure to deliver chattels only creates right to compensation’

• BROOKING J: to make land ‘subject to’ = contingent condition and contract voidable where property is not delivered in repair (not void). If you want to make it a condition – have to emphasise it.

2. Cooperation to effect fulfilment

• At the very least each party will incur an implied obligation not to obstruct fulfilment of the condition: *Kennedy v Vercoe* (1960)

• Nature of some contingent conditions makes it appropriate to find more onerous implied promise: to make all reasonable efforts to effect fulfilment of condition:
  - Contingent condition to obtain satisfactory finance: *Meehan v Jones*
  - Contingent condition to sell existing property within a reasonable time: *Perri v Coolangatta*
  - Contingent condition that purchaser obtain development approval within a prescribed time: *Italo Australian Club v National Australia Bank* (1989)

• Consequences: the above obligation might attract liability in damages: *Perri v Coolangatta* (Gibbs CJ)

• Failure to promote fulfilment may bar termination: where party has not made efforts to fulfil contingent condition, party’s breach will normally disqualify it from terminating the contract on basis of failure of condition: *Suttor v Gundowda*; Gibbs CJ in *Perri v Coolangatta*
  - This is ONLY WHERE the defaulter’s failure to observe an implied promise is an effective cause of non-fulfilment: *Nina’s Bar Bistro Pty Ltd v MBE Corp Pty Ltd* (1984)

• Where contract expressly provided party use best endeavours and that is a condition precedent in itself, a lack of best endeavours will normally disqualify it from terminating the contract on basis of failure of condition: *Italo Australian Club Ltd v National Australia Batik Ltd* (1989)

• Where condition precedent was for benefit of third parties, failure to promote fulfilment may not preclude termination: *Newmont Pty Ltd v Laverton Nickel NL* (1982)

3. Waiver of the need for fulfilment

• **General rule:** if the substance of the stipulation is a condition for the benefit of the purchasers and they may waive it if they choose: *Perri v Coolangatta* (Brennan J)
  - When is condition for benefit of one party?
    - Unilateral waiver permitted only to the sole beneficiary of the condition: *Gange v Sullivan* – some contention with this.
    - Party alleging condition is for their exclusive benefit has onus of proof: *Raysyun v Taylor* (1971)
    - Time stipulation: is usually for benefit of both parties, this should be distinguished from substance of condition, which in contracts for sale is usually for benefit of purchaser and therefore before time for fulfilment of condition precedent, purchaser can unilaterally waive condition precedent because in substance it was for purchaser’s benefit BUT after the time stipulated expires the condition is for the benefit of both parties and cannot be unilaterally waivered: *Perri v Coolangatta*

• Examples:
  - P can unilaterally waive need for development approval: *Grange v Sullivan*
  - P cannot unilaterally waive need for development approval if V retained interest as mortgagee: *Sandra Investments v Booth*
  - Contract of land subject to P’s sale of property = P can unilaterally waive: *Perri v Coolangatta*
  - Contract conditional upon local authority approving subdivision could not be unilaterally waived because V had
interest in land in area: Gough Bay Holdings v Tyrwhitt-Drake [1976]

- **Timing of waiver:** Waiver must take place before the time provided expressly or impliedly for fulfilment of condition precedent: Gange v Sullivan (1966)
- **Effect of waiver:** prevents the other party from terminating the contract on non-occurrence of the event, within the time allowed and after the waiver, both parties would have become unconditionally bound to complete performance: Perri v Coolangatta.
- **Form of waiver:** Mahoney J in Toga Developments No 10 Pty Ltd v Gibson stated that waiver would not be effective unless it was made for consideration or set out in deed, currently scholarship seems to prefer the view that an unequivocal indication of intent to dispense with condition could become binding under doctrine of election: cf Sargent v ASL Developments

Toga Developments No 10 Pty Ltd v Gibson – this case is inconsistent with Perri!

- **FACTS:** sale of land conditional upon council granting town planning consent on or before 22 December 1972 and if not granted either party might terminate. Completion was to take place no later than 30 days after council gave consent. On 14 December P purported to waive clause. Consent not obtained but neither party at fault. 5th Jan V purported to terminate contract.
- Mahoney J: (i) not a clause for benefit of purchaser because (a) time stipulation effects vendor and (b) express right for V to terminate would be removed by allowing unilateral waiver (ii) even if for benefit of purchaser it would only be effective if in deed or supported by consideration
- **Examination of issues:** with the answers to what would happen today
  - (i) for (a) look at Perri v Coolangatta which states that substance of the condition is what allows termination and time limit is not part of the substance of condition. For (b), the termination rightsare for V to not be chained to condition longer than the time limit so therefore waiver before time expiration would not be denying vendor anything: cf Gough Bay Holdings v Drake.
  - (ii) waiver can be by (i) contractual variation made in form of deed or supported by consideration (ii) estoppel (iii) election to abandon
  - Effective waiver must be in form of deed according to contractual concepts i.e. consideration

4. **Failure/non-fulfilment of Contingent Condition**

- **Definition:** Where a contingent condition precedent fails in any respect and this can include event that occurs contrary to contemplation of parties OR where condition not fulfilled within period of time required by contract.
  - **Time stipulation:** where there is no express time limit on fulfilment of condition failure of condition occurs when a reasonable time in all the circumstances has elapsed: Perri v Coolangatta
- **Consequences of non-fulfilment**
  - The promisor may normally elect to treat itself absolutely discharged from the dependent obligation (terminating the contract): Perri v Coolangatta (Mason J)
  - Alternatively if party does not wish to rely on failure of contingent condition, condition is ignored and contract becomes performable at proper time: Zieme v Gregory (1963)
- **Effective form of termination**
  1. Party needs to communicate decision to termination, court reluctant to find automatic termination: Gange v Sullivan (as contract is voidable NOT void for non-fulfilment of contingent condition: Suttor v Gundowda)
    - **Effective communication:** can be as simple as declaring an action that contract was ended: Perri v Coolangatta
    - **Is notice required?** Notice not normally necessary for failure of contingent condition (Perri v Coolangatta) BUT where
time stipulation is reasonable period Brennan J states that notice should probably be given to fulfil condition before termination as reasonable period is contentious: *Perri v Coolangatta*

- **Exception:** where (i) contingent condition entirely beyond control of parties cf *Charles Lodge Pty Ltd v Menahem* (1966) (ii) where clearly indicated by contract that there is a right of automatic termination: *MK & JA Roche v Metro Edgley* [2005] and Gibbs CJ *Perri v Coolangatta*; contract was ‘null and void’ where condition not fulfilled = automatic termination: *Rudi’s Enterprises Pty Ltd v Jay* (1987)

2. Party needs to be without fault in respect of non-fulfilment of condition – cannot profit from their own wrongdoing by being able to terminate: *MBE Corporation v Bar Bistro*

- **Restrictions on right to terminate:**
  - Where party has prevented performance/intimated that they do not intend to perform contract *(see dependency of promises (iii))*
  - Election to affirm contract: *Suttor v Gundowda* (1950)

- **Election requirements: Sargent v ASL Developments Ltd* (1974)
  - Unequivocal decision to keep contract on foot
  - Made with knowledge of facts which give right to terminate
  - Doubt as to whether party electing to affirm must have known facts also gave rise to right to terminate (usually irrelevant for contingent conditions)
  - Doubt as to whether election to affirm must be communicated to other party *(see 1 of effective form of communication above)*
    - NOTE: mere delay in exercising right to terminate is not an election to affirm contract and would not create estoppel: *Sargent v ASL Developments* (Mason J)
  - Estoppel: in interval between failure of condition and actual election to terminate *Suttor v Gundowda* (1950)

- **Late occurrence of contingent condition:** can still terminate if contingent condition was performed later that date specified AS LONG AS time for contingent condition was expressly or impliedly specified as essential: *Gilbert v Healey* (Needham J); *Suttor v Gundowda*.

- **Exception of unconscionable termination:** termination of contract can be relieved against IF it would inflict an inequitable forfeiture of proprietary interest in land (as long as person seeking to rely on this exception was not in breach): *Stern v McArthur*

*Tricontinental Corp v HDFI Ltd* (1990)

- FACTS: HDFI promised to indemnity Tricontinental (supplied money to Selkis) provided HDFI received demand from T within 14 days of default. S defaulted on 30 November and on 7 December notice sent to wrong address and T demanded money due to failure to notify.
  - Court of Appeal held that it was a contingent condition precedent to HDFI’s duty to indemnify T that T follow notice procedure and since it wasn’t fulfilled and after 14 December could never be fulfilled HDFI was entitled to treat itself as discharged from duty to perform underpinning agreement.
  - Act must be done in accordance with the contract, does not matter whether the divergence from description was serious or not.

*Zieme v Gregory* (1963)

- FACTS: purchaser failed to make reasonable efforts to obtain finance for a purchase of land prevented it from terminating for failure of subject to finance condition
  - HELD: vendor became entitled to call for contractual performance at proper date despite purchaser’s failure to obtain finance.
NOTE: purchaser’s failure to complete at this date was serious breach justifying termination by the vendor and forfeiture of deposit (in *Gray v Allen* (1977) purchaser’s failure to make reasonable efforts to get council building permission, rendered it liable to decree of specific performance, granted notwithstanding non-fulfilment of condition).

**Perri v Coolangatta Investments** *(1982)*

FACTS: P agreed to purchase land from V (Coolangatta) – 7 April 1978. No time fixed for completion and contract did not expressly provide that time was of essence. Deposit and purchase price payable on signing of contract but paid deposit prior. Sale subject to special condition 6 - purchasers completing sale of Lilli Pilli (LP). LP sold March 1979 and completion on 13 June 1979 and then V requested completion by 8 August (effectively gives 3 weeks to complete) and not completed and on 10 August notice to rescind. On 29 September 1978 V sought declaration for valid rescission.

GIBBS CJ: condition did not fix any time within which sale was to be completed therefore should be a reasonable time.

By September 1978, reasonable time elapsed but condition had not been fulfilled, question is whether respondent can terminate without first giving notice to fulfil condition/perform contract within reasonable time.

*Aberfoyle Plantations Ltd v Cheng* is authority that no notice is necessary when contract expressly or by implication fixes date on which condition is fulfilled.

RULE: where conditional contract fixes date condition is to be fulfilled, contract may be terminated if condition has not been fulfilled when date arrives and it is unnecessary to give prior notice to other party.

RULE: where contingent condition is concerned, where time has elapsed, either party (if not in default) could elect to treat contract as at an end if condition has not been fulfilled or waived and unnecessary to first give notice (this is because can’t give notice to complete for something someone didn’t promise – can only give notice to use reasonable efforts as this is an implied promise.

The above is subject to any sufficient indication in the contract of contrary intention

At September 1978, a reasonable time had elapsed therefore open to respondent to avoid contract without giving notice, by instituting proceedings before condition fulfilled or waived, respondent evidenced election to avoid contract.

V wrongfully repudiated because gave notice on wrongful grounds as *cannot rescind contract before contingent precedent was fulfilled* (cannot be in breach of contract until condition precedent fulfilled) – although reasonable time elapsed.

By 29th September V had good ground to terminate as five and a half months passed and condition precedent has failed and either side can terminate if not at fault.

V cannot keep deposit because termination is not for serious breach rather for failure of contingent condition.

Attempt to waive contingent condition February 1979 could be possible as condition was effectively for sole benefit of purchaser and was capable for unilateral waiver, BUT time limit was for benefit of both sides and P can only effectively waive condition before time limit expires and here did it after.

As time is not essential, V can sue for damages and can only terminate where delay of promised time has gone to the root of the contract to deprive V of substance of bargain OR if V can infer P is unwilling/unable to complete within reasonable time. Best way to achieve this is to give P a notice to complete.

**Suttor v Gundowda** *(1950)*

FACTS: contract for sale of land provided that in the event the Treasurer’s consent was not obtained within two months, the contract should be deemed cancelled. Consent was not given by due date but given 15 days later. 10 days after consent was given the vendor purported to terminate.

SCNSW: Roper CJ stated vendor could not treat contract as terminated because they had already waived their right to do so by negotiations with purchaser’s agents before consent was granted.

HCA: affirmed decision albeit not solely for SCNSW reasons.