IN THE SUPREME COURT OF NEW ZEALAND

SC 68/2005
[2006] NZSC 67

	BETWEEN	ROGER WILSON STEELE AND CHRISTINE LYNNE ROBERTS Appellants
	AND	ELEFTARIOUS SEREPISOS Respondent

Hearing: 23 May 2006

Court: Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ

Counsel: R C Laurenson and J L Williams for Appellants
R J B Fowler and S M O'Sullivan for Respondent

Judgment: 4 September 2006

JUDGMENT OF THE COURT

A. The appeal is allowed.

B. The cross-appeal is dismissed.

C. The orders made by the Court of Appeal are set aside.

D. In their place we make an order for the entry of judgment in the High Court in favour of the appellants.

E. The appellants are to have costs in the High Court as fixed by that Court in the light of this judgment, and in the Court of Appeal the appellants are to have costs of $6,000 plus disbursements, to be fixed if necessary by the Registrar of that Court.

F. The appellants are to have costs in this Court of $15,000 plus disbursements, to be fixed if necessary by the Registrar of this Court.

REASONS

ELIAS CJ

[1] The appeal and cross-appeal are brought from a decision of the Court of Appeal[1] holding that vendors of an allotment of land were entitled to treat the contract for sale and purchase as discharged but were liable to the purchaser for their failure to give him proper notice of their intention. The vendors, Mr Steele and Ms Roberts, appeal against the decision that they were required to give notice. The purchaser, Mr Serepisos, cross-appeals against the determination that the vendors were entitled to treat the contract as discharged. The cross-appeal, if successful, would overtake the appeal and is accordingly best addressed first.

[2] I am unable to agree with the reasons given by Blanchard J, Tipping J and Anderson J for their conclusion that the cross-appeal fails. I give brief reasons for my view, which is in general agreement with that of McGrath J, that the vendors were in breach of contract. I would have allowed the cross-appeal. Since the cross-appeal fails, however, I indicate my agreement with the majority in allowing the appeal by Mr Steele and Ms Roberts. Because I have had the advantage of reading the reasons of the other members of the Court in draft, I do not need to rehearse much of the background.

[3] In December 1996, Mr Steele and Ms Roberts agreed to sell to Mr Serepisos part of the land on which their Roseneath house is situated, for a purchase price of

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1 *Steele & Anor v Serepisos* CA 203/04 12 October 2005 (William Young, O'Regan and Gendall JJ).

$207,000. The land was not subdivided at the time of the agreement for sale. The agreement provided for possession to be given on "the seventh working day after the new title has issued". A new title could not be issued under the Land Transfer Act 1952 until resource consents for the subdivision had been obtained and the approved survey plan deposited. The agreement for sale and purchase provided that the subdivision was to be "at the vendor's cost in all things".

[4] Section 225(1) of the Resource Management Act 1991 makes it clear that an agreement for sale of a proposed allotment is not illegal or void if entered into before the subdivision is completed. It provides however that any such agreement is deemed to be made subject to a condition that the survey plan will be deposited under the Land Transfer Act.

[5] By implication, s 225(1) obliges the vendor of unsubdivided land to obtain the approval of the territorial authority without which the survey plan cannot be deposited as approved. It is established in New Zealand by *WR Clough & Sons Ltd v Martyn & Others*[2] that this obligation does not make the vendor liable in all circumstances for failure to obtain deposit of an approved plan. Rather, the vendor will be in breach of contract if he fails to take all reasonable steps to obtain the necessary consents and the deposit of the plan when approved. The reasonable steps the vendor is obliged to take include complying with any conditions reasonably imposed by the territorial authority.

[6] In *Clough*, the vendor was held not to be in breach of contract for failing to comply with an unexpected condition by the territorial authority that a 6 metre wide public service lane was to be provided on the vendor's land. The provision of the lane would have resulted in a subdivision materially different from that agreed to by the parties. It was not reasonable to require the vendor to comply with the condition.

[7] The present case is different. The Wellington City Council approved the survey plan with the foreseeable and reasonable condition that "separate new private sewer and stormwater drains shall be provided to proposed Lot 2 from existing

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2 [1978] 1 NZLR 313 (CA).

Public Services in Palliser Road". The parties had assumed they would be able to connect the new sewer and stormwater drains through the property of a neighbour. That assumption was disappointed when the neighbour declined to grant an easement to allow the connection to be made. Although the new drains could be connected to the public services on Palliser Road over the lot being retained by the vendors, the steepness of the section meant that the connection was considerably more expensive to put in and was likely to impact adversely upon the vendors' existing landscaping. Connection through the vendors' remaining land was not apparently impractical, however. If it had been, the vendors could have asked the Council to use its power under s 460 of the Local Government Act 1974 to construct the drain through the adjoining land.

[8] The appellants do not suggest that the condition imposed by the Council was itself unreasonable. They contend, however, that fulfilment of the condition was more onerous than the parties to the agreement for sale and purchase had envisaged. Does this circumstance permit the vendors to decline to comply with the condition imposed by the Council without being in breach of contract?

[9] I am unable to agree with the majority that it was reasonable for the vendors to fail to comply with the deemed contractual obligation provided for under s 225(1). The Council's condition as to sewerage and stormwater connection was expected and was in its terms appropriate and reasonable. It did not result in a materially different subdivision than that envisaged by the parties, as was the case in *Clough*. In *Clough*, the Court of Appeal expressly rejected the suggestion that onerous and expensive obligations relating to the subdivision agreed to by the parties could excuse fulfilment of the obligation to take all reasonable steps to obtain approval:[3]

> We accept that the contract is to be treated as importing an obligation on the vendors to take all reasonable steps to obtain approval, as Mr O'Brien contends. This is supported by *Hargreaves Transport Ltd v Lynch* [1969] 1 WLR 215; [1969] 1 All ER 455 and other cases cited in *9 Halsbury's Laws of England* (4th ed) para 459.[4] No doubt the vendors would have to submit to reasonable building line and sewerage conditions, notwithstanding that they involved much expense and affected other land of the vendors, if that were necessary to achieve the subdivision provided for by the contract. But the contract and the implied obligation relate to *that* subdivision.

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3 At 317 (emphasis added).
4 Now 9(1) at 908 (2006 Reissue).

[10] I do not think the obligation imposed through s 225(1) can be read so that the vendor is only obliged to fulfil it in a particular manner, if that is not reflected in the contract the parties have made. Although it appears that the parties here did expect that the drains could be connected through the neighbours' property, they did not make their agreement conditional on the neighbours' consent to that course. Nor is it suggested that the assumption had contractual significance in any other way. There was no basis established for implication of a contractual term that access for the drains be provided over the neighbouring property. Although the cost of connecting the drains through the vendors' remaining lot is considerable (at an estimated $20,000,[5] compared with a few thousand dollars[6] for connection through the neighbouring property), that cost has to be seen in the context of the purchase price of $207,000. It cannot be said that performance became radically different from that undertaken in the agreement for sale and purchase, justifying discharge under the doctrine of frustration.[7] No one has suggested that the parties entered into the contract under a mistake sufficient to negative consent to the transaction or to give grounds for relief under the Contractual Mistakes Act 1977.

[11] If the condition of connection of the drains to the public services in Palliser Road had been one stipulated for in the agreement between the parties, a non-contractual assumption as to how it might be fulfilled would not have absolved the vendors from performing the condition. Is the matter any different because the condition arises by statute? I do not think it can be. Such approach could produce considerable uncertainty. If the requirements of the territorial authority necessary for fulfilment of the deemed condition under s 225(1) are reasonable and not unexpected, I am of the view that vendors are bound to fulfil them, unless they are for some other reason entitled to be excused from their contract. The subdivision agreed to by the parties in their contract was not changed by the condition as to sewerage connection. Its performance has turned out to be more onerous than the

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5 An estimate reached in 2004.

6 The connection cost was put at $1,600 in 1996.

7 *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 at 729 per Lord Radcliffe; applied in *Wilkins and Davies Construction Company Ltd v Geraldine Borough* [1958] NZLR 985 (SC). See, also, *The Power Co Ltd v Gore District Council* [1997] 1 NZLR 537 (CA).

parties may have expected, but that was not caused by the unreasonableness of the obligation imposed under s 225(1). It arose out of an expectation not addressed in the contract between the parties and not sufficient to ground relief in contract as between them. I would allow the cross-appeal and reinstate the orders made by Miller J in the High Court.

[12] Since there is a majority in the Court for dismissal of the cross-appeal, I indicate my agreement with the conclusions of Blanchard J, Tipping J and Anderson J that the appeal should be allowed. Notice in accordance with the principles discussed in *Hunt v Wilson*[8] is notice to a party in continuing default, given to bring matters to a head and stop time drifting on. It does not arise where a condition has proved to be impossible of reasonable fulfilment and the contractual obligations can properly be regarded as discharged. Whether that stage has been reached may be a difficult question, but it does not turn on whether reasonable notice of intention to treat the obligations as discharged has been given.

BLANCHARD J

[13] I agree with the reasons given by Tipping J and the orders he proposes. Section 225(1) of the Resource Management Act 1991 has been interpreted by the courts so as to make it workable in practice. In effect, it is as if contracts subject to the section contained a term requiring reasonable steps to be taken to secure deposit of the necessary plan. In this context, where naturally the parties have not spelled out in their documentation what is reasonable, account must be taken of what both sides actually had in contemplation at the time of entering into the contract.

[14] It would not be sensible to try to distinguish between the reasonableness of a local authority's condition for the approval of a plan of subdivision and the reasonableness of a vendor's attempt to comply with that condition. The present case demonstrates this. The evidence strongly supports the view that the parties entered into their contract contemplating that the connection to the public drain

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8 [1978] 2 NZLR 261 (CA).

would be via the neighbouring property. A Council condition which might in practice force the vendors to put the connection through the balance of their property was, on this basis, plainly unreasonable as between the parties, which is what is relevant in relation to fulfilment of the s 225 condition, albeit that it was not unreasonable as between the council and the subdividing vendors.

[15] In my view, to require the vendors to accept the drainage through the balance of their land would be unreasonably to require them to do something quite different from what had been contemplated both by them and by the purchaser. Even allowing for changes in the value of money, the difference in cost is substantial. But in addition there would be a significant adverse effect on the vendors' remaining land, where their house is situated on a steep site, involving the breaking up of a garden and the placement of exposed pipes.

[16] With regard to the vendors' appeal concerning the notice point, I accept that where a party has an obligation to take reasonable steps to achieve compliance with a condition which has no condition date (or where time for fulfilment has been set at large) the other party must give a warning notice making time of the essence for fulfilment of the condition before cancelling for that reason. That is what Cooke J was addressing in *Hunt v Wilson*.[9] But I can see no reason why equity should require a party charged with trying to achieve compliance, who has unavailingly taken reasonable steps to do so, to warn the other party before exercising the right to treat the contract as at an end for non-fulfilment of the condition. It may well be prudent practice in such circumstances to give a warning notice telling the other party that reasonable efforts have been taken without success and that it appears that the contract will shortly have to be treated as at an end. This is prudent because it is possible that the other party may then point to a reasonable step which has been overlooked. That may save the embarrassment of an invalid termination notice. But the risk of such invalidity is upon the party who believes that it has taken all reasonable steps. The outcome of any ensuing dispute must turn on whether in fact it had or had not taken all reasonable steps. The notice of termination is either valid on

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9 [1978] 2 NZLR 261 (CA).

that basis, or it is not. A warning notice is not required as a matter of law in these circumstances because it can serve no purpose in law. The recipient is not in default and cannot be required to do anything in response to the notice. Neither the standard contractual terms nor any principle of equity of which I am aware requires that a warning notice be given to someone who is not in default.

TIPPING J

Introduction

[17] The appellants, Mr Steele and Ms Roberts (the vendors), agreed to sell to the respondent, Mr Serepisos (the purchaser), an unsubdivided lot in a proposed subdivision of their residential land in Roseneath. The agreement was signed on 18 December 1996, prior to the deposit of the necessary survey plan. The contract, which required completion on "the seventh working day after the new title is issued", was therefore governed by s 225 of the Resource Management Act 1991 and subject to the condition set out in that section that the survey plan would be deposited. The vendors were obliged to undertake the steps necessary to obtain approval of the plan from the Wellington City Council and then to arrange for its deposit. Section 225(2) gave the purchaser certain rights to cancel or rescind the agreement but they are not material to the present dispute.

[18] After a considerable period of time, during which the vendors tried unsuccessfully to make the necessary arrangements to deposit the plan, the purchaser sued for specific performance in 2003. The trial Judge declined that relief but held that the vendors were in breach of their contractual obligations and that the purchaser was therefore entitled to damages which were to be assessed at a later hearing.[10] The vendors appealed to the Court of Appeal but achieved only partial success in that

[10] HC WN CIV-2003-485-1335 13 August 2004 (Miller J).

Court.[11] The Court ordered that the damages were to be assessed on a basis somewhat more favourable to them.[12]

[19] Having been unsuccessful in their primary objective, which was to have the High Court's decision that they were liable to pay damages reversed, the vendors obtained leave to appeal to this Court on that issue. The purchaser was also given leave to cross-appeal on a point which is logically prior to that which arises on the appeal.

[20] The ultimate stumbling block which the vendors encountered in their endeavours to obtain approval for their plan of subdivision concerned the provision of stormwater and sewage drains to the new lot. The trial Judge found that on entering into their agreement the parties were in agreement that the necessary drains for the land being sold would be provided by means of a connection to existing public drains which ran from a neighbouring property to Palliser Road. This envisaged the consent of the owners of the neighbouring land which, for reasons which need not be discussed, was not, in the event, ever obtained. There was an alternative method of achieving the same drainage outcome, which would have involved the drains being put through the land which the vendors were retaining, and on which their house was built with its associated landscaped garden. This land was Lot 1 on the survey plan. The land the subject of the sale was Lot 2. The alternative route through Lot 1 was substantially more expensive and would have involved considerable environmental and amenity disadvantages for Lot 1. That, in brief, is the factual background against which the issues raised by the appeal and cross-appeal arise.

The s 225 condition

[21] Section 225(1) provides:

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11 CA 203/04 12 October 2005 (William Young, O'Regan and Gendall JJ).

12 Miller J held that the vendors were liable to pay damages on the basis of their failure to procure the deposit of the plan. The Court of Appeal held that the damages should be assessed, with due regard to relevant contingencies, on the basis of the opportunity which the purchaser lost of procuring the deposit of the plan. That opportunity should have been given to the purchaser by means of a notice, the appropriateness of which lies at the heart of the vendors' appeal.

> **225 Agreement to sell land or building before deposit of plan**
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> (1) Any agreement to sell any land or any building or part of any building that constitutes a subdivision and is made before the appropriate survey plan is approved under section 223, shall be deemed to be made subject to a condition that the survey plan will be deposited under the Land Transfer Act 1952 or in the Deeds Register Office, as the case may be; and no such agreement is illegal or void by reason that it was entered into before the survey plan was deposited.

[22] This statutory provision did not, as its literal terms might suggest, create a statutory warranty by the vendors that they would deposit the plan, come what may. The purchaser rightly did not argue for that construction. The purpose of s 225(1) is essentially permissive, that is, it allows contracts to be entered into prior to the deposit of the plan but necessarily subject to its deposit.[13] To construe the section as also creating a warranty by the vendor that the plan will be deposited would create a substantial imbalance of rights and obligations between the parties outside the statutory purpose. That is why it is necessary for the judicial gloss to which I will shortly refer to be put on the statutory words.

[23] For these reasons the obligation which rested on the vendors as regards the deposit of the plan was not absolute. Rather it required the vendors to take all reasonable steps to deposit the plan, and thus to take all reasonable steps to fulfil conditions that might be imposed on the plan's approval, provided those conditions were themselves reasonable.

[24] The leading authority is the decision of the Court of Appeal in *W R Clough & Sons Ltd v Martyn & Others*.[14] The judgment of the Court was delivered by Cooke J. The case involved a contract brought about by the exercise of an option. The contract was subject to a statutory condition equivalent in all material respects to that set out in s 225(1). The primary issue concerned the nature of the duties cast on the vendor in relation to obtaining approval and procuring the deposit of the plan of subdivision. Cooke J noted[15] that Mr O'Brien QC[16] had submitted that the contract

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13 See *Griffiths v Ellis* [1958] NZLR 840 where the Court of Appeal by a majority held that s 332(1)(a) of the Municipal Corporations Act 1933 made illegal a sale of unsubdivided land. The law was amended to overcome this ruling by the Municipal Corporations Amendment Act 1959 which introduced as s 351 of the 1954 Act the provision of which s 225 is the counterpart.

14 [1978] 1 NZLR 313 (Richmond P, Woodhouse and Cooke JJ).

15 At 316.

16 Counsel for the appellant.

constituted by the exercise of the option should be treated as containing an implied term. Counsel had formulated this term in slightly different ways in the course of argument but the form he was finally content to adopt was that the vendors must take all reasonable steps to comply with conditions imposed by the Council, so long as such conditions were reasonable. The Court accepted that the contract was to be treated as importing an obligation on the vendors to take all reasonable steps to obtain approval, as Mr O'Brien had contended.[17]

[25] I regard *Clough* as appropriately stating the law in relation to contracts which are subject to s 225(1). The first inquiry is therefore whether a condition is reasonable in itself. If it is, the vendor must take all reasonable steps to comply with it. If it is not, the vendor is not bound to proceed unless an attempt to remove or vary the condition would be reasonable in the circumstances.

[26] The Council imposed the following condition, among others, on its approval of the vendors' plan: "Separate new private sewer and stormwater drains shall be provided to proposed Lot 2 from existing Public Services in Palliser Road." The Council did not state how that should be done. As a condition this requirement was in itself perfectly orthodox and reasonable. It was performance of the condition which caused the vendors problems, because they were unable to obtain the consent of their neighbours over whose land the intended easement was to run. It has not been argued that the vendors' efforts to obtain the consent of their neighbours were in any way deficient. The Court of Appeal held that in the circumstances the vendors had taken all reasonable steps to comply with the condition, because it would have been unreasonable to require them to incur the additional expense and the environmental and amenity disadvantages of putting the drains through Lot 1.

[27] The purchaser contended on his cross-appeal that the Court of Appeal had erred in law in coming to that conclusion. Mr Fowler, who presented this aspect of the purchaser's case, argued that once a condition imposed by a local body on a plan approval was itself reasonable, as this one was, the risk that fulfilment of the condition might be unexpectedly onerous for the vendors fell on them. The effect of this argument is that if a condition is itself reasonable, the vendor must fulfil it,

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[17] At 317.

however unreasonable the steps required to do so may be. Mr Fowler argued that the only relief available to a vendor in such circumstances lay in the doctrine of frustration.

[28] I do not consider this argument is consistent with *Clough* or with principle. It would be artificial to make a sharp distinction between the reasonableness of a consent authority's condition in itself and the reasonableness of the steps necessary to fulfil it. The composite duty resting on a vendor in present circumstances is to take all reasonable steps to deposit the plan. Deposit of the plan necessarily involves fulfilment of the conditions upon which it has been approved, unless those conditions can be varied or removed. To require unreasonable steps to be taken to fulfil a condition reasonable in itself sits uneasily with the proposition that s 225(1) does not create a warranty or promise by the vendor that the plan will be deposited, come what may. To adopt the purchaser's argument would inappropriately confine the inquiry to the reasonableness of the condition in itself, and thereby remove from consideration the reasonableness of its fulfilment by the vendor in the particular circumstances of the transaction between the vendor and the purchaser. Both the purpose of the gloss, which is to make the section work in a fair and sensible manner, and the decision in *Clough* support the conclusion that in order to fulfil the condition imposed by s 225(1), vendors are required to take reasonable steps, but no more than reasonable steps, to comply with conditions reasonably imposed by the consent authority.

[29] The observation in *Clough*[18] that the vendors in that case would have to submit to reasonable conditions notwithstanding "they involved much expense and affected other land of the vendors" must not be taken out of context. In *Clough*'s case there was no suggestion that the parties envisaged any particular method of fulfilling the necessary sewage requirements, that being one of the conditions to which the Court was referring. Here they did. It is the ability to compare the alternative method with the method envisaged by both parties that distinguishes this case from *Clough*. The present case goes beyond simply a consideration of the amount of the necessary expense and any effect on other land. The existence of a

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[18] At 317.

comparator assists in measuring the reasonableness between the parties of the steps necessary to fulfil the alternative method.

[30] It was not suggested in argument that the inevitable gloss which needs to be placed on s 225(1), as it was formulated in *Clough*, has caused difficulties in practice. Obviously the general reasonableness criterion, like any such criterion involving *ex post facto* judicial assessment, must involve some uncertainty, as Mr Fowler stressed. But that is not a sufficient reason for limiting the reasonableness criterion to the condition itself and denying its applicability to the steps required to perform it. To adopt that view would be to modify *Clough* in an inappropriate way. No general principle of contract law is engaged. This case is concerned only with how s 225(1), which creates a bluntly worded condition implied by law into a particular type of contract, should be interpreted so as to achieve a satisfactory balance between individual justice and contractual certainty. *Clough*, as I see it, achieves that balance.

[31] The purchaser's legal challenge to the decision of the Court of Appeal must therefore fail. He nevertheless invites this Court to depart from the Court of Appeal's factual conclusion[19] that the vendors took all reasonable steps to deposit the plan. This, as earlier noted, was effectively a finding that it would be unreasonable in the circumstances to require the vendors to provide the necessary drainage facilities through Lot 1. The Court of Appeal saw this issue as being "closely balanced". I am not, however, persuaded that the Court of Appeal was wrong to conclude that, all in all, a subdivision involving drainage through Lot 1 would be "of a substantially different character" from what the parties had contemplated at the time of their agreement. That conclusion, which might be thought to come close to Mr Fowler's permitted escape of frustration, was based on the trial Judge's finding that both sides anticipated that the drainage would go through the neighbouring property. There was no written condition in the contract to that effect but the Judge's finding approaches an oral term.

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[19] Made because the Court of Appeal differed from the High Court on the nature of the vendors' obligation; a matter into which it is not necessary for this Court to go.

[32] What was undoubtedly within the mutual contemplation of the parties colours what it was reasonable to expect the vendors to do in fulfilment of the drainage requirement. The fact that the alternative method was substantially more expensive ($20,000 in 2004 dollars as against $1,600 in 1996 dollars), and created amenity and environmental disadvantages for Lot 1, makes the Court of Appeal's assessment of this aspect of the case entirely supportable. The purchaser has not persuaded me that this Court should come to any different conclusion.

The s 460 point

[33] The purchaser raised a further point on this aspect of the case based on s 460 of the Local Government Act 1974. The point was not raised at trial. Section 460 applies where adjoining owners will not consent to the kind of easement which the vendors were seeking. In those cases, if the Council is of the opinion that the only practical route of a new private drain is through the adjoining property, it may, after due notice, enter the adjoining land and do everything necessary to construct the drain. The purchaser contends that the vendors should have requested the Council to exercise its s 460 power and their failure to do so means they cannot claim they took all reasonable steps to deposit the plan.

[34] The first difficulty with this argument is that there is no evidence on which to determine the likelihood of the Council being willing to exercise its s 460 power. The reasonableness of what the vendors omitted to do is difficult to gauge in this light. The second difficulty is that at no stage did the purchaser suggest to the vendors they should ask the Council to act under s 460. That factor and the late emergence of the point in the course of the litigation suggests that the point cannot have been an obvious one at the relevant time. The third difficulty, associated with the second, is that the point was not pleaded. In these circumstances I am not persuaded that the vendors were in default of their contractual obligations in not asking the Council to act under s 460.

[35] As none of the points raised by the purchaser in support of his cross-appeal succeeds, the cross-appeal must be dismissed.

The requirement for a notice

[36] That brings me to the vendors' appeal, which challenges the basis upon which the Court of Appeal, despite its finding that the vendors had fulfilled their s 225(1) obligation, was nevertheless of the view that they were liable to pay damages to the purchaser because they did not give him the opportunity to resolve the drainage difficulties himself. The Court of Appeal's conclusion to this effect was based on the proposition that it was not open to the vendors "to cancel" the contract without having given the purchaser "fair notice" of their intention to do so and a "fair opportunity" to take steps himself to "secure the easement [from the neighbours]".[20]

[37] It is important to recognise at the outset that the present is not a case in which the vendors were asserting that the purchaser was in contractual default by reason of delay or otherwise. The vendors' case was that they were not liable to perform the contract because, through no fault on their part, it had never become unconditional. In spite of their having taken all reasonable steps to that end, the vendors had been unable to procure the deposit of the plan. The vendors' case did not involve any contention that they were entitled to cancel the contract on account of default by the purchaser. His argument that a notice was required and the Court of Appeal's conclusion to that effect must be assessed in this light.

[38] In coming to the conclusion that in present circumstances the vendors were obliged to give the purchaser the notice in issue, the Court of Appeal based itself on the judgment of Cooke J in *Hunt v Wilson*.[21] The Court expressed its reasoning in this way:

> [47] In general, a party who seeks to cancel a contract on the basis of non-satisfaction of a condition within a reasonable time must first give to the other party a notice akin to a notice making time of the essence. Such notice must give the other party a reasonable opportunity to attempt to satisfy the condition. The requirement to give such a notice emerges from the judgment of Cooke P delivered in this Court in *Hunt v Wilson* [1978] 2 NZLR 261, a judgment which must now be regarded as authoritative. We see no basis for concluding that this approach should not apply in the general context of the condition implied by s 225 of the Resource Management Act. Indeed in *Hunt*

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20 At [53].
21 [1978] 2 NZLR 261 (CA).

> *v Wilson* (at 273) Cooke P referred to *Clough* in terms which make it clear that he regarded that case as being subject to the principles of law which he was discussing.
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> [48] As Cooke P recognised in *Hunt v Wilson*, the necessity for notice depends on the circumstances, and especially on the utility of such notice in the context of the practicalities of the situation and the stances taken by the parties.
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> [49] In the present case, the primary stumbling block to the completion of the subdivision was the unwillingness of the appellants to accept the condition as to drainage over lot 1. There would not have been much point in the appellants giving the respondent notice that the contract would lapse unless they (the appellants) had changed their mind on that point within say three months. On that basis it might be thought that there was no practical requirement to give notice.
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> [50] In the course of argument, however, another possibility was floated from the bench. If the appellants had given the respondent notice that the contract would end after the expiry of a specified but reasonable period unless the condition as to the survey plan was satisfied within that period, it would have been open to the respondent to endeavour to secure an easement from the current owners of 55 Palliser Road. Given the value to the respondent of completing the contract, it would have been in his interest to make, if necessary, a substantial payment to the neighbour for such an easement. We have no basis for concluding that such an approach might not have succeeded.

[39] The Court of Appeal then referred to particular aspects of the evidence which required attention on the basis of the law as the Court understood it. Neither the Court of Appeal nor the parties in argument before us suggested that the issues arising were governed or influenced by any express term of the contract between the parties.

[40] For reasons I will develop, I consider the Court of Appeal erred in its interpretation of what Cooke J said in *Hunt v Wilson*. I indicated what I regarded as the correct principle emerging from Cooke J's remarks in the course of my judgment in *Mt Pleasant Estates Co Ltd v Withell*:[22]

> A party faced with delay on the other side cannot normally hold the other party in repudiation or claim that a stipulation has been broken unless and until an appropriate notice has been given making time of the essence and requiring performance by a stated date. Provided the notice is valid (ie not premature) and allows a sufficient period for fulfilment, non-performance by the stipulated date can then be regarded as repudiation or, as appropriate, breach of a stipulation. There is little doubt that an appropriate notice is

[22] [1996] 3 NZLR 324 at 330 (HC).

> necessary if the issue is performance of the contract as a whole. The question in the present case is whether such a notice is required where the issue is not performance of the contract as a whole but performance of a condition requiring satisfaction prior to settlement.
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> The key New Zealand case on the point is *Hunt v Wilson* mentioned earlier. There Cooke J proposed what he described as an ordinary rule that where no time is specified for fulfilment of a condition, a reasonable time is allowed and in the event of delay a notice is required to bring the matter to a head.

And a little later on the same page:

> It is inequitable to have the axe falling without warning except perhaps in an extreme case. Certainty and fairness to both parties will be promoted if the law requires the party contemplating cancellation for delay to give a notice expressly warning the party said to be in default that in the absence of performance within the time stated by the notice, which itself must be a reasonable time, the party serving the notice will regard itself as entitled to cancel. Of course the notice must not itself be premature.

[41] That is the compass of the issue which I consider Cooke J determined in *Hunt v Wilson*. If Cooke J did lay down a principle which required the giving of a notice in the present case, as the Court of Appeal concluded, that principle should not be endorsed by this Court.

[42] *Hunt v Wilson* concerned an agreement for the sale and purchase of land between parties who were co-owners of the land in question. Mr Hunt agreed to sell his interest to Mr Wilson. The price was to be fixed by arbitration with each side appointing a valuer. If the valuers could not agree they were to appoint an umpire whose decision would be final. No time was fixed in the agreement for these steps to be completed or indeed for settlement of the transaction. Valuers were appointed on each side but they did not confer about their valuations. Some 18 months after the agreement was signed, Mr Hunt, as vendor, peremptorily notified Mr Wilson that he no longer regarded the agreement as being on foot. Proceedings ensued and one of the issues was whether Mr Hunt as vendor was entitled to rid himself of the contract in the peremptory way he had adopted.

[43] Richmond P and Richardson J determined the issue against the vendor as one of contractual construction. Cooke J based his decision to similar effect on the proposition that Mr Hunt could not terminate the contract without giving Mr Wilson a sufficient notice making time of the essence and warning him that such was

Mr Hunt's intention unless he, Mr Wilson, took certain specified steps to expedite the price fixing machinery within an objectively reasonable time. The case was essentially about delay and what steps, if any, the vendor was obliged to take before claiming to be free of the contract, on account of the period of time which had elapsed without any resolution of the price payable pursuant to the agreed arbitral machinery.

[44] Mr Hunt was effectively trying to say that, as it was all taking so long, he could cancel the contract even if it did not stipulate any time for the price to be fixed or indeed for completion. He was implicitly suggesting that Mr Wilson was in default and that he could therefore peremptorily cancel the contract. This is the context in which Cooke J gave the judgment upon which the purchaser relied in the Court of Appeal and before us. *Hunt v Wilson* was not a case in which a party claimed to be free from further contractual obligations on account of having failed to satisfy a condition, despite having taken all reasonable steps to do so.

[45] Cooke J commenced his discussion by making the point that in general neither party may withdraw from a conditional contract at will.[23] Under many conditional contracts one party has to take steps to procure fulfilment of a condition. Sometimes that applies to both parties. Unless the relevant party has warranted fulfilment of the condition, that party's obligation is no greater than to take all reasonable steps to achieve fulfilment. This general proposition is essentially the same test as that applied by the Court of Appeal in *Clough* to a predecessor of s 225.

[46] Cooke J then made reference to *Aberfoyle Plantations Ltd v Cheng*[24] and *Scott v Rania*,[25] to which I will return. In essence those cases confirmed that if no time is prescribed by the contract for fulfilment of a condition, or for completion, the law provides that these events must take place within a reasonable time. What amounts to a reasonable time is a question of fact which depends on the

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23 At 267.
24 [1960] AC 115 (PC).
25 [1966] NZLR 527 (CA).

circumstances of the particular case. Where no time is contractually prescribed for completion, there is no basis for regarding time as being already of the essence. Therefore the equitable requirement of a notice making time of the essence for completion applies. The essential question in *Hunt v Wilson* was whether a similar requirement for the giving of a notice making time of the essence applied to fulfilment of a condition.

[47] As the following passage from Cooke J's judgment is central to the issue which arises on this appeal, it is necessary to set it out in full, despite its length. This is what his Honour said:[26]

> In *Williams on Vendor and Purchaser* (4th ed, 1936) vol 1, p 58, it is said that the terms implied by law in an open contract (if not affected by statutory conditions of sale) include:
>
> > "7 (1) Any act necessary to be done by either party in order to carry out the contract, such as the delivery of the abstract, the statement of the requisitions on or objections to the title, the acceptance of the title, or the preparation or execution of the conveyance, shall be done within a reasonable time. What is a reasonable time is a question of fact to be determined with regard to all the circumstances of the case.
> >
> > (2) In the case of unreasonable delay by either party in the performance of any act necessary to carry out the contract, the other party may serve a notice on the party in default requiring him to do the act, which he delays to perform, within some specified time (which must be a reasonable space of time, having regard to the circumstances of the case, as from the date of the notice), and intimating the other party's intention to put an end to the contract if the notice is not complied with; and if such a notice is served and is not complied with, the party in default shall not enforce the specific performance of the contract in equity, and shall be liable at law for a breach of the contract."
>
> Except *Compton v Bagley*, none of the authorities cited in *Williams* deal explicitly with notices other than notices calling on a party to complete the whole contract of sale. No doubt an alternative to giving notice fixing time for the satisfaction of a particular condition would be to give notice making time of the essence for completion. Then the condition would be relevant to whether the time allowed in the notice was reasonable. For instance, here the vendor could rightfully have said in November 1970, "Everything has drifted far too long. I give notice making time of the essence and requiring completion three months from today. That should allow ample time for all

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[26] At 272-273.

> the valuations. If the price is not fixed or for some other reason you are not ready to settle by then, I will treat the contract as at an end." He was entitled to call for some expedition in the light of the history: *Stickney v Keeble* [1915] AC 386. But, whatever the appropriate period in any given case, when the contract itself fixes no time for satisfaction of the condition and the position is simply that both such satisfaction and completion have to occur within a reasonable time, it would seem consistent with the general approach of equity to time questions and the sale and purchase of land to require normally at least some form of reasonable notice. In terms the passage in *Williams* and the judgments of Upjohn LJ and Romer J relate to necessary acts by one of the parties to the contract; but the same should apply, I think, when some consent or action is to be obtained from third parties; and, as has been seen, the *Aberfoyle* judgment strongly suggests as much.
>
> The rationale of the notice requirement is well known. It is referred to in the Judicature Act 1908, s 90:
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> > "Stipulations in contracts as to time or otherwise which would not ... have been deemed to be or to have become the essence of such contracts in a Court of equity shall receive in all Courts the same construction and effect as they would ... have received in equity."
>
> If a stipulation as to time in a contract for the sale of land had not been strictly complied with, equity would not allow this to be used as a ground for resisting specific performance unless time was originally of the essence or had been made so. In one of the leading expositions of the doctrine, *Tilley v Thomas* (1867) LR 3 Ch App 61, 67, Lord Cairns LJ specifically said that it applied, if the Court could do justice between the parties, "notwithstanding a failure to keep the dates assigned by the contract, either for completion, or for the steps toward completion ..."
>
> We are not here concerned with any fixed dates. I refrain from discussing what limitations on the liberality of equity there are in that field. Where the contract fixes no date and everything is governed simply by the implication of reasonableness, it makes for clarity and justice to adopt the equitable approach. In the everyday subject of vendor and purchaser it is especially important that the law should be as simple as possible. Solicitors and others concerned would have little difficulty in working with an ordinary rule - indeed many experienced practitioners probably instinctively do so - that where no time is specified for fulfilment of a condition, a reasonable time is allowed and in the event of delay a notice is required to bring the matter to a head. Perhaps the authorities have left something of a grey area in the law, but the *Aberfoyle* case and the others cited do at least point towards this solution.

[48] Mr O'Sullivan, who argued this aspect of the purchaser's case, relied particularly on the last paragraph for which he urged a wide and purposive reading along the lines adopted by the Court of Appeal.

[49] *Aberfoyle v Cheng* was a decision of the Privy Council. It is usually cited for the succinct summary provided by Lord Jenkins for the Board:[27]

> But, subject to this overriding consideration [the true construction of the agreement], their Lordships would adopt, as warranted by authority and manifestly reasonable in themselves, the following general principles: (i) where a conditional contract of sale fixes a date for the completion of the sale, then the condition must be fulfilled by that date; (ii) where a conditional contract of sale fixes no date for completion of the sale, then the condition must be fulfilled within a reasonable time; (iii) where a conditional contract of sale fixes (whether specifically or by reference to the date fixed for completion) the date by which the condition is to be fulfilled, then the date so fixed must be strictly adhered to, and the time allowed is not to be extended by reference to equitable principles.

[50] This approach was adopted by our Court of Appeal in *Scott v Rania* which is itself usually cited for McCarthy J's summary of the relevant principles. That summary was given in six paragraphs of which the fifth is the one germane to the present case and reads:[28]

> Notwithstanding that a condition, such as "subject to my being able to arrange mortgage finance", has not been fulfilled, a party through whose default that non-fulfillment has occurred, if that is the case, may not assert non-fulfillment, for it is a settled principle of law of great antiquity and authority that in these matters no one can take advantage of the existence of a state of things which his default has produced: *New Zealand Shipping Company v Societe des Ateliers et Chantiers de France* [1919] A.C. 1; [1918-19] All ER Rep. 552. And so where the text of the contract reveals that the fulfillment of the condition necessitates some action on the part of a party, that party cannot assert non-fulfillment without showing that that has occurred despite reasonable steps taken by him: *Barber v Crickett* (supra); *Knotts v Gray* (supra). In *Mulvena v Kelman* (supra) Henry J. said that in such cases a term is implied that the plaintiff would take all reasonable steps to fulfil the condition. There may be no material difference between that statement and what I have said, but I prefer not to put it on the basis of an implied contractual term but rather to say that the rule of law to which I have referred earlier prevents a party in default from asserting the fact of non-fulfillment.

Neither *Aberfoyle v Cheng* nor *Scott v Rania* touches directly on whether Cooke J's requirement of a notice in *Hunt v Wilson* was intended to apply or should apply in a case like the present. Furthermore, *Scott v Rania* was not a case which engaged the principle I have just cited from McCarthy J. I have referred to it simply as a convenient statement of that principle.

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[27] At 124.
[28] At 534.

[51] The key circumstance in *Hunt v Wilson* was delay. That was the focus of Cooke J's judgment. At an early stage of his discussion, and prior to the passage set out above, Cooke J observed that the pace of the arbitration machinery could not be fully under the control of the parties. Serious delays might occur without the fault of either, so neither would be liable for damages on account of that delay. His Honour then observed that the party prejudiced would be without an effective remedy if unable to treat the contract as at an end following serious delay. It was in that context that he was considering the issues before the Court, and particularly the need for a notice making time of the essence.

[52] His Honour then immediately referred to *Hargreaves Transport Ltd v Lynch*,[29] a case which had been cited in *Clough*. In *Hargreaves* a contract of sale was subject to planning permission for the development proposed by the purchaser. It prescribed no date for permission or completion. The local authority refused permission but on questionable grounds. The vendor asked the purchaser to appeal. That would have involved a delay of up to 12 months. The Court of Appeal held that the purchaser need not accept such a long delay and was entitled to treat the contract as at an end and recover its deposit. Cooke J said that the effect of the *Hargreaves* decision was that although both parties had shown reasonable diligence in seeking planning permission, the purchaser was not bound to put up with excessive delay. He observed that he would follow the same approach in *Hunt v Wilson*.

[53] That last observation is difficult to reconcile with his Honour's ultimate conclusion that a notice was required. In *Hargreaves* the purchaser, having taken all reasonable steps to fulfil the planning condition, was held to be entitled to rescind the contract forthwith and without notice. The effect of following *Hargreaves* in the present case is that the vendors, having similarly taken all reasonable steps necessary to fulfil the drainage condition, were entitled to treat the contract as at an end without giving a warning notice to the purchaser.

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[29] [1969] 1 All ER 445 (CA).

[54] Furthermore, the vendors here were not claiming any right to avoid or cancel the contract on account of continuing delay either generally or as a result of default by the purchaser. There was no question of the purchaser being given further time or opportunity to do something which he was contractually obliged to do. It has understandably never been suggested that the purchaser had any contractual obligation as regards satisfaction of the s 225 condition. The vendors were simply declaring, after receipt of the proceedings for specific performance, that they took the view they had taken all reasonable steps to fulfil the s 225 condition; that they had not managed to do so; and the contract, which had never become unconditional in this respect, had come to an end.

[55] I consider it very doubtful that Cooke J had a situation like the present in mind when he wrote his judgment in *Hunt v Wilson*. The facts of that case were materially different. His Honour's discussion in *Hunt v Wilson* was designed to support the view that, just as when time is not initially of the essence for completion, a notice is required making time of the essence and requiring completion on or before a certain date, so a similar notice should be required for fulfilment of a condition when time for its fulfilment is not initially of the essence. The purpose of such a notice in each situation is two-fold. First, the notice warns the other party that the notice giver requires performance by a stated date. Second, the notice indicates that the notice giver will regard the other party as being in repudiation, and hence vulnerable to cancellation on that account, if the terms of the notice are not observed. Provided the notice is valid, its non-fulfilment allows the giver of the notice to elect to bring the contract to an end. That is different from a party being allowed to treat the contract as discharged when, through no fault of that party, a condition has not been fulfilled.

[56] The rationale for the giving of a notice such as that with which Cooke J was concerned in *Hunt v Wilson* does not apply in circumstances like the present. There was, in this case, no basis for the vendors to assert as against the purchaser that time was now of the essence for him to do something because there was nothing relevant he was contractually bound to do. The vendors were not setting up, and had no basis for setting up, grounds upon which they could successfully assert a right to cancel on

account of the purchaser's repudiation or breach of a contractual stipulation. They were justifiably of the view that the contract was at an end for non-fulfilment of the condition.

[57] A brief historical examination of the different approaches of the common law and equity to time questions in the law of contract, and the allied requirement for the giving of a notice making time of the essence, confirms the view that Cooke J was not intending to lay down a requirement for the giving of notice in such wide terms as would apply to the present case. If he was, I must respectfully disagree. I cannot see any appropriate conceptual basis for requiring a notice in present circumstances and to do so would risk creating more problems than it would solve.

[58] The speeches delivered in the House of Lords in *United Scientific Holdings Ltd v Burnley Borough Council*[30] provide valuable insights into the development of the law in this area. In equity, time was not regarded as being initially of the essence unless directly so stipulated or by clear and necessary implication. In 1852 Sir John Romilly MR so stated the rule in *Parkin v Thorold*.[31] Sir John also noted that, at law, time was always of the essence. But during the 19th century the attitude of the common law to the time for performance of contractual obligations became less intractable.

[59] As Lord Simon observed in the *Burnley Borough* case,[32] equity's attitude to time was deeply influenced by its handling of mortgages and sales of land. His Lordship was of course speaking of the regime whereby the mortgagor transferred title to the mortgagee and had only an equity of redemption. In the case of sales of land equity regarded the equitable estate as passing on the making of the contract, with the vendor holding the bare legal title in trust for the purchaser until completion. Courts of equity would not allow the beneficial estate to revest in the vendor[33] for failure of some time stipulation unless that stipulation could be shown to be essential or, as it was sometimes put, more than formal. Equity would not

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30 [1978] AC 904.
31 (1852) 16 Beav 59.
32 At 941.
33 Such revesting, unless justified, was viewed as a species of forfeiture from the purchaser and equity traditionally set its face firmly against forfeitures.

ordinarily regard such stipulation as more than formal because completion amounted to no more than the transfer of the vendor's bare legal title.

[60] The position reached in the last quarter of the 19th century was that in equity time was prima facie not of the essence, whereas at law the opposite prima facie position prevailed. Then came the so-called fusion of law and equity with the equitable approach prevailing, as indicated in s 90 of our Judicature Act 1908.

[61] Against that background I move to the method by which equity allowed time to be made of the essence, if it was not originally so. Time could not originally be of the essence if the contract did not provide for a specific date for completion. If there was no such date, completion was required within a reasonable time, as we have already seen. The purpose of the notice which equity required in that situation was to make it clear to the recipient that the giver regarded a reasonable time as having elapsed and that, in this light, the giver regarded the proposed date as the date by which it was reasonable for the recipient's contractual obligation to be performed. As Lord Simon said in *Burnley Borough*,[34] the notice was designed to tell the recipient that he would be regarded as being in repudiation unless he performed by the stated date. Of course the Court might hold that the notice was given prematurely or gave too short a period for compliance. In that case repudiation would not be ascribed to a failing recipient.

[62] It is central to this background that the purpose of the notice requirement which Cooke J was discussing in *Hunt v Wilson* was to secure performance by the recipient of some contractual obligation, in default of which the recipient would be at risk of being found in repudiation, entitling the giver of the notice to cancel the contract. None of this supports the need found by the Court of Appeal for the vendors to give notice to the purchaser in the circumstances of this case. What would the notice say? It could not require the purchaser to do anything. It could only say that the vendors considered they were now entitled to treat the contract as having been discharged for non-fulfilment of the s 225 condition. The only point in

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[34] At 946.

that would be to give the purchaser an opportunity by a stated date to see if he could procure fulfilment of the condition. But there is no principle of law or of equity which, in circumstances like these, requires the vendors to give the purchaser that opportunity when it is not provided for in the contract.

[63] In so far as Dr D W McMorland in his *Sale of Land* may be taken as suggesting otherwise,[35] I am unable, for the reasons given, to agree. I prefer the view expressed in Blanchard's *A Handbook for Sale and Purchase of Land*.[36] McMorland puts the matter in this way:[37]

> The final question remaining on this issue is whether such a notice need be given by whichever party wishes to avoid the contract, or whether it need be given only by the party who does not have the substantive benefit of the condition. As already noted, this is not a situation of an alleged breach where there is an innocent and a defaulting party so that only one party could have the ultimate right of cancellation. Once the right of avoidance for failure of the condition has arisen, it may be exercised by either party.
>
> It can be argued that only the party who does not have the substantive benefit of the condition need give notice because that would allow the other party a final chance to fulfil the condition before the contract is lost; whereas receipt of the notice is of little value to the party without that benefit who is normally not responsible for trying to achieve its fulfilment.
>
> However, it can be argued against this that the party who does not have the benefit of the condition may have a very real interest in achieving the full execution of that particular contract and therefore in having the opportunity to try to achieve the fulfilment of the condition. For example, a vendor who has obtained a high sale price in a contract subject to a finance condition may have a stronger motive for finding the finance for the purchaser than does the purchaser. [Footnote reference to *Connor v Pukerau Store Ltd* [1981] 1 NZLR 384 (CA).]
>
> It is therefore suggested that whichever party wishes to avoid the contract must give notice to the other making time of the essence as to the fulfilment of the condition.

[64] Blanchard expresses this view:[38]

> It is therefore recommended that in New Zealand a termination notice should not be given to the party with the benefit of the condition where there is no condition date – either fixed expressly or by reference to a fixed settlement

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35 (2 ed 2000).
36 (4 ed 1988).
37 At [5.07].
38 At [1202].

> date – unless a prior warning notice of reasonable length has been given. [Footnote here: This may not be necessary where the delay has been so protracted that it is obvious that the condition has not been fulfilled within such time as must have been in the contemplation of the parties when they entered into the contract as being sufficient time for fulfilment of the condition.] Rather than calling upon the purchaser to settle, which he is not obliged to do, the notice should indicate to him that in the view of the notice giver a reasonable time for fulfilment of the condition has already elapsed and that, if it is not satisfied or waived by a date specified in the notice, the notice giver will terminate the contract. Possibly the warning notice can be given before the reasonable time elapses though the date nominated in it must be after the point at which further delay will become unreasonable.
>
> It goes without saying that the person with the benefit of the condition need not give a warning notice of his intention to cancel.

[65] I have not sought to analyse the case in terms of which party had the benefit of the condition. That is because I do not regard the solution to the present issue as best addressed by reference to that question, albeit I note that Burrows, Finn & Todd also adopt a similar conceptual approach to that of McMorland and Blanchard.[39] The key issue is not so much which party has the benefit of the condition but rather which party has the contractual obligation to take the steps required to endeavour to fulfil the condition. A notice need only be given to the party with that obligation.

[66] What the position should be if both parties have an obligation to fulfil the condition does not require determination in this case. As earlier noted, there is no suggestion, and no basis for any suggestion, that in the present case the purchaser had any contractual obligation as regards the fulfilment of the s 225 condition. While I accept that it can be said that both parties were capable of deriving benefit from the condition, that is not the key point. For whose substantive benefit the condition has been included in the contract can be a matter of moment in cases of waiver[40] but, for present purposes, it is preferable to approach the matter on the basis of which party has the obligation to take steps to try and fulfil the condition.

[67] In present circumstances the simple fact of failure to deposit the plan does not amount to a breach of contract. The only breach in that situation would lie in failing to take all reasonable steps. As the vendors have been acquitted of such a failure, they cannot be regarded as being in breach. To hold them liable for damages on the

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39 *Law of Contract in New Zealand* (2 ed 2002) at [8.2.5].
40 See *Globe Holdings Ltd v Floratos* [1998] 3 NZLR 331 at 339 (CA).

sole basis of their failure to give the suggested notice is unsound, both in principle and on the authorities. The only possible basis for such a conclusion would be to argue that the giving of a notice constituted a reasonable step that should have been taken to fulfil the s 225 condition. Understandably, the purchaser's case has never been put that way.

[68] It is conventional law that the vendors were entitled to rely on the non-fulfilment of the condition as a defence to an action on the contract.[41] They were not obliged to cancel the contract in order to do so.[42] We are not required to consider whether any specific advice of avoidance was required to achieve this outcome because the vendors made it clear that they were treating the contract as having come to an end by reason of the non-fulfilment of the condition. They did so at least when they responded to the purchaser's claim for specific performance. Nothing had occurred up to that point which deprived them of their continuing ability to rely on the non-fulfilment of the condition as a defence to that claim.

[69] I should, finally, note that in considering the present issue, I have examined the *ex tempore* judgment of Holland J in *Glen Ayr Pastoral Pty Ltd v Terry Scott Pty Ltd*.[43] His Honour's approach, albeit not cited to us, might be thought to give some support to the argument advanced for Mr Serepisos. In circumstances which were broadly comparable to those in the present case, Holland J suggested that before a party could treat the contract as being at an end, an appropriate notice was required. I am not, however, persuaded by his Honour's reasoning which was little more than simply conclusory. Furthermore, his Honour's judgment is internally inconsistent in that he had earlier suggested that in the parallel, and if anything more persuasive, circumstance of an anticipatory termination of the contract on the basis that non-fulfilment of the condition appeared to the terminating party to be inevitable, no notice was required. A third factor is that Holland J's view is difficult to reconcile

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41 See Burrows, Finn & Todd at [8.2.5]; *Carter on Contract* (looseleaf, Butterworths, Australia) Vol 1 at [05-030] ff; G H L Fridman *The Law of Contract in Canada* (4 ed 1999) 467-468; and *Chitty on Contracts* (29 ed 2004) Vol 1 at [12-150] and [24-039]. None of these standard works suggests that a party is not entitled to rely on the non-fulfilment of a condition unless and until that party has given the other the kind of notice which the Court of Appeal considered necessary.

42 I use the word "cancel" in the sense of cancellation in terms of the Contractual Remedies Act 1979. For clarity it is best not to use the concept of cancellation in any different sense.

43 [1974] 2 BPR 9215 (NSW SC).

with the later decision of the High Court of Australia in *Perri v Coolangatta Investments Pty Ltd*.[44]

[70] For these various reasons I am of the view that Mr Laurenson's submissions for the vendors should be accepted and those of Mr O'Sullivan for the purchaser should be rejected. I consider the Court of Appeal was wrong to hold that the vendors were liable for breach of contract in not giving notice to the purchaser of their intention to treat the contract as discharged for non-fulfilment of the s 225 condition. Such a notice was not required by the terms of the contract itself, and there was no proper or sufficient legal basis to require such a notice in the absence of contractual entitlement.

Formal orders

[71] I would therefore allow the appeal with the consequence, following the dismissal of the cross-appeal, that the orders made by the Court of Appeal and the High Court should be set aside. In their place judgment should be entered for the vendors in the High Court with costs and disbursements to be fixed by that Court. The vendors should have costs in the Court of Appeal in the sum of $6,000 plus disbursements and other necessary payments to be fixed, if necessary, by the Registrar of that Court. In this Court the vendors should have costs of $15,000 plus disbursements and other necessary payments to be fixed, if necessary, by the Registrar of this Court.

McGRATH J

Background and issues

[72] In December 1996 Mr Serepisos entered into an agreement with Mr Steele and Ms Roberts to buy a section at the rear of their residential property at Palliser Road in Wellington for $207,000. The section, which was Lot 2 on a plan attached to the agreement, had a frontage on to Robieson Street. The balance of the land was

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[44] (1982) 149 CLR 537.

Lot 1 on the plan and was to be retained by the vendors. At the time of the agreement a resource consent was needed for the intended subdivision.

[73] In New Zealand, under the Resource Management Act 1991, any agreement to sell land which requires a subdivision to give it effect is subject to the condition that a survey plan for the subdivision is deposited under the Land Transfer Act 1952. The vendor is obliged to take all reasonable steps to obtain the necessary approvals and to complete deposit within a reasonable time. This obligation has been held to include submitting to reasonable sewerage conditions imposed by the local authority.

[74] The present case, which involves a dispute between the vendors and the purchaser over whether the vendors properly treated the contract as being at an end for failure of the statutory condition, gives rise to two issues of general significance. The first issue arises where the local authority imposes a condition of consent to the subdivision (in this case concerning sewerage) which is a reasonable, indeed a standard, condition of its kind, but has the practical effect of placing an unreasonable burden on the vendors. Are the vendors bound to submit to such a condition as part of their obligation to take reasonable steps to secure deposit of the survey plan?

[75] The second issue arises where, despite having taken all reasonable steps to secure deposit of the plan, the vendors have been unable to fulfil that condition and, a reasonable time having elapsed, wish to terminate the contract. Are the vendors in those circumstances able simply to notify the purchasers that the contract is at an end, or are they rather required to give a notice to the purchaser that allows him a reasonable opportunity himself to fulfil the condition before the vendors may terminate?

High Court judgment

[76] In the High Court the purchaser sued the vendors for breach of their contractual obligation under the condition. Miller J found that the vendors had in mind that the new lot would obtain stormwater and sewerage drainage by connecting to public drains on a neighbouring property in Palliser Road running along the common boundary. The Judge found that when, in the course of their pre-

contractual discussions, the parties had agreed that the vendors would pursue the subdivision, their accord extended to an agreement that sewerage and stormwater would be connected to the public drain on the neighbouring property. The parties attached a plan to their subsequent agreement for sale and purchase on which the public drain on the adjacent property was shown, although no connection was depicted.

[77] The purchaser's application for the necessary resource consent was premised on his constructing two townhouses on Lot 2. Following opposition from local homeowners an amended application for a single dwelling was eventually lodged. On 7 April 2000 the Council gave consent to subdivide subject to conditions including one, a standard stipulation for such a consent, which provided:

> Separate new private sewerage and stormwater drains shall be provided to proposed Lot 2 from existing public services in Palliser Road.

[78] The connection to the public drain was a straightforward matter which in 1996 would have cost about $1,600. It did, however, require consent to an easement from the owners of the neighbouring property. There was no provision in the agreement for sale and purchase making the transaction conditional on the neighbours' consent. In the end the consent was not forthcoming.

[79] During 2003 the purchaser took the position that the vendors were able to satisfy the resource consent condition by granting a drainage easement over Lot 1, the property they were retaining. The Judge found that it would be possible to provide stormwater and sewerage drainage in that way, with considerable disruption to the vendors' property, including the ripping up of existing pathways in the garden, and with exposure of some of the pipes. The cost would be about $20,000.

[80] On 1 July 2003 the purchaser issued proceedings for specific performance. The vendors only then took the position that the contract was at an end and they returned the deposit to the purchaser's solicitors.

[81] Miller J held that the vendors' obligation to complete the subdivision had not been made conditional on the neighbours giving consent to connection to the public

drains. Nor did the terms of the agreement allow for the vendors to be discharged from their obligations if unreasonable conditions were imposed by the local authority when giving the necessary consents. He held that the vendors were in default because they had not achieved the subdivision of their property which they were contractually obliged to do and for that reason had been unable to complete the transaction. The vendors were accordingly liable to the purchaser for breach of contract. Specific performance was refused and the question of damages was adjourned to be determined at a subsequent hearing.

Court of Appeal judgment

[82] The vendors appealed. The Court of Appeal disagreed with the High Court's conclusion that the vendors had assumed an obligation to procure deposit of a survey plan for the subdivision because, under s 225 of the Resource Management Act 1991, the agreement for sale and purchase was conditional on deposit of a survey plan. Following the judgment of the Court of Appeal in *W R Clough & Sons Ltd v Martyn & Others*,[45] the Court of Appeal held in this case[46] that the vendors' obligations did not go beyond taking reasonable steps to obtain deposit of a survey plan, including submitting to any reasonable conditions imposed by the Council.

[83] The Court also decided that the combination of the extra cost of supplying drainage over and above that originally contemplated, coupled with the effect on amenities of running drainage over Lot 1, would make a subdivision involving that means of drainage one of a substantially different character to what the parties had contractually agreed on. The vendors accordingly were not required by the agreement to provide it. The consequence of this finding was that the vendors' inability to obtain the easement allowing connection to the drains on the neighbours' property precluded the subdivision from proceeding.

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45 [1978] 1 NZLR 313.
46 At [27]-[32].

[84] The Court then considered whether in these circumstances it was open to the vendors simply to notify the purchaser that the contract was at an end because, despite their best endeavours, the condition as to deposit of a plan of subdivision had not been fulfilled within a reasonable time, or whether they were obliged, first, to give a notice of their intention to terminate which allowed the purchaser a further fixed period of time himself to fulfil the condition.

[85] The Court of Appeal decided that the vendors were bound to give a notice which allowed the purchaser a reasonable opportunity to attempt to satisfy the Council's drainage condition. This requirement was drawn from the judgment delivered by Cooke J in *Hunt v Wilson*[47] which, even though it was a separate judgment, the Court of Appeal said authoritatively stated the law applicable to this case.[48] While the requirement to issue a notice necessarily depended on all the circumstances (including its utility in the particular situation, and the stances taken by the parties), the possibility that in this case the purchaser, after notice, could have successfully negotiated to obtain an easement from the neighbour could not be excluded. The Court held that it was not safe to conclude that the purchaser would have or could have done nothing to secure the easement for himself if given such a notice.

[86] It followed that it was not open to the vendors to treat the contract as being at an end without having given prior notice of their intention to terminate and that that failure put them in breach of contract. There was no appeal against the refusal of specific performance but the Court of Appeal did say that on assessing damages the High Court would have to allow for the contingency that the easement from the neighbours might not have been secured.

Leave to appeal

[87] The vendors were given leave to appeal to this Court on the question of whether the purchasers could validly cancel the contract without first giving a notice

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47 [1978] 2 NZLR 261 (CA).
48 At [47].

which afforded the purchaser a reasonable opportunity of endeavouring to satisfy the condition implied into the contract by s 225 by complying with conditions of consent to the subdivision. The purchaser was given leave to cross-appeal on the question of whether the vendors' obligation under s 225 required them to provide drains through the balance of their property if no alternative route was available. The question in issue in the cross-appeal is logically prior to that in the appeal and, if successful, would remove the basis for cancellation relied on by the vendors and the need to determine the appeal. Accordingly, it is convenient to determine the cross-appeal first.

Scope of duty to procure deposit of plan

[88] The cross-appeal was argued by Mr Fowler for the purchaser. As indicated, counsel challenged the Court of Appeal's finding that the vendors were not contractually obliged to provide drainage to the proposed new allotment over their residual land. It was common ground that, under s 225 of the Resource Management Act, as explained by the Court of Appeal in *Clough*, the vendors were bound to take all reasonable steps to secure deposit of the plan, but whether the obligation included providing drainage and sewerage for Lot 2 over the property being retained was in issue.

[89] In *Clough* the Court of Appeal considered the effect of s 351(3) of the Municipal Corporations Act 1954, which was the predecessor of s 225 of the Resource Management Act. Neither party contended there was any material difference between the two provisions and I proceed on the basis that s 225 imports the same obligations into the contract requiring a subdivision as were identified in respect of its predecessor.

[90] Section 225 provides as follows:

> **225 Agreement to sell land or building before deposit of plan**
>
> (1) Any agreement to sell any land or any building or part of any building that constitutes a subdivision and is made before the appropriate survey plan is approved under section 223, shall be deemed to be made subject to a condition that the survey plan will be deposited under the Land

> Transfer Act 1952 or in the Deeds Register Office, as the case may be; and no such agreement is illegal or void by reason that it was entered into before the survey plan was deposited.
>
> (2) Subject to subsection (1), any agreement to sell any allotment in a proposed subdivision made before the appropriate survey plan is approved under section 223 shall be deemed to be made subject to the following conditions:
>
> > (a) That the purchaser may, by notice in writing to the vendor, cancel the agreement at any time before the end of 14 days after the date of the making of the agreement:
> >
> > (b) That the purchaser may, at any time after the expiration of 2 years after the date of granting of the resource consent or one year after the date of the agreement, whichever is the later, by notice in writing to the vendor, rescind the contract if the vendor has not made reasonable progress towards submitting a survey plan to the territorial authority for its approval or has not deposited the survey plan within a reasonable time after the date of its approval.
>
> (3) An agreement may be rescinded under subsection (2) notwithstanding that the parties cannot be restored to the position that they were in immediately before the agreement was made, and in any such case the rights and obligations of each party shall, in the absence of agreement between the parties, be as determined by a Court of competent jurisdiction.

[91] In *Clough* the Court of Appeal elaborated on the provision that any agreement to sell any land that will involve a subdivision, which is entered into prior to approval of a survey plan, is deemed to be subject to a condition that the plan will be deposited. The Court said:[49]

> We accept that the contract is to be treated as importing an obligation on the vendors to take all reasonable steps to obtain approval …No doubt the vendors would have to submit to reasonable building line and sewerage conditions, notwithstanding that they involved much expense and affected other land of the vendors, if that were necessary to achieve the subdivision provided for by the contract. But the contract and the implied obligation relate to that subdivision.

[92] Their obligation to take all reasonable steps to get the survey plan deposited accordingly required the vendors to submit to reasonable sewerage and stormwater conditions imposed by the Council as part of its consent to the subdivision, as long as compliance would not make the subdivision materially different to that for which the parties had contracted. From the vendors' perspective, for example, there would be a material difference if the effect of Council conditions was significantly to alter

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[49] At 317.

either the area of the balance of the subdivided land to be retained by the vendors under the contract, or the manner of use of that land.

[93] Importantly in the present context, however, the Court of Appeal in *Clough* made it clear that the fact that compliance with the conditions would involve much expense, or would affect other land of the vendors, including residual land they retained after subdivision, would not excuse the vendors from compliance with reasonable conditions as long as the outcome involved no material difference to what the parties had provided for in their contract. That is, the Court drew a distinction between the reasonableness of the conditions and the onerousness of complying with them.

[94] In the present case, it was common ground that the Council's condition as to sewerage and stormwater was a standard and unexceptional one for a local authority to impose. It could be fulfilled in two ways. One was by connection to the public drains on the neighbouring property for which consent was required but not forthcoming.[50] The other was by providing drainage over the vendors' residual land, at a greater cost and with adverse visual and other impacts.

[95] In general, the extra expense and effect on amenities of compliance with the Council's sewerage and stormwater requirements will not excuse the vendors in performance of their contract unless their combined effect is to make the subdivision different from that which forms the basis of the parties' contract. The Court of Appeal, however, found in this case that "a subdivision involving drainage through Lot 1 would be of a substantially different character to what the parties had contemplated at the time of their agreement".[51]

[96] It appears that in referring to what the parties "contemplated" the Court of Appeal had in mind their common expectation that drainage and sewerage would be provided by connection to the public drain on the adjacent lot. The Court did not, however, find that this understanding was part of their contractual agreement and

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50 It was suggested at the hearing that application could be made to the Council to exercise its powers under s 460 of the Local Government Act 1974 but as that suggestion was not raised in argument before the Court of Appeal I do not take it into account.

51 At [43].

indeed expressed sympathy with the refusal of counsel for the purchaser in the Court of Appeal to accept that the agreement was contractual in nature.[52]

[97] Unless the Court is to depart from the approach in *Clough*, the question of whether the vendors were bound to comply with the condition by providing sewerage over Lot 1 in this way turns on whether that would make the subdivision something different from that for which the parties contracted, in light of their having a common expectation that sewerage would be the subject of an easement and connection to drains over the neighbours' property. That is not, of course, the same question as whether it was reasonable, between the parties, to impose on the vendors the extra expense and detrimental affect on amenity of that method of complying with the condition.

[98] Mr Laurenson, however, submitted on behalf of the vendors that a condition had to be reasonable between the parties as well as being a reasonable condition for a local authority to impose. He argued that in this case the additional cost and visual and other impacts on the vendors' land made it unreasonable to require that the condition be satisfied by running sewerage and stormwater drainage over its property to connect with the public drains in Palliser Road. Mr Laurenson pointed to what Miller J found to be the parties' agreement that drainage would be via the connection to the public drain on the neighbours' property to support his submission of unreasonableness of the Council's condition on this basis.

[99] As indicated above, s 225 imports into an agreement to sell land, which requires a subdivision to give it effect, a condition that a survey plan be deposited. The provision has been held to impute obligations on the vendor to take reasonable steps within a reasonable time to satisfy the condition. The standard of compliance set in *Clough* requires that the vendor submit to reasonable sewerage conditions even if they involve much expense and affect other land of the vendors. That standard of performance of the vendor's obligation is simply what is required to give business efficacy to the contract.

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[52] At [25].

[100] The condition becomes part of the contract by operation of statute rather than as an expression of any intention by the parties. It is, however, implied for a purpose, beyond which it should not be taken.[53] That purpose is ascertained in the course of interpretation of the statutory provision. It is to avoid contracts for sale and purchase of land requiring subdivision, entered into before deposit of a survey plan, from being illegal on that account.[54]

[101] It is not, however, necessary for that purpose further to cushion the impact of the negotiated terms of a contract to sell land to be subdivided by allowing the vendor to opt out if compliance with reasonable conditions of consent to the subdivision turns out to be more onerous than the parties might have expected, or considered to be reasonable when they entered into the contract. It does not go without saying that the parties would have inserted such a term into their contract had they considered the issue. Where the parties do consider that question they should provide contractually for protection against the risks of such effects if they wish to have it. Otherwise they will be taken to have assumed the risk that sewerage and drainage could not be provided in the manner that the parties anticipated. Any overlay of a general reasonableness standard in this area is likely to lead to confusion and uncertainty and is undesirable. Only where the consequences of compliance with a reasonable condition are so onerous as to amount to frustration of the contract should the party affected be excused.

[102] The doctrine of frustration would operate in a case such as the present if, while the contract was in force, there were an unforeseen supervening event which either made performance of the vendors' obligations impossible, or made it so different from what was intended that the contract simply could not apply in the changed circumstances. That would be because performance would be of a wholly different contract from that on which the parties had agreed. The vendors' duty then

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53 In *Morris v Pugh* (1761) 3 Burr 1242 at 1243 Lord Mansfield CJ said: "But fictions of law hold only in respect to the ends and purposes for which they were invented; when they are urged to an intent and purpose not within the reason and policy of the fiction, the other party may shew the truth." The passage is referred to in Frame "Fictions in the Thought of Sir John Salmond" (1999) 30 VUWLR 159 at 162.

54 See *Griffiths v Ellis* [1958] NZLR 840.

would be discharged because it would be unjust (or absurd) to continue to impose it. In the present case, however, the vendors did not argue that the refusal of the neighbours to consent to an easement frustrated performance of the vendors' obligations. Rather, they argued that their obligations in respect of the statutory condition had been performed without fulfilling it and the condition had accordingly failed. In these circumstances it is unnecessary further to discuss the doctrine of frustration.

[103] The Court of Appeal, in the end, saw the increased cost of running sewerage through Lot 1, and the resulting effect on amenities through destruction of paths and steps and exposure of stormwater and sewerage pipes, as crucial. The impact on the vendors' amenities of providing for stormwater and sewerage drainage over the land that they are retaining does not, however, to my mind make the subdivision one that should be regarded as materially different from what the parties contracted for. The contract is merely less profitable for the vendors than they had anticipated.

[104] In addition a requirement that a condition of consent to a subdivision be reasonable, before a party having the obligation to try to get the consent is bound by it, is workable. Conditions imposed by consent authorities that are not of a standard kind and are also onerous will generally not be reasonable. But the introduction of the further notion that the manner of compliance with the condition must also be reasonable is likely often to lead to uncertainty and litigation over the obligations of the parties. The effective administration of the law of contract in the area of vendor and purchaser obligations is not well served by that potential for confusion.

[105] For these reasons I am of the view that the vendors were bound to submit to the condition as to drainage and sewerage by providing for these services over the lot they were retaining. In notifying the purchaser that they were treating the contract as being at an end, when they could not get the neighbours' consent to running these services over their land, the vendors were in breach and liable for damages.

[106] As the majority of the Court, however, favours dismissal of the cross-appeal I will go on to consider the merits of the vendors' appeal against the Court of Appeal's

finding that they should have given prior notice of their intention to avoid the contract for non-fulfilment of the condition, which allowed the purchaser an opportunity itself to try and make arrangements to meet the Council's condition concerning drainage and sewerage.

Should termination be on notice?

[107] The vendors appealed against the finding of the Court of Appeal that before terminating the contract they should have given a notice to the purchaser, allowing him a reasonable opportunity to satisfy the drainage condition and specifying a date by which he had to do so.

[108] On behalf of the vendors Mr Laurenson argued that they were required to take reasonable steps to obtain the subdivision, to meet reasonable conditions of the local authority consent and to take those steps within a reasonable time. The Court of Appeal had found that, at the time the vendors terminated the agreement, a reasonable time for compliance had expired. Mr Laurenson submitted that it was open to the vendors, at that point, to treat the condition as having failed and to terminate the agreement.

[109] The issue in this branch of the appeal is accordingly whether the notice avoiding the contract for non-fulfilment of the condition itself should have fixed a reasonable time during which the purchaser had the opportunity to try to fulfil it. The context in which the issue arises is unusual in that it involves neither delay nor default by the party bearing the obligation. Mr O'Sullivan, who argued the appeal for the purchaser, contended that such a notice was nevertheless still an essential preliminary requirement in the exercise of the right to terminate the agreement.

[110] The condition implied into a contract to sell land by s 225 of the Resource Management Act cannot be waived by either party. It reflects public policy and is also for the benefit of both parties. Its effect is to save the contract from illegality at the outset because the subdivision cannot lawfully be completed without deposit of the plan. Failure of the condition will prevent any further obligation on the parties to complete the contract from arising. The issue on this aspect of the appeal concerns

the procedure by which a vendor, not in default of its obligations, can treat the contract as terminated by the failure of the condition.

[111] Ordinarily, where one party has a contractual obligation to take steps to secure fulfilment of a condition within a reasonable time, but has not been able to do so, the contract is not automatically discharged once a reasonable time has elapsed.[55] The contract is voidable rather than void. If the other party wishes to put an end to the contract, so that obligations cannot be enforced against it if the condition is later fulfilled, that party is able to avoid it by giving a notice. The notice must require the party bearing the obligation to fulfil the condition within a reasonable, but specified, time. If the condition is not fulfilled within that time, the notifying party may treat the contract as discharged.

[112] The policy reasons underlying the treatment of the contract as voidable, rather than void, in those circumstances, and thus terminable only on notice, were expressed by Mason J in *Perri v Coolangatta Investments Pty Ltd*:[56]

> …it is undesirable that the rights of the parties should rest definitively and conclusively on the expiration of a reasonable time, a time notoriously difficult to predict. One object of the development of the requirement that a notice should be given fixing a reasonable time for performance as an essential preliminary to rescission is the perceived need to promote greater certainty and a better understanding by parties of their rights and obligations.

[113] In the present case, however, it is the vendors, who bear the obligation to take reasonable steps towards securing deposit of the survey plan, who assert that the contract had come to an end. They assert that it is not their failure to perform which has caused the condition to fail. Rather, they have performed all their obligations, by taking such steps as were reasonable. Notwithstanding this they were not successful but nor were they in default. There was simply nothing more that they could reasonably do to fulfil the condition.

[114] In these circumstances, a requirement that a notice be given fixing a reasonable time for fulfilment of the condition would serve a different purpose to a

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55 Contractual conditions that must be fulfilled in a reasonable time must be distinguished from those to be fulfilled by a definite date. The discussion that follows applies to the former rather than the latter type of condition.

56 (1982) 149 CLR 537 at 555.

notice to complete. The notice would not be given to force the party having the obligation to perform it within a reasonable time, nor to warn that party of the consequences of a failure to perform its obligations. The function of a notice requirement would rather be, first, to give the party without the obligation an opportunity to save the contract by fulfilling the condition itself within the time stipulated, secondly to give that party (here the purchaser) the opportunity to scrutinise the adequacy of the actions taken by the other party to fulfil its obligations while the contract is still in existence, and thirdly to avoid the notified party being taken by surprise by a peremptory pronouncement that the contract is at an end. The crucial question for the purchaser in this case would be whether the purchaser was able, within the set time, itself to satisfy the condition.

[115] The vendors took the view that the condition was self-executing. They argue that they were entitled to treat the contract as discharged once a reasonable time had passed during which they had been unable to obtain the neighbours' consent, and that no period of notice was required. The argument carries support from the traditional view of a notice to complete expressed by Brennan J, with whom Stephen J agreed, in *Perri v Coolangatta Investments Pty Ltd*:[57]

> A notice to complete insists upon performance by a party in default to whom the notice is given of an obligation binding upon him. It can have no application to a situation where the party to whom it is given is under no obligation to perform.

[116] In New Zealand, however, the basis for a different view emerged in 1978 in the judgment delivered by Cooke J in *Hunt v Wilson*. The trial Judge had determined the date on which a reasonable time for fixing the contract price under an agreement for sale of land, for obtaining the mortgagee's consent to the transaction, and for its completion had all expired. The Judge held that on that date the agreement came to an end for non-fulfilment of those conditions. The agreement had not specified a set time for compliance with the conditions by the purchaser. In his judgment on appeal Cooke J observed that the trial Judge's approach had involved a retrospective determination that the contract had come to an end on a date

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[57] At 569.

which, at the time, could not have been identified by the parties. In fact the parties had treated the contract as remaining in force after the date on which the trial Judge had found it came to an end. There was, Cooke J said, "something unattractive" in that approach. The question he posed was:[58]

> [I]f the contract fixes no time either for satisfaction of a condition or for completion, and each simply has to occur within a reasonable time, can one party claim that the contract is at an end for failure of the condition without serving notice making time of the essence and allowing an appropriate time?

[117] Cooke J referred to *Aberfoyle Plantations Ltd v Cheng*.[59] The judgment of the Privy Council in that case had indicated, obiter, that had the Board accepted that the vendor was entitled to a reasonable time to fulfil the condition the Board would have been disposed to agree that time could not be made of the essence of a contract, by service of a notice of avoidance when it was not originally of the essence and the vendor was not in default.[60] Cooke J said of these observations that:[61]

> Although their Lordships did not go as far as positively deciding the point, their observations certainly tend towards the view that, if no time is fixed for completion and a condition is to be satisfied within a reasonable time, the equitable requirements as to notice apply.

[118] He later stated the principle he thought should be applied, and the policy basis for it, in these terms:[62]

> Where the contract fixes no date and everything is governed simply by the implication of reasonableness, it makes for clarity and justice to adopt the equitable approach. In the everyday subject of vendor and purchaser it is especially important that the law should be as simple as possible. Solicitors and others concerned would have little difficulty in working with an ordinary rule – indeed many experienced practitioners probably instinctively do so – that where no time is specified for fulfilment of a condition, a reasonable time is allowed and in the event of delay a notice is required to bring the matter to a head. Perhaps the authorities have left something of a grey area in the law, but the *Aberfoyle* case and the others cited do at least point towards this solution.

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58 At 270.
59 [1960] AC 115.
60 At 128.
61 At 271.
62 At 273.

[119] The judgment of Cooke J, although a separate judgment, has been very influential on the approach taken by the New Zealand courts to contract law generally. In it Cooke J expressed doubt on the utility of the analysis of conditions as being precedent or subsequent. A leading text on contract law in New Zealand sees the case as signalling a decisive move away from reliance on rigid theoretical structure in the interpretation of conditional contracts.[63]

[120] The notice requirement Cooke J laid down in *Hunt v Wilson* would not allow a party to treat a contract as having come to an end after elapse of a reasonable time without giving notice. This reflected his concern over the difficulty, without litigation, in achieving clarity over what was a reasonable time, a question on which the parties would often differ. This is supported by his observation that the law of vendor and purchaser should be as simple as possible. Cooke J said that the notice requirement should be the rule where there had been delay in fulfilment of a condition to be satisfied in a reasonable time, to prevent the peremptory termination of the contract by a party once a reasonable time for achieving fulfilment had expired.

[121] The theoretical underpinning of the need for a notice as reflected in the authorities is less apparent in his Honour's reasoning. However, the principle that the equitable requirement of notice should apply in cases where a condition must be fulfilled within a reasonable time was not the subject of any qualification in Cooke J's judgment. Nor to my mind should it be. In all cases of this type, regardless that the reason for non-fulfilment of the condition might be other than mere delay on the part of the party obligated to perform, a notice should be required before the right to terminate arises.

[122] In the present case, the party with the obligation to fulfil the condition claims that the contract came to an end once it had discharged its obligation to take reasonable steps to secure its performance without success. A reasonable time had expired when it gave a notice of termination and, in any event, the vendors argued, fulfilment of the condition by either party was by then impracticable. The finding of the Court of Appeal, however, that the purchaser, although having no obligation to

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[63] Burrows, Finn & Todd *Law of Contract in New Zealand* (2 ed 2002) at [8.2].

take steps towards fulfilment of the condition, might still have been able to procure the neighbours' consent demonstrates that this is not an exceptional case in which the "defect" was incurable. It follows that, although the vendors were not in default of their obligations, this is not a case in which a notice would serve no useful purpose.

[123] The reasons given by Tipping J in this Court, in my view, create an exception to the general requirement of a notice for cases, such as the present, in which the reason for failure of the condition in question is other than mere delay. I do not think that there is any benefit to be derived from complicating matters by making a distinction between cases such as the present and those in which a notice addresses mere delay. Nor do I think any exception to the general application of the principle outlined by Cooke J should be created. For the sake of clarity and convenience in practice a consistent approach should be followed under which a warning notice is given whenever it is said that a condition to be fulfilled in a reasonable time has failed.

[124] The view that a notice is needed in these circumstances would appear to have the support of Dr D W McMorland, who points out that a notice in the present sort of case is not a notice to settle as there is no question of settlement while the condition remains unfulfilled. Rather the notice will advise the recipient party that in the view of the party giving the notice, a reasonable time has elapsed and, if the recipient is not able to fulfil the obligation within the time provided in the notice, the party giving it will treat the contract as at an end.[64] Dr McMorland concludes with the observation:[65]

> It is therefore suggested that whichever party wishes to avoid the contract must give notice to the other making time of the essence as to the fulfilment of the condition.

[125] Whether or not it is correct to read the dicta of Cooke J as intended to apply to a case such as the present, in which the recipient of the notice is under no obligation to seek to fulfil the condition but on the facts may be able to do something

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64 D W McMorland *Sale of Land* (2 ed 2000) at [5.07].

65 At 158, citing *Connor v Pukerau Store Ltd* [1981] 1 NZLR 384 (CA) in support.

within a reasonable time to achieve that result, is not of course the ultimate question for this Court. The real issue is whether that approach best serves the sound administration of contract law in the field of vendor and purchaser of land that requires subdivision for the contract to proceed. I am satisfied that it does, essentially for reasons that underpin the reasoning of Cooke J in *Hunt v Wilson* and Mason J in *Perri v Coolangatta Investments Pty Ltd*, albeit each case was decided in a different context.

[126] Perceptions of contracting parties of what is a reasonable time, within which something must be done, are highly subjective. They are likely to be influenced by the individual aspirations of the parties in relation to the contract. A party who has the responsibility of endeavouring to obtain a public body's consent within a reasonable time under the contract will often have a different view of what time and steps are reasonable to fulfil the condition to that of the party who must simply await the outcome. That party will often be ill-informed of what is required to overcome obstacles and do what is necessary to satisfy conditions and as a result be at a disadvantage in assessing whether the other party has performed its obligations. It may also, as here, possibly be in a position to do what the other party could not. The situation is fraught with the risk of misunderstanding on each side of the position of the other, including a risk that peremptory termination on the basis that a reasonable time has passed and nothing further can be done will be seen by the other party as premature and in breach of obligations.[66] Justice is not enhanced by a rule under which the legal justification for avoidance can only be reliably determined retrospectively with all of the expense and inconvenience of litigation.

[127] The advantages of the proposed rule, identified by Cooke J, were first clarity and justice. Clarity would be provided by the requirement for a notice in the circumstances of the present case because the specification of a reasonable time in

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[66] These considerations reflect those of the Supreme Court of New South Wales in *Glen Ayr Pastoral Pty Ltd v Terry Scott Pty Ltd* (1974) 2 BPR 9215, in which Holland J considered the question of whether, after a reasonable time has elapsed for fulfilment of a condition requiring local authority consent to be obtained but no consent has been forthcoming, a contract automatically terminates, or whether a notice is required to bring it to an end. He decided that the contract was not automatically void, but voidable at the option of either party, because "the parties may be placed in a position of great uncertainty as to whether [a reasonable time] has elapsed".

the future for fulfilment of the condition will give greater certainty to all parties to such a contract as to the date by which the condition must be fulfilled. The notice would also bring to a head the question of performance by the party in the position of the present vendors of its obligations under the condition. That party would have a further incentive to examine its own actions to ensure that there is nothing further it should do to perform its obligations. It will warn the notified party who has no obligation, but may have a strong interest in the fulfilment of the condition, of impending termination, giving it the chance to assess what it might do to save the contract by satisfying the condition or persuading the other party it should do more to meet its obligations if it can. In the end, if that cannot be achieved by the notified person, there is a greater likelihood that it will accept that the contract is at an end, although in some cases the dispute will continue.

[128] The practical simplicity of the application of such a rule for contract administration is a further advantage. Solicitors and conveyancers would operate under a regime in which delay in the fulfilment of a condition will invariably require a notice giving an opportunity to the other party, whether or not it is under an obligation, before a contract can be treated as discharged for non-fulfilment. This will avoid the complexity entailed in distinguishing between different types of conditions.

[129] For these reasons I would uphold the application of the requirement of a notice in every case in which there is delay in fulfilment of a condition that had to be fulfilled in a reasonable time before either party could terminate the contract for non-fulfilment. The notice, which could only be given by a party not in default, would allow the other party a reasonable opportunity to fulfil the condition. The requirement would apply generally unless it was plainly impracticable for the other party to achieve fulfilment.

[130] In this case the vendors terminated the contract without giving a notice and accordingly did not validly avoid the contract. I would therefore dismiss their appeal.

Conclusion

[131] For the above reasons I would have dismissed the appeal and allowed the cross-appeal, thereby upholding the purchaser's right to damages to be assessed by the High Court.

ANDERSON J

[132] The appellants agreed to subdivide their residential land into two lots and to sell to the respondent proposed Lot 2. They intended to remain living in their house on proposed Lot 1. The parties' understanding was that sewerage and drainage facilities for Lot 2 would be provided via a neighbouring property. By virtue of s 225(1) of the Resource Management Act 1991 the contract was subject to a condition "that the survey plans will be deposited under the Land Transfer Act 1952".

[133] The appellants had a duty to take all reasonable steps towards achieving the fulfilment of the condition.[67] Breach of such a duty would allow a purchaser to rescind[68] and to sue for damages, or to treat the contract as extant and sue for specific performance including the carrying out of the necessary reasonable steps. A vendor could not assert that the contract was at an end for failure of a condition if such failure was occasioned by the vendor's own default, for it is an ancient and fundamental principle of law that no one may take advantage of his own wrong.

[134] Several years after the agreement was made the local authority approved the plan subject to a usual condition for reticulation of stormwater and sewage. But by then there was no realistic prospect of providing facilities via the neighbour's property. They could be provided only by way of Lot 1, at much greater expense

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67 *W R Clough & Sons Ltd v Martyn & Others* [1978] 1 NZLR 313 (CA).

68 The word "rescind" may have any of a number of meanings, as Sir Guenter Treitel has remarked in *The Law of Contracts* (11 ed 2003) 760. In these reasons for judgment when I use it I mean to

than either party could have envisaged at the time of the contract, and with significant deleterious impact on the amenities and value of the appellants' home. Without prior notice to the respondent, the appellants treated the contract as at an end for failure of the condition relating to the deposit of a subdivisional plan.

[135] The essential issues are: (a) whether the appellants were obliged to provide stormwater and sewage drainage over proposed Lot 1; and (b) if not, whether they became entitled to rescind for non-fulfilment of the condition imposed by s 225(1); and (c) if they did become so entitled, whether they were required to give notice of an intention to rescind.

[136] In respect of the first issue I do not accept the argument on behalf of the respondent to the effect that the appellants were required to comply with any condition the local authority reasonably imposed as a condition of approval of a subdivision. Whether or not a particular requirement may reasonably be imposed by a local authority requires examination of that authority's public functions and responsibilities, and invokes public law considerations. Whether satisfying the condition would require more of the subdivider than taking all reasonable steps is a question requiring examination of the nature and circumstances of the contract. They are different questions with different contexts. To say that because the condition imposed by the local authority in this case is not unreasonable in public law terms, it is therefore reasonable for the vendor to comply with it, assumes that the local authority's functions under the Resource Management Act and the vendor's duties pursuant to the contract are identical. That is plainly wrong. They are different and independent. Suppose the local authority had imposed a condition so manifestly unreasonable or otherwise unlawful that a setting aside on appeal or review would be relatively inexpensive and virtually inevitable. The appellants could not properly treat themselves as released when in the circumstances it would be entirely reasonable to resort to litigation. That hypothesis demonstrates the distinction between, and independence of, the respective obligations and functions.

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indicate treating the contract between the appellants and the respondent as having come to an end.

[137] In this case, where it was mutually understood that the amenities for Lot 2 would be provided in a certain way which would involve relatively little cost and no impact on Lot 1, I am of the opinion that the appellants' duty did not require them to bear much greater cost, disruption to Lot 1, and depreciation of the visual appeal, physical use and, inevitably, the value of their house.

[138] I am also of the opinion that the appellants became entitled to rescind for non-fulfilment of the condition imported by s 225(1). They were not in breach and there was no prospect of the condition being satisfied without their doing more than was reasonably required of them. More than a reasonable time had passed without fulfilment of the condition. The contract was spent.

[139] On the issue whether the appellants had to give notice, the Court of Appeal felt obliged to find against the appellants because of that Court's understanding of *Hunt v Wilson*.[69] But, with respect, I think they misunderstood Cooke J's judgment, which must be examined in light of the facts. There, the purchaser under an agreement conditional on the determination of price by an arbitral process, had a duty to take reasonable steps to keep that process moving along. When it stalled and remained stalled for an inordinate period, because the arbitrators failed to appoint an umpire, the purchaser could reasonably have done more to get it going again. For example, as Cooke J observed, some years earlier than the vendor's purported rescission the purchaser could have made an application to the High Court under s 6 of the Arbitration Act 1908 for an order appointing an umpire. It took him almost five years after the date of the agreement, and two years after the vendor's purported rescission, to follow that course.

[140] Two things in particular, I think, need to be borne in mind when one evaluates *Hunt v Wilson*. One is that Cooke J's judgment is best understood as extending the notice requirements when a party is in default as to completion of a contract, to situations when a party is in default in respect of a condition of the contract. The second matter is that the majority of the Court of Appeal decided the case on a basis different from that of Cooke J.

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[69] [1978] 2 NZLR 261 (CA).

[141] When a contract does not state a time for its completion, equity will not permit a party to rescind for non-completion by the other party without having previously given the defaulting party a notice stipulating a certain time for completion and making performance by that time essential. That gives the defaulter a chance to remedy the default. Equity's requirement is motivated by fairness, not by notions of etiquette. If there is no default by the one party, the other does not have to make a mere gesture of politeness and then wait for more time to pass before declaring the inevitable. A prudent conveyancer might well advise a client to give such a notice in order to reduce a risk of a subsequent argument about or finding of prematurity, but the client would not be obliged to do so.

[142] In this case a notice by the appellants could serve no purpose. The respondent was not in default. Still less were the appellants seeking to rescind by reason of default on the part of the respondent.

[143] I would allow the appeal.

Solicitors:
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