Conditional Contracts and Contractual Conditions in the Law of Vendor and Purchaser

by

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I. INTRODUCTION[1]

> I venture to think that the ambiguous labels precedent and subsequent, when applied to conditions, are seldom of real help in solving issues in this branch of contract law.

These words of Cooke J in *Hunt* v *Wilson*[2] succinctly state the thesis of this article.

The labels, which are used merely as tools, have themselves been the cause of such confusion that many practitioners faced with a conditional contract may be uncertain as to the precise effect that a condition has upon the parties' relationship. This paper hopes to present an analytical analysis which will alleviate at least some of this uncertainty.

It is necessary to assume a knowledge of the terms involved. Briefly put, there are two key terms: "condition-precedent" and "condition-subsequent"; they are the antithesis of each other and have been said to exist side by side in relation to a temporal reference point.[3] Two such points have emerged: the existence of the contract and the duty to perform a promise or promises.[4]

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[1] Most of the disputes have arisen in the field of vendor and purchaser. For this reason the discussion is weighted in that direction. The substance of the paper however is not similarly restricted.

[2] [1978] 2 NZLR 261, 267 (CA). For further criticisms of the labels see Stoljar, "The Contractual Concept of Condition" (1953) 69 LQR 485, 506–511; Molloy, "Agreement Subject to Solicitor's Approval" [1974] NZLJ 214, 216; Fox, "Subject to Finance Again" [1966] NZLJ 426, 428.

[3] McMorland, "A New Approach to Precedent and Subsequent Conditions" (1980) 4 Otago LR 469, 470.

[4] A discussion of exactly what is contingent upon the condition is beyond the scope of this

The synthesis of these two elements produces an apparently attractive symmetry of analysis. A condition, it is said, may be one of four types:

(1) "condition-precedent" to the contract;[5]
(2) "condition-subsequent" to the contract;[6]
(3) "condition-precedent" to the parties' duty to perform a certain promise or promises;[7]
(4) "condition-subsequent" to the parties' duty to perform a certain promise or promises.[8]

Under this analysis, a dispute is resolved by first examining the form of the contract;[9] that is, the factual matrix.[10] This reveals the appropriate label (type of condition), and the relevant rule attaching to that label is then applied to the parties' relationship.[11]

The immediate objects of any analysis are:

(1) To simplify analysis;
(2) To determine whether the parties have entered into a contractual relationship;
(3) To determine the effect the condition has on the parties' relationship.

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article. The analysis assumes that it is the duty of performance and not the originating obligation that is contingent. See Coote "Consideration and the Joint Promisee" [1978] CLJ 301, 305.

[5] For example: *Griffiths* v *Ellis* [1958] NZLR 840 (CA) *per* North J dissenting; *Mulvena* v *Kelman* [1965] NZLR 656 (SC); *Scott* v *Rania* [1966] NZLR 527 (CA) *per* North P and McCarthy J. But compare McMorland, "A Practitioners' Guide to Conditions Precedent and Subsequent" Auckland Law Faculty Seminar Series 1980, Legal Research Foundation Publication, 105, 106–108, submitting that in each case it was a condition subsequent.
Katz v *Jones* [1967] NZLR 861 (SC); *Gardner* v *Gould* [1974] 1 NZLR 426 (CA); *Wilson* v *Papageorgieu* (noted [1973] Recent Law 37).
See also McMorland, *op cit*, 112–115 where it is argued that the following cases involved a "condition precedent" to the contract: *Buhrer* v *Tweedie* [1973] 1 NZLR 517 (SC), *Frampton* v *McCully* [1976] 1 NZLR 270 (CA) and *Boote* v *RT Shiels & Co Limited* [1978] 1 NZLR 445 (CA).

[6] *Barber* v *Crickett* [1958] NZLR 1057 (SC); *Eastman* v *Bowis* [1962] NZLR 954 (SC); *Knotts* v *Gray* [1963] NZLR 398 (SC) (but see McCarthy J's caveat to this classification in *Scott* v *Rania, supra*, note 5 at 533); *Martin* v *Macarthur* [1963] NZLR 403 (SC).

[7] *Scott* v *Rania, supra*, note 5 at 540 *per* Hardie Boys J (dissenting); see also dicta in *Buhrer v Tweedie, supra*, note 5 at 519–520 *per* Wilson J; see also the dicta in *Maynard v Goode* (1926) 37 CLR 529, 540 *per* Isaacs J.

[8] Pleaded in *DF & KM Munster Ltd* v *Millbrook Bakery* (1981) *Ltd*, High Court, Hamilton. 6 July 1983 (A231/82) Pritchard J.

[9] *Scott* v *Rania* [1966] NZLR 527, 533 *per* McCarthy J.

[10] The label regime is, therefore, subject to the criticism that it is mechanical and abstract (in being removed from the intention of the parties). This danger is recognised in the context of offer and acceptance where the Courts are wary of applying these tools of analysis too literally. See the censure by Lord Wilberforce in *New Zealand Shipping Co Ltd* v *Satterthwaite & Co Ltd* [1975] AC 154, 154 (PC).

[11] *Scott* v *Rania supra*, note 9 at 537 *per* Hardie-Boys J. For those readers wishing to pursue these concepts further, see McMorland *supra*, note 3, and note 5.

It is submitted that the best means of achieving these objectives is by simple application of the law of contract.

The approach adopted here involves a two-stage framework for solving disputes involving conditional contracts. The first stage is to determine whether the parties have entered into a contractual relationship; the second stage is to determine the effect that the condition will have on the parties' relationship.

This analysis is then tested on the New Zealand cases in this area of the law.

II. A TWO STAGE FRAMEWORK FOR SOLVING DISPUTES IN CONDITIONAL CONTRACTS

It is a primary proposition of this section that all conditions operate post-contractually.[12] This is because no obligations or duties can arise until after a binding contract has been formed.[13] Hence labels like "precedent" and "subsequent" are confusing and erroneous since they purportedly apply to temporal points both before and after the formation of contract.[14]

It is submitted that any contractual dispute may be solved by applying the following two stage method and the rules applicable to each stage:

1. *Stage One: To determine whether the parties have entered into a contractual relationship.*

Often all that is required in contract disputes is to determine whether the parties have entered into a contractual relationship:[15] stage one of this analysis addresses this issue. Essentially this involves determining whether, upon the proper construction of the parties' dealings, they intended to enter into a contractual relationship and be legally bound, or to continue to be free to negotiate the terms (and conditions) of a proposed agreement. This can be determined, it is submitted, by answering one question: were the parties free to unilaterally leave the agreement prior to the date stipulated for the fulfilment of the condition without incurring any legal consequences? If the parties were free to do so then they were still in the negotiation phase. If the parties were unable to

[12] The definition of a condition in the Restatement of the Law of Contract (2nd ed 1973) §1, contemplates only an event which qualifies a duty of performance under an existing contract; similarly Stoljar, *supra*, note 2 at 485 rejects the notion of conditions operating precontractually. See also *Smallman* v *Smallman* [1971] 3 All ER 717, 720 *per* Lord Denning, (English CA).

[13] *Provost Developments Ltd* v *Collingwood Towers Ltd* [1980] 2 NZLR 205 (CA), 207 *per* Woodhouse J, and 209 *per* Cooke J (CA); compare *Scott* v *Rania, supra*, note 9 at 534 *per* McCarthy J.

[14] The function of a condition is to determine the contingency of the duty of performance and not the formation of contract. Hence its primary description is as a condition precedent to the parties' duty of performance. Its description as subsequent to the formation of the contract is subsidiary and incidental.

[15] For example *Griffiths* v *Ellis supra* note 5 where if the parties had entered into a contract it was illegal and therefore not capable of being enforced.

leave without legal consequences attaching, then they had entered into a contractual relationship.[16]

Whether the parties have entered into contractual relations is determined by establishing whether the essential elements of a contract are present. These elements are:[17] (a) offer, followed by (b) acceptance (unequivocal and in the same terms), with (c) consideration given[18], and made (d) with an intention to create legal relations.[19]

To illustrate the point, if the legal requirement as to writing has been met (for example by an exchange of letters), but the parties intend a more formal expression of their agreement, the court must determine the nature of their relationship. Dixon CJ has suggested that three legal situations could exist:[20]

> (1) Where the parties have reached final agreement and intend to be immediately bound, but also propose to have terms restated in fuller or more precise form, but not different in effect; or
>
> (2) Where the parties have reached final agreement as to the terms of their bargain, but have made the performance of one or more of the terms conditional upon the execution of a formal document; or
>
> (3) Where the parties do not intend to make a concluded bargain at all, unless and until they execute a formal contract.

It is submitted that the correct approach is to decide whether, upon construction of the offer and acceptance, the parties intended to enter contractual relations and thus be legally bound or whether the parties intended to do no more than negotiate the terms and conditions of a proposed agreement.

In the first two classes the parties would be found to have entered binding contractual relations. In the third class, which includes the "subject to contract" clauses, it is commonly accepted that the parties remain in the negotiation phase.[21]

What, it might be asked, is the significance of finding that the parties are actually in the negotition phase (and not in a post-contractual phase) where the offer has a condition attached to it?

It is simply and significantly this: to constitute a contract the parties must, *after* the fulfilment of the condition, meet all the requirements for a binding contract.[22] Therefore the offeree cannot afford to assume that upon fulfilment of the condition the parties will automatically have

[16] When a contract has been formed the parties are no longer free to withdraw. The parties' obligations are crystallized at that point: see *Smallman* v *Smallman, supra*, note 12.

[17] Provided that the parties have capacity and the contract is not illegal.

[18] See Coote, *supra*, note 4 at 306.

[19] Intention necessarily means apparent intention; it is gauged by the actions of the promisor in light of social and commercial conventions in the objective sense.

[20] *Masters* v *Cameron* [1954] 91 CLR 353, 360–364 (HC of Australia).

[21] *Provost Developments Ltd* v *Collingwood Towers Ltd, supra*, note 13 at 207 *per* Woodhouse J.

[22] See for example, *Buhrer* v *Tweedie, supra* note 5 at 519 where Wilson J stated: "[But] in my opinion [the solicitor's] approval merely opened the way to [the offeror] to make a firm offer to see to [the offeree], and the offeree's acceptance would still be required before a binding contract resulted".

a contract. Neither can the offeree afford to assume that his acceptance after fulfilment of the condition will necessarily complete the contract; for the offeror is always at liberty in the meantime to vary, or revoke in its entirety, the offer made.

It is likely that in the New Zealand conveyancing context the parties will have intended to be contractually bound.[23] It is therefore unlikely that the parties would be found to be still in the negotiation phase.

2. *Stage Two: Operation of post contractual relations*

This section deals with the operation of the contract after it has been determined from stage one analysis that there is a contract between the parties. In terms of label analysis it includes the following types of conditions:

(1) "condition-precedent" to the contract;[24]
(2) "condition-subsequent" to the contract;
(3) "condition-precedent" to the parties' duty to perform certain promises;
(4) "condition-subsequent" to the parties' duty to perform certain promises.

In short, all conditions in agreements which are not agreements of negotiation are included; all such agreements are called contracts. To avoid confusion these will be referred to as "post-contractual conditions".

The object of second stage analysis is to determine the legal effect of fulfilment or non-fulfilment of the post-contractual condition on the parties' contractual relationship. This must depend on the parties' intentions as to the legal effect of fulfilment or non-fulfilment of the post-contractual condition. In particular, did the parties want the effect of non-fulfilment upon their duty to perform the primary obligations to be absolute and automatic, or to provide them with a discretion?

The answer may be adduced from the following propositions. Propositions (1), (2) and (3) are taken from *Aberfoyle Plantations Ltd* v *Cherg*, a decision of the Privy Council.[25]

(1) Where a conditional contract of sale fixes no date for completion of the sale, then the condition must be fulfilled within a reasonable time;
(2) Where a conditional contract of sale fixes a date for the completion of the sale then the condition must be fulfilled by that date;
(3) 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

[23] *Provost Developments Ltd* v *Collingwood Towers Ltd, supra*, note 13 at 210 *per* Cooke J; Fox *supra*, note 2 at 427; Coote "Agreements 'Subject to Finance'" (1976) 40 Conv (NS) 37, 42; McMorland, *supra*, note 3 at 470.

[24] That is, those conditions mistakenly held to be "conditions-precedent" to the contract, but which were in fact treated as operating within an existing contract; see *supra*, note 5.

[25] [1960] AC 115, 124–125.

adhered to,[26] and the time allowed is not to be extended by reference to equitable principles;[27]

(4) Where the parties want a degree of flexibility within their contractual relationship they must expressly or implicitly so stipulate.[28] Thus 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 need not be strictly adhered to, and the time allowed may be extended — but subject to one (if expressly stipulated) or either party having the right to determine the contract before the condition is fulfilled.

The parties to a contract define (with greater or lesser precision)[29] the terms upon which they are contracting and use conditions as a tool to control those circumstances.[30] The possible circumstances are endless — in the conveyancing context common clauses are the raising of finance and procurement of clear title to the property. Operating alongside such considerations will be the parties' desire that the sale take place, if at all, within a certain time frame.[31] Seen in this way post-contractual conditions consist of two elements: a subject element[32] and a time element.[33]

[26] Under the general law where a date is specified time is of the essence: *Parkin* v *Thorold* (1852) 16 Beav 59, 65; *United Scientific Holdings Limited* v *Burnley Borough Council* [1873] AC 904 (HL).

[27] *Aberfoyle Plantations Ltd* v *Cheng, supra*, note 25 at 125: their Lordships state at 126 that where the duty to perform primary obligations (that is, to complete the contract) is conditional, equity will not intervene to extend the time allowed for fulfilment. Their Lordships compare such conditions with a clause fixing the date for completion, which they say may be extended.

[28] The operation of the condition in *New Zealand Shipping* v *Société des Ateliers et Chantiers de France* [1919] AC 1 (PC) was held to automatically avoid the contract. Lord Atkinson went on to state at 9: "Of course, the parties may expressly or impliedly stipulate that the contract shall be voidable at the option of either party to it".

[29] An excellent example of a well drafted condition is clause 7 of the REI NZLS Standard Form Agreement For Sale and Purchase. It states precisely the effect that the non-fulfilment of the condition will have on the parties' contractual relationship. In keeping with the tenor of this article it would be preferable that clause 7.2(1) read: "The condition shall operate subsequent to the formation of a binding contract". For a list of 12 requirements for an ideal subject to finance clause see Coote "Agreements 'subject to Finance'" *supra*, note 23.

[30] A condition is conceptually similar to an exception clause: both qualify the extent of the obligation undertaken. A condition is operative prior to the contract becoming unconditional, while an exception clause is also operative after the contract has become unconditonal; but both take effect (in terms of their impact on the obligation) at the formation of contract. See Coote, "The Second Rise and Fall of Fundamental Breach", (1981) 55 ALJ 788; Yates "Exclusion Clauses in Contracts" (London, Sweet & Maxwell, 2nd ed 1982), 123.

[31] For example, in the context of finance clauses, the vendor will not want to compromise his or her opportunity to sell elsewhere by being bound to the purchaser for an unspecified "reasonable time". Similarly, the purchaser will want to restrict the period within which he or she is required to make reasonable efforts to obtain the finance.

[32] For the degree of certainty with which the subject element must be specified see Coote "Agreements 'Subject to Finance'", *supra*, note 23 at 37–42.

[33] It is possible, and indeed likely, that the two elements are not mutually exclusive and therefore may prevent either party unilaterally waiving the condition prior to the date stipulated for its fulfilment. Because of its finite nature, a condition must be fulfilled (or

The parties will have settled on the degree of strictness to which the time-frame must be followed. Ideally where they seek strictness, the contract will be so worded that the operation of the condition will be automatic on its non-fulfilment. Where, on the other hand, the parties are willing to allow a degree of flexibility they should expressly word the contract so as to give either or both parties a discretion to end the contract on its non-fulfilment.[34] As stated above, where the parties have stipulated a date for fulfilment of the condition but there are no words to indicate the immediacy of its effect, it is my contention that there is a legal presumption that the effect of a post-contractual condition will be automatic.

Having identified the intention of the parties as to time, it is then necessary to identify the effect this will have on each party's duty of performance. Some preliminary points need to be made.

Where the parties have entered contractual relations the non-fulfilment of the post-contractual condition cannot go to the very existence of the contract; that is, the contractual relationship is affected *de futuro* and not *ab initio*.[35] The fulfilment or non-fulfilment will only affect each party's duty of performance; that is, whether they will be required to perform primary or secondary obligations.

This requires the focus or point of reference to move from the existence of the contract to the parties' duty to perform certain obligations.[36] Independently of whether or not the condition is fulfilled the contract remains in existence. The contract itself is left to determine the parties' rights and duties where the condition is not fulfilled. For example, on the non-fulfilment of a condition a purchaser seeking the return of his deposit need not resort to restitutionary remedies — this would be allowed under the auspices of the contract. Thus for the purposes of determining rights and duties (remedies) the courts have treated the agreement as if it were a contract which was void *de futuro* and not *ab initio*.[37]

Moreover under this analysis the duty to perform primary obligations[38] (duty to complete) does not arise until the post-contractual con-

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waived or varied) by the due date. Once this time is passed the condition is technically extinguished. It is therefore not capable of being waived (*Scott* v *Rania, supra*, note 11 at 532 *per* North P and at 534 *per* McCarthy J), or fulfilled (*Gilbert* v *Healy Investments Pty Limited* (1975) 1 NSWLR 650, 655; *New Zealand Shipping* case, *supra*, note 28 at 9 *per* Lord Atkinson) after that date. It follows that the only way for the parties to re-enter into a contractual relationship is to enter into a new contract: (*New Zealand Shipping, ibid* 12 *per* Lord Atkinson; *Scott* v *Rania, ibid*, 543 *per* Hardie Boys J).

[34] For example, clause 7 of the REI NZLS Standard Form Agreement For Sale and Purchase.

[35] It was the exchange of legal promises that created the contract. The failure to perform that promise cannot impugn the promise itself. It remains for the purpose of determining remedies.

[36] See Stoljar, *supra*, note 2 at 508.

[37] *Supra*, note 5 and references cited therein.

[38] However, preliminary obligations, for example making a reasonable effort to obtain finance in the case of finance clauses, may arise at the formation of contract. Compare the view expressed by McCarthy J in *Scott* v *Rania, supra*, note 11.

dition is fulfilled.[39] This view is derived from the nature of conditional promises. Unlike an absolute promise, where the duty of performance arises at the formation of contract, the duty in a conditional promise is deferred and contingent upon the fulfilment of a condition.[40] In conditional contracts performance of the promise may ultimately be satisfied in one of two ways: by performance of either the primary or secondary obligations.[41] The post-contractual condition may then be seen to operate as a "switch"; it may activate a duty to perform either the primary or secondary obligations. This switch is preset by the intention of the parties at the formation of the contact. Where the condition is fulfilled by the stipulated date the switch will activate the contingent duty to perform primary obligations in all cases.

On the other hand, if the condition is not fulfilled by the stipulated date, its legal effect will depend on whether it was intended to operate automatically.[42] Where the parties have determined that the time frame be absolutely adhered to the switch will automatically activate a duty to perform secondary obligations. Where the parties intend a degree of temporal flexibility the switch will "stand ready" for either party to exercise his or her discretion and "manually" operate the switch by notice to the other party that the contract has been determined. In this case either party could bring secondary obligations into play. If for some reason neither party were to operate the switch within a reasonable time it would cause secondary obligations to come into play by operation of law.

Although comparing a condition to a switch in this way may seem very abstract, it makes clear the operation of the condition — something that has been confused for a very long time.

III. NEW ZEALAND CASES

Decisions in a line of New Zealand conveyancing cases appear inconsistent and confused when analysed in label terms. The decisions can be seen as more consistent if viewed in terms of the two stage contractual analysis suggested. For example, the reasoning of the majority in *Grif-*

[39] Compare label analysis, where, presumably, a duty of performance exists from the formation of contract and which may be destroyed by the non-fulfilment of a "condition-subsequent".

[40] Hence the reason the promisor cannot be in breach of contract for failure to complete the contract prior to the stipulated date. She may, however, be in breach of a duty to perform preliminary obligations.

[41] There is good consideration in a conditional promise: *Gutlon* v *Marcus* 164 Mass 335, 336 *per* Holmes J: "[W]hen a man acts in consideration of a conditional promise, if he gets the promise he gets all he is entitled to by his act, and if, as events turn out, the condition is not satisfied, and the promise calls for no performance, there is no failure of consideration". There may, in fact, be no secondary obligations, but there is still good consideration in the promise.

[42] There has been debate over just how a contract is used to determine the parties' remedies. For a discussion of the analysis see Coote, *supra*, note 30 at 2, 11. The writer prefers Lord Diplock's analysis in *Photoproductions Limited* v *Securicor (Transport) Ltd* [1980] AC 827 (HL).

fiths v *Ellis*[43], it is submitted, is at one with the proposed analysis — at least to the extent of stage one. In that case the issue was whether an agreement between the parties constituted a contract. If it did, it would have offended s322 of the Municipal Corporations Act 1933 which rendered illegal contracts for the sale of part of any unsubdivided land. If this were the case the plaintiff would then be unable to bring an action because the contract was illegal. The parties entered into an agreement for the sale and purchase of two unsubdivided sections, and in an attempt to prevent illegality inserted a clause which read "this agreement is subject to the survey plan of such subdivision being approved and deposited . . .".

In the Supreme Court, Shortland J held that it was the agreement itself and not the performance of it which was subject to the condition. But this reasoning holds itself open to the previous criticism, that both parties were merely in advanced negotiation. With respect his Honour is clearly wrong — this is shown by the simple test of whether the parties were free to unilaterally withdraw prior to the date for fulfilment of the condition. They clearly could not have withdrawn and were thus in a contractual relationship. This was recognised by the majority of the Court of Appeal who held that the parties were in a contractual relationship and that the condition operated within the contract.[44] Finlay J found both offer and acceptance and held that from the moment of "execution" they were parties to an illegal contract. His Honour reasoned that the incorporation of a condition, be it precedent or subsequent, could have no effect on the illegal nature of the contract. His Honour stated:

> Whatever the character of the condition, the agreement . . . purported, on its execution, to be a binding contract involving mutual rights and obligations upon the parties to it. Under it . . . the appellant had, with some degree of immediacy to do constructional work and to perform other acts and execute necessary documents. The condition expressed — whatever its character — had no relation to this obligation of the appellant as vendor, so that if the condition expressed in clause 13 of the agreement is a condition precedent, it was not a condition precedent to those immediate obligations of the appellant as vendor to which I have referred. In respect of those acts, the rescission effected by the condition would be nugatory for, by its terms, the only result which was to follow the termination of the contract by non-fulfilment of the condition was that the deposit was to be repaid, whereupon the whole agreement was to be null and void.[45]

The next six cases in this line involved finance clauses.

In each case it was the purchaser who was seeking to avoid the contract after the non-fulfilment of the condition. Under those circumstances the designation of the condition as either automatic or discretionary would make no difference to the effect it would have on the contractual relationship.[46] Thus the issue in those cases was whether

[43] [1958] NZLR 840 (CA).

[44] *Ibid*, the reasoning of the dissenting judge, North J, was confused. See McMorland, *supra*, note 3 at 479–480 for criticism of his Honour's judgment.

[45] *Ibid*, 856.

[46] See for example the statement by Henry J in *Mulvena* v *Kelman*, *supra*, note 6 at 657

(in the absence of 'waiver' or repudiation — which was not alleged) the purchaser had made reasonable efforts to arrange finance.[47]

The cases are significant in that they each begin their analysis by establishing the existence of a contract. This accords with the first stage of analysis suggested earlier. *Barber* v *Crickett*[48] was decided five weeks after *Griffiths* v *Ellis*,[49] but apparently without knowledge of the Court of Appeal decision. The case involved a contract which was conditional on the purchaser "arranging the necessary mortgage finance to purchase the property". The purchaser, who had not made a reasonable effort to obtain finance (indeed he rejected the finance company's offer of finance), sought to deny the existence of a contract. After the date for fulfilment of the condition had passed, the purchaser, through his solicitor, wrote to the vendor stating that he was unable to fulfil the condition (clause 13) and requested return of the deposit.

Cleary J found the parties had entered into contractual relations and made his decision on the basis of this finding. The learned Judge mentions the terms "condition-precedent" and "condition-subsequent" in just one sentence.[50] His Honour states that undoubtedly clause 13 was a condition subsequent to the formation of contract, and cites authority in support of this. It is evident however that his Honour preferred to base his decision on a more simple analysis.

Having determined that the parties were in a contractual relationship it was then clear that by failing to make reasonable efforts to obtain the finance the purchaser had breached a duty to make such reasonable efforts.[51] The purchaser was thus unable to recover his deposit.

In *Eastmond* v *Bowis*[52] Richmond J accepted that the parties had entered into a contract. On this basis, the issue was whether the purchaser was entitled to rescind the contract for non-fulfilment of the condition. The learned Judge held that the plaintiff had made reasonable efforts to arrange finance and therefore there was no bar to the plaintiff establishing non-fulfilment of the condition as a ground for rescinding the contract.

The third case involving a finance clause was *Knotts* v *Gray*.[53] The facts of the case were similar to the previous two cases and on all fours with *Barber* v *Crickett*. However because counsel for both parties agreed that it was the parties' intention that the condition was a condition subsequent and the purchaser must make a reasonable effort Mc-

[47] *Provost Developments Ltd* v *Collingwood Towers Ltd*, *supra*, note 13.
[48] *Supra*, note 6.
[49] *Supra*, note 43.
[50] In terms of offer and acceptance (consensus ad idem) his Honour recognised, at 1061, "that parties had agreed upon all the terms of the contract, including the stipulation that the contract was conditional on the respondent obtaining the necessary mortgage finance".
[51] Cleary J did not explain the basis for the purchaser's obligation to make a reasonable effort to bring about the occurrence of the condition.
[52] *Supra*, note 6.
[53] *Supra*, note 6.

Carthy J found he was not bound to "consider the validity of Cleary J's judgment in *Barber* v *Crickett*"[54]. It must be taken however that his Honour and both counsel accepted, on the facts,[55] that the parties had entered into a contract and that the condition operated within the contractual relationship.

In *Martin* v *MacArthur*[56] the facts were similar to the previous three cases and all three cases were discussed. As in *Knotts* v *Gray* both parties accepted the decision of Cleary J in *Barber* v *Crickett*. Accordingly Richmond J concluded:

> In the result, I approach the matter on the basis that the condition as to finance is a condition subsequent, the non-fulfilment of which would render the contract voidable at the option of the purchaser.[57]

It is important to note that his Honour is not stating here that the non-fulfilment of a "condition-subsequent" renders the contract voidable as opposed to void. Richmond J's comment contains two distinct elements. The first, that the condition is a condition operating subsequent to the formation of the contract. The second, that where the condition is not fulfilled the contract will be voidable,[58] in this case, at the option of the purchaser. This second element is a summation by his Honour of the principles established in the discussion of conditions in *Barber* v *Crickett*[59] which his Honour accepted as being correct. This discussion is an instance of what this article terms second stage analysis.

The five cases analysed in this section have each conformed (within reasonable parameters) to the analysis this article proposes. Their conformity was established primarily by the classification of the conditon in each case as subsequent to the formation of the contract.

In *Mulvena* v *Kelman*[60] however, the danger of the terms precedent and subsequent become apparent. It is clear from the judgment that Henry J chose the existence of the contract as the reference point rather than the parties' obligations to perform their promises. Thus his Honour rejected the contention of both counsel that, as in the previous cases, the condition was a condition subsequent (to the formation of the contract).

His Honour reasoned that, as the condition was attached to the offer, the offer was not absolute in it terms and this prevented the formation of a binding contract. His Honour stated "clause 11 [the finance condition] was no mere term in a concluded contract which pro-

[54] *Ibid*, 399.

[55] *Ibid*, 401. The parties themselves recognised that the agreement containing the condition, which they signed, was a contract which upon the non-fulfilment of the conditior was to become "null and void".

[56] *Supra*, note 6.

[57] *Ibid*, 405.

[58] *Ibid*, 406. This interpretation was supported by the parties' willingness to extend the time allowed for fulfilment of the condition.

[59] *Supra*, note 6 at 1059–1060.

[60] *Supra*, note 5.

vided for its dissolution in a certain event"[61]. The condition was categorised as a condition precedent to the formation of a binding contract.

It is respectfully submitted that his Honour's reasoning is incorrect. The existence of a condition in an offer merely defines more specifically the promise made by the offeror. Thus all conditional contracts involve an offer subject to a condition.[62]

In all the cases so far considered the facts have meant that the first stage analysis was the critical stage. It was establishing the existence of a contract between the parties that was important. Where a purchaser in contractual relations failed to make a reasonable effort to bring about fulfillment of the condition he or she was not entitled to the return of any deposit. Whereas if the parties were found to be in a mere state of advanced negotiation the purchaser would always be entitled to the return of any deposit money paid.[63]

But as regards second stage analysis any decision as to the classification of the condition was rendered unnecessary. Nevertheless the judgment of Henry J in *Mulvena* v *Kelman* and of North J (dissenting) in *Griffiths* v *Ellis* provided the foundation for the confusion in the cases to follow.

In *Scott* v *Rania*[64] it was the vendor who denied that a contract existed after non-fulfilment of the condition, claiming that his duties under the contract had automatically terminated when the condition remained unfulfilled upon the stipulated date. This meant that the second stage analysis became critical: what legal effect did the non-fulfilment of the condition have on the parties' contractual relationship? The decision is testimony to the confusion that label analysis can produce. It is nevertheless respectfully agreed that the majority judgments of the Court of Appeal came to a decision, which on the facts, reflected the intention of the parties.

The next case, *Hunt* v *Wilson*,[65] is a landmark decision, and as stated earlier, took an entirely different approach to the analysis of conditional contracts. The Court of Appeal rejected the label regime outright; the judgments of Cooke and Richardson JJ contain liberal references to the "ambiguity and unhelpfulness" of labels; Richmond P chose to omit all reference to labels.

The nature of this contract differed from those previously discussed. No time was fixed for obtaining the mortgagee's consent (the condition), valuation of the property, arbitration where the value was disputed, or completion. The case was particularly unusual in that the completion date was not fixed.

[61] *Ibid*, 658.

[62] The point that all conditions must be contained in the offer was made by McMorland, *supra*, note 3 at 481. It is reiterated that if the condition was a bar to the existence of a contract, the parties would still be in the negotiation phase. Accordingly the label "condition-precedent" to the contract is a misnomer.

[63] On the basis of money had and received without consideration.

[64] *Supra*, note 11. See McMorland, *supra*, note 3 for criticism of the judgments.

[65] *Supra*, note 2.

The different nature of this case serves to indicate the flexibility of the two stage approach. While the judges differed as to the interpretation of the contract, all followed the basic two-stage approach suggested. First, they established the existence of the contract between the parties. Richardson J stated:

> . . . it is a condition relating not to the formation of a binding contract; but only to the performance of a particular term.[66]

The judges then considered the question of the effect of the terms upon the parties' contractual relationship.

Cooke J relied heavily on the principles established in *Aberfoyle Plantations* v *Cheng*:[67]

> On the footing that the ordinary rules [of *Aberfoyle*] applied, each of the three things: price fixing, morgagee's consent and completion had to take place within a reasonable time.[68]

This is a direct application by his Honour of the first principle enunciated by the Privy Council.

Richardson J on the other hand made the significant, and it is submitted, correct distinction between price fixing (an unconditional term) and the mortgagee's consent (a conditional term).[69] The parties had unconditionally promised that price fixing steps would be performed. Accordingly, the effect of non-performance was treated differently from non-fulfilment of the condition.

Accordingly, while stage two analysis was only one of the issues to be determined, its identification helped to clarify the correct issues.

The final case for consideration is *DF & KM Munster Limited* v *Millbrook Bakery (1981) Ltd.*[70] It involved the sale of a business subject to a (post-contractual) condition that the head lessor allow the assignment of a lease before the settlement date. In deciding the case Pritchard J was not tempted by the plaintiff's pleading that:

> The condition in clause 20 of the agreement was a condition precedent or was or became a condition subsequent to the performance of the obligations of the parties to the agreement.[71]

His Honour's response was much more incisive:

> In my view, the effect of Clause 20 of this agreement is plain: the right of each party to call upon the other for completion of the sale is contingent upon the happening, *within the time limited by the contract*, of an event over which neither party had complete control (my emphasis).[72]

[66] *Ibid*, 278 line 37.
[67] *Supra*, note 25.
[68] *Supra*, note 2 at 269 line 48.
[69] It is submitted that many of the difficulties experienced with conditional contracts are the result of a failure to distinguish between unconditional terms containing time stipulations and conditional terms containing time stipulations. As the Privy Council stated in *Aberfoyle Plantations* (*supra*, note 25) equity may intervene to extend the time in the case of the first type but not the second.
[70] *Supra*, note 8.
[71] *Ibid*, 15.
[72] *Ibid*, 18.

His Honour then held that the effect of the contractual condition was determined by the principles established in *Aberfoyle Plantations Limited* v *Cheng*:

> As to the time within which a condition such as this has to be satisfied, there is a set of rules enunciated by Lord Jenkins in *Aberfoyle Plantations Ltd* v *Cheng* [1960] AC 115; (1959) 3 All ER 910, 914. Unless the contract specifies some other date, then the condition must be fulfilled by the date for completion of the sale, or if there is no prescribed date for completion, then within a reasonable time. The date so determined must be strictly adhered to — it will not be extended by reference to equitable principles.[73]

In the event the settlement took place in a piecemeal manner — the vendor gave a clear and unambiguous notice allowing the purchaser a reasonable time within which to ensure that the condition was fulfilled. As this was not complied with the contract came to an end.

As to the nature of the condition his Honour stated:

> The condition is not a promissory condition, non-compliance with which would be a breach of contract and give rise to a right of cancellation; it is a condition which renders all the rights and obligations of the parties subject to a contingency over which neither party had complete control and which was not satisfied; the result being that either no rights or obligations came into existence or that any rights or obligations which did come into existence terminate automatically on the failure of the condition. It is immaterial, in this context, whether the condition is a condition precedent to the formation of a binding contract or whether it is a condition subsequent, the failure of which puts an end to the contract.[74]

It is certainly significant that the distinction is made here between contractual terms and contractual conditions. However, it is submitted, His Honour rather clouds his appreciation of the distinction when, in the last sentence, he seems to suggest that it can be accommodated without difficulty within the label model. For it is the essence of that model that the status of a condition as precedent or subsequent *is material* to the determination of what duties become incumbent upon the parties at what time.

Establishing the four requirements of contract has not proved too difficult in most of the cases involving the usual conditions such as finance clauses. As stated earlier the parties will generally be found to have entered into a conditional contract. There has been more difficulty however in cases involving solicitor's approval clauses. There are two reasons for this. First, there is the question whether an acceptance containing a solicitor's approval clause amounts to a counter-offer capable of acceptance. Second, and this point is related to the first, whether the extent of the solicitor's ability to vitiate the agreement prevents there being any consideration on the part of the party relying on the clause, so that even though there was an exchange (of promises) there is no contract. The answer is determined again by establishing whether at the relevant time, the four requirements of contract have been met. Was

[73] *Supra*, note 8 at 19.
[74] *Ibid*, 22.

there: (a) an offer (b) an acceptance (c) consideration and (d) an intention to contract?

In *Buhrer* v *Tweedie*[75] the transaction included a solicitor's approval clause. Wilson J held there that there was no offer. His Honour quoted the court below:

> For my part I find the qualification to the [defendant's counter] offer too wide to constitute an offer in law. . . .[76]

His Honour came to this conclusion stating:

> . . . having examined what they wrote more carefully, I have come to see that what Mr Buhrer wrote was merely a statement of the terms upon which, *if his solicitors approved*, he was prepared to sell — and that was all that Mr Tweedie agreed to.

This finding was based on the principle that:

> A statement is clearly not an offer if it expressly provides that the person who makes it is *not* to be bound merely by the other party's notification of assent.[77]

Wilson J found as a matter of fact that there was no effective offer capable of acceptance. There is nothing intrinsically wrong with this finding, but it would seem that a party seeking to avoid a contract in this way would need to overcome a strong presumption (in New Zealand) that the parties had entered into a binding contract.[78]

Frampton v *McCully*[79] was a Court of Appeal decision also involving a solicitor's approval clause. The facts were similar to *Buhrer* v *Tweedie*: the purchaser made an offer to the vendor which the vendor accepted but subject to solicitor's approval. Two issues were raised. The first was whether the vendor's acceptance constituted a conditional acceptance which would be binding on him if and when the solicitor approved the contract. Cooke J in delivering judgment dismissed the purchaser's submission that this was the case. He stated:

> . . . it is clear law that in general a conditional acceptance cannot bring about a contract, though it may amount to a counter-offer. That elementary principle lay at the heart of the decision of this court in *Reporoa Stores Limited* v *Treloar* [1958] NZLR 177. As Gresson J said: ". . . to bring about a binding contract the offer and the reply accepting must be of and in respect of precisely the same terms. The offeree must unreservedly assent to the exact terms proposed by the offeror"[80].

The second issue arising was whether the exchange amounted to a counter-offer. As in *Buhrer* v *Tweedie*, whether it constituted a legally binding offer was established by determining if the offeror intended to be legally bound by his statement. This in turn meant deciding the extent to which the party had caveated his obligations, in effect, to what extent they intended the solicitor to be able to vitiate the agreement.

[75] [1973] 1 NZLR 517 (SC).
[76] *Ibid*, 519.
[77] *Ibid*.
[78] On the question of generality of its application, perhaps this case will be treated as one decided on its own facts.
[79] [1976] 1 NZLR 270 (CA).
[80] *Ibid*, 276 line 27.

Cooke J found the powers reserved to the solicitor too broad[81]. Accordingly as there was no reason to limit the grounds on which the vendor's solicitor could refuse approval "it would be unreal to treat the conditional acceptance as a counter-offer capable, if itself accepted, of giving rise to a conditional contract of sale"[82].

The two foregoing cases indicate the courts' hesitancy to recognise a contractual relationship where one party remains at liberty to withdraw from the agreement. As one commentator put it:

> If any contract is to be formed in advance of the solicitor's approval, there must be some contraints upon exercise of his discretion. If he were to be free to act solely on his client's instructions there could be no immediate contract because the client would have undertaken no present obligation[2], unless it be just to communicate with his solicitor.[83]

In the unusual circumstances of *Boote* v *RT Shiels Ltd*[84] (the land agent signed up the purchaser to a different property from that which he had shown him), the purchaser's original offer — which included a solicitor's approval clause — was taken to be a counter-offer by the vendor. The purchaser's subsequent acceptance of this counter-offer (which included his own original solicitor's approval clause) did not prevent a binding conditional contract from arising. As the purchaser's solicitor approved the contract, comments by the court on the generality of the clause were not part of the ratio decidendi, but there were obiter comments indicating that the solicitor's approval would be restricted to conveyancing aspects. This meant that sufficient obligation had been undertaken to allow formation of a contract.

This is in line with the reasoning of Wilson J in *Buhrer* v *Tweedie* adopted from the court below, quoting the magistrate's conclusion:

> Had the solicitor's approval related to some aspects such as 'title' or 'finance' or even 'consent of mortgagees' then it could be held to be a condition precedent [in] a contract.[85]

Thus in *Buhrer* v *Tweedie* and *Frampton* v *McCully* what might have amounted to a counter-offer was not recognised as such because each party had reserved excessive discretion; whereas in *Boote* v *RT Shiels* the extent of discretion reserved did not prevent a counter-offer from arising; as the offer had been accepted a conditional contract came into existence prior to the solicitor giving approval.

The same approach was taken by the Court of Appeal in *Provost Developments Limited* v *Collingwood Towers Limited*[86]. Woodhouse,

[81] *Ibid*, 277.
[82] *Ibid.*
[83] Coote "Subject to Solicitor's Approval — Another Development", [1980] NZLJ 78. In *Provost* v *Collingwood Towers*, supra, note 15, Woodhouse J stated (at 209 line 33) that if there were no limits on the solicitor's discretion "then in reality the client could not be said to have accepted any obligation at all and the arrangement made would be nothing more than a nudum pactum". This, his Honour stated later (at 209) "would prevent the actual formation of the conditional contract".
[84] [1978] 1 NZLR 445 (CA).
[85] *Ibid*, 519.
[86] [1980] 2 NZLR 205 (CA).

Cooke and Richardson JJ were unanimous in holding that the solicitor's discretion be confined to conveyancing matters. The effect upon the parties' contractual relations was neatly encapsulated by Richardson J:

> [I] have no hesitation in concluding that there was a concluded contract arising on the execution of the agreement on 23 June 1978.
>
> The effect of the condition is to make the further performance of the contract conditional on the approval of the solicitor on each side by the stipulated time. If that approval is not forthcoming by then, the condition fails. The condition applies equally to both parties. They have agreed that the transaction will proceed if and only if their respective solicitors give their approval. And they have fixed a sensibly early cut-off date after which the transaction either proceeds, having received the endorsement of both solicitors, or becomes an historic relic.[87]

IV. CONCLUSION

This article is a response to the call from judiciary, academics and practitioners alike to abandon the use of the labels "condition-precedent" and "condition-subsequent". It should be clear from the foregoing that if as is suggested here the use of labels is abandoned the long line of cases addressing the vexed question of whether a condition is precedent or subsequent need not be considered.

The courts have recently suggested that problems in this area of the law are to be settled according to the rules of contract. Accordingly practitioners may be prohibited from sheltering behind these labels in the future.

It was submitted that the ordinary principles of contract law do in fact neatly satisfy the objectives behind any analysis, namely: to simplify the process of solving the dispute, to establish whether the parties have entered into a contractual relationship and to determine the effect the condition has on the parties' contractual relationship.

It was argued that the two-stage framework proposed would provide the basis for a simple and conceptually correct analysis of conditional contracts.

Stage one analysis involves determining whether the parties are merely in an invitation to treat situation (that is, in a state of negotiation), or whether they have entered into a binding contractual relationship. Often this is as far as the analysis need go.

It was further argued that once it is found a contract exists, the correct approach is to treat the condition as a part of the parties' obliga-

[87] In *Buhrer* v *Tweedie* and *Frampton* v *McCully* the offeror had caveated his obligation to the extent that there was insufficient obligation to create a legal promise. On the other hand in *Boote* v *RT Shiels* and *Provost Developments Ltd* v *Collingwood Towers Ltd* the reservation of the solicitor's approval was used to define the obligation more specifically.

It is evident there is a need for some form of consumer protection for the inexperienced vendor or purchaser. Coote, "Consumer Protection in Land Sales" [1975] NZLJ 123 recognised this need and suggested the answer might lie in a statutory cooling-off period. This suggestion, or the incorporation of some form of the clause above into the REI NZLS Form of Agreement, appear attractive alternatives in light of *Provost*.

tions. The parties use conditions as a tool to define the circumstance or factual matrix upon which they will be required to perform the contract. In keeping with the clear distinction between consideration and performance it was submitted that conditions must be seen as a post contractual concept; hence they condition the performance and not the formation of the contract or the existence or subsistence of obligations. *A fortiori* all conditions in conditional contracts are (post) contractual conditions.

Stage two analysis equates with the need to identify the effect of the condition on the parties' contractual relationship — more particularly, the strictness with which the time element in the condition must be complied with.

Under the authority of *Aberfoyle Plantations* v *Cheng* it was submitted that in the absence of express or implied intention time must be strictly complied with, otherwise the contract is automatically avoided.

Accordingly those practitioners under the impression that all conditions provide the parties with a "let-out" or discretion to avoid on non-fulfilment[88] run the risk of being professionally embarrassed. Users of the REI NZLS Form are not immune from this danger; they need only receive an agreement not in the standard form (an "out-of-town" agreement) to be exposed to the general law.

[88] Possibly due to the impression gained from the use of the REI NZLS Standard Form of Agreement for Sale and Purchase — which expressly states that non-fulfilment provides the parties with a discretion to avoid the contract.