

1. CONTINGENT CONDITIONS

A. Introduction

I. Contingent condition:

- 1) Duty to perform oblig does not arise until occurrence/not of event -neither P promises to ensure will/not occur

II. Timing:

- 1) If no time specified, reasonable time implied; *Perri v Coolangatta* (1982)

B. Identification

I. Condition precedent: event must occur BEFORE performance due

- 1) Promissory
 - a. Obligation to perform promise does not arise until execution of other's promise
 - b. Tramways test of essentiality**
- 2) Non-promissory ('contingent')
 - a. No promise that condition precedent will be fulfilled
 - i.e. 'subject to' - weighs more to condition than promise; *McTier v Haupt* (1991)

II. Condition subsequent: duty of perform IMMEDIATE - comes to end should event occur/not

C. Approach

I. Determining whether immediate duty of performance arises

1) Distinguishing performance from formation

- a. Condition precedent to:
 - (1) **Formation**
 - (a) No enforceable rights UNLESS & UNTIL condition fulfilled; *Perri* (Mason dissent)
 - (2) **Performance**
 - (a) Rights created are capable of enforcement - obligation to perform depends on fulfilment
- b. **Presumption as to performance:**
 - a. CP to formation rather than performance where 'contract read as whole plainly compels this conclusion'; *Perri* (Mason J)
 - (2) **Rebuttable presumption:**
 - (1) Displaces where provide that the agreement is:
 - (1) 'subject to formal contract'; or (*Masters v Cameron*)
 - (2) 'subject to satisfactory survey' (*Astra Trust v Adams*)
 - (3) **Factors in favour:**
 - (1) Signature; *Perri* (Gibbs CJ)
 - (2) Obligations can be found prior to condition coming into effect e.g. payment of deposit, implied promise to take reasonable steps to fulfil CC; *Perri* (Gibbs CJ)

2) Has the need for fulfilment been eliminated?

- I. Waived by means of a **contractually agreed variation**, an **election** or an **estoppel**;

A. Contractually agreed

- A. Writing (if governed by Statute of Frauds), by deed & consideration

B. Waiver:

1. **Timing:** before express/implied time for fulfilment; *Grange v Sullivan*
2. **Benefit of waiving party**
 - i. Right rests with party for whose benefit clause exists; *Perri* - Brennan J
 - a. "one should not lightly imply a right of waiver in 1 party to possible prejudice of other unless it clearly emerges on face of contract"; *Sandra Investments v Booth* (1983) (Wilson J)
 - ii. **Sole benefit:** party seeking unilateral waiver; *Toga Developments 1973* - Mahoney J
3. **Onus of proof:** on party alleging condition for exclusive benefit; *Raysun v Taylor* (1971)
4. **Substance:** determine whether party has sole benefit of condition
 1. Temporal element likely to benefit both parties; *Perri* - Brennan
5. **Method:** Unequivocal indication of intent to dispense with condition - election between inconsistent rights; *Sargent v ASL Developments* (1974)