THE UNCERTAINTY OF CERTAINTY OF CONTRACT

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I INTRODUCTION

It is trite learning that even where all the other requirements of a contract have been met, it is still possible for an agreement to fail to qualify as a contract because of uncertainty. This may take the form of ambiguity in the language used by the parties or of vagueness, unintelligibility, or incompleteness in the terms of the contract.

So far as ambiguity is concerned, the situation may be resolved by the admission of extrinsic evidence as to the intention of the parties or by interpreting the agreement objectively. The fact that a contract has more than one possible meaning does not make it void for uncertainty, for as long as it is capable of a meaning, it will ultimately bear that meaning which the court decides is its proper construction. It is a matter of ascertaining the intention of the parties and of applying it. In this connection, recourse may be had to the doctrine of *ut res magis valeat quam pereat*; if there is ambiguity concerning the meaning intended by the parties and one possible meaning could render the instrument void for uncertainty, then the meaning consistent with validity should be favoured. However, if the ambiguity cannot be resolved or if the language employed by the parties is so obscure and so incapable of any definite or precise meaning that the court cannot attribute to the parties any particular contractual intention, the contract will be void for uncertainty.[1]

It is a fundamental principle of law that the court will not make a contract for the parties and where the parties have not reached final agreement or have merely agreed upon some terms, leaving others to be settled by further agreement, or where the parties have intended a final agreement but the terms are too vague or indefinite to be given effect, the court will not implement the transaction by spelling out appropriate terms. In order to constitute a valid contract the parties must so express themselves that their meaning can be determined with a reasonable degree of certainty. The terms must be so definite or capable of being made definite without further agreement that the promises and performances to be rendered by each party are reasonably certain.

However, so far as business agreements are concerned, the House of Lords has said[2] that it is the duty of the court to construe such contracts fairly and broadly without being too astute in finding defects, and this sentiment has found favour in local jurisdictions.[3] The problem must always be "so to balance matters that, without violation of essential

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1 *Drew Robinson & Co* v *Shearer* (1914) 18 CLR 209, 221; *Upper Hunter County Council* v *Australian Chilling & Freezing Co Ltd* (1968) 118 CLR 429, 436. See also *Life Insurance Co of Australia Ltd* v *Phillips* (1925) 36 CLR 60; *Bishop* v *Taylor* (1968) 118 CLR 518; *Brown* v *Gould* [1972] Ch 53, 61-62.

2 *Hillas & Co Ltd* v *Arcos Ltd* [1932] All ER Rep 494, 503 per Lord Wright.

3 *Upper Hunter County Council* v *Australian Chilling & Freezing Co Ltd* supra n 1; cited in *Palmer* v *Bank of New South Wales* [1973] 2 NSWLR 244, 253.

principle, the dealings of men may as far as possible be treated as effective and that the law may not incur the reproach of being the destroyer of bargains."[4] Hence, the courts are willing to make implications as to what is just and reasonable where the contractual intention is clear, especially in contracts of future performance over a period of time, as *Hillas & Co Ltd* v *Arcos Ltd* itself shows. In such a situation, there are usually standards of commercial custom and usage or course of dealing to assist the court in deciding what terms are just and reasonable.

As Lord Denning MR said in *F & G Sykes (Wessex) Ltd* v *Fine Fare Ltd*:[5]

> [I]n a commercial agreement the further the parties have gone on with their contract the more ready are the Courts to imply any reasonable term so as to give effect to their intentions. When much has been done, the Courts will do their best not to destroy the bargain. When nothing has been done, it is easier to say there is no agreement between the parties because the essential terms have not been agreed. But when an agreement has been acted upon and the parties . . . have been put to great expense in implementing it, we ought to imply all reasonable terms so as to avoid any uncertainties.

In *Hillas & Co Ltd* v *Arcos Ltd* the fact that the parties to the agreement had successfully carried through a similar transaction the previous year undoubtedly played a large part in the decision of the House of Lords upholding the sketchy agreement before it. The gaps could be filled by implying terms that were just and reasonable and in doing so recourse could be had to previous dealings as a yardstick to assist the court. Nevertheless, *Hillas & Co Ltd* v *Arcos Ltd* remains a high water mark of the length to which a court will go in implying reasonable terms to prevent an agreement failing for uncertainty. Such willingness has not always been apparent as the following pages of this article will show and even where the parties have themselves stipulated that the yardstick of reasonableness will be used as, for instance, in fixing the price, the courts have at times refused to decide what is reasonable and have held the agreement void for uncertainty. It is difficult to resist the conclusion that in such cases the courts have used the test of uncertainty of contract to perform a "channelling" function and have relied upon it as a basis for refusing to enforce an agreement which in the circumstances they felt should not be enforced.[6]

The last few years have seen a considerable modification of the rigid judicial view that contracts must be held void for uncertainty where the parties have left matters unresolved so that the court is left to impose its own view of what is fair and reasonable. The current approach appears to be that, so long as the parties have stipulated in the agreement that some formula or yardstick is to apply, even though it be a vague and

4 *Hillas & Co Ltd* v *Arcos Ltd* supra n 2 at 499 per Lord Tomlin; cited in *Prints for Pleasure Ltd* v *Oswald-Sealy (Overseas) Ltd* [1968] 3 NSWR 761, 765.

5 [1967] 1 Lloyd's Rep 53, 57-58. The case involved the continuing supply of chickens over a period of five years in numbers to be agreed upon from time to time, and it was held that what was a reasonable number could be ascertained by the arbitrator under the arbitration clause in the agreement.

6 Thus, in *Hall* v *Busst* (1960) 104 CLR 206, discussed infra pp 26-27, the defendant, a woman appeared to have made an improvident bargain in the light of the inflationary rise in the price of land subsequent to the making of the agreement, while in *Peters Ice Cream (Vic) Ltd* v *Todd* [1961] VR 485 (where a covenant in restraint of trade not to sell other brands of ice-cream within a reasonable distance from the defendant's shop was held void for uncertainty) questions of public policy were involved.

general one, the court will uphold the agreement and in doing so, will inevitably impose its own view of what is fair and reasonable in the circumstances of the case. But the overriding requirement still exists that the parties must have got beyond the stage of negotiation; they must have intended to enter into a contract but have failed to spell out precisely all relevant terms. Whether this stage has been reached or not must depend on the facts of each case.

The question of how far a court is prepared to imply reasonable terms to save an agreement is the main thrust of this article and emphasis will be placed on decisions dealing with agreements expressed to be "subject to finance" as well as on cases where no price is fixed by the agreement or where it is expressed to be fixed by mutual agreement between the parties at some time in the future. To begin with however, some reference will be made to the increasingly common practice of entering into agreements where one party is designated as including not only himself but also his nominee.

II Contract of Sale to B or His Nominee

Difficulties have arisen in relation to contracts for the sale or lease of land between A as vendor (or lessor) and B or his nominee as purchaser (or lessee). The first question is whether or not the contract defines the purchaser with sufficient certainty and dependent on that is the question whether or not the nominee can enforce the contract on his own behalf. The issue of uncertainty hinges on the precise words used in the agreement. If the agreement states that either B or C will purchase the land but no indication is given as to which person will ultimately be the buyer or how he is to be ascertained, there is nothing binding either B or C, neither is obliged to purchase and the agreement is void for uncertainty. But if B agrees that he or his nominee will buy the land, prima facie there is a contract binding B. The relevant principle is that that is certain which can be made certain and the ultimate purchaser is known as between two possible choices when B makes his nomination. The method of ascertaining the purchaser has been fixed by the parties A and B.[7]

But even though the contract is not void for uncertainty, it has been held by the New Zealand Court of Appeal in *Lambly* v *Silk Pemberton Ltd*[8] that if B nominates C as purchaser that does not in itself create a direct contractual relationship between C and the vendor A, at least in the absence of any express or implied consent on the part of A to the substitution of C for B. Such consent will of course usually be forthcoming but if A has already repudiated the contract and indicated that he will not proceed with the transaction his consent will not be available.

The actual decision of the New Zealand Court of Appeal was that the sale to B "or his nominee" merely stated expressly the existing right which a purchaser normally had to nominate who was to take title to the land, an interpretation of the words "or his nominee" which had been adopted in *Tonelli* v *Komirra Pty Ltd*[9] and *Jenkins* v *Smith*.[10] Their

7 *Lambly* v *Silk Pemberton Ltd* [1976] 2 NZLR 427, 431 (CA). The plea of uncertainty in a contract to grant an option to B or his nominee failed in *O'Halloran Enterprises Pty Ltd* v *Williamson* [1979] VR 33. See also *Westminster Estates Pty Ltd* v *Calleja* (1970) 91 WN (NSW) 222.

8 Ibid.

9 [1972] VR 737 (land sold to the plaintiff *and* his nominees).

10 [1973] VR 441, 447-448 (contract to sell to A *or* his nominee).

Honours went on however to consider the argument advanced on behalf of the purchaser that there had been a novation of the contract.[11] It was clear that there was no agency or trust relationship between B and C nor any assignment by B to C of his equitable interest in the land and the benefit of the contract. It was pointed out that the consent of the party to whom the original contractual obligation was owed was essential for there to be an effective novation[12] and no such consent was forthcoming in the instant case. Reference was made to dicta in *David Jones Ltd* v *Lunn*[13] and *Tonelli* v *Komirra Pty Ltd*[14] in which it was suggested that the mere exercise of his right of nomination by the purchaser or optionee was sufficient to enable the third party to enforce the contract on his own behalf, but their Honours were not disposed to adopt such an approach in the case before them.[15]

It follows from this view that in the absence of any agency or trust relationship or of any assignment of contractual rights, no privity of contract exists between vendor and nominee and the latter cannot enforce the contract on his own behalf. The words "or his nominee" do not entitle the purchaser, without reference to the vendor, to bring a third party of his own choosing into the contractual relationship in substitution for himself.

With respect, it is submitted that this is too rigid an approach. In the case of a sale by A to B or his nominee there is not an absolute obligation to purchase on the part of B followed by the purported substitution of a third party as obligor. B's obligation is a conditional one, the condition being that he does not nominate someone else as purchaser. A for his part agrees unconditionally to sell either to B or to whomsoever B nominates, that is, he agrees to sell to whichever of two persons B selects, and if B fails to nominate a third party he in effect selects himself. If however B nominates C with C's consent and A is advised of the selection, it is suggested that a contract exists between A and C and any notion of A's consent being required is beside the point.[16] A term can easily be implied in the transaction between A and B that B will act reasonably in choosing his nominee and will not select a man of straw, and it is equally easy to imply a term in the contract between A and C

11 It is one thing to direct the vendor to transfer the land to a third person nominated by the purchaser and quite another to allow the purchaser by his own election to get rid of his own contractual liability and substitute some other person of his own choosing: *Lambly* v *Silk Pemberton Ltd* supra n 7 at 429.

12 See eg *Fairlane Shipping Corporation* v *Adamson* [1975] QB 180, 188-189.

13 (1969) 91 WN (NSW) 468, 480. See also *O'Halloran Enterprises Pty Ltd* v *Williamson* supra n 7 where it was assumed that the nominee of the optionee could exercise the option. In *Godecke* v *Kirwan* (1973) 129 CLR 629 both the purchaser and his nominee sued on the agreement and the vendor agreed to carry it out if the Court decided that a binding contract had initially been made.

14 Supra n 9.

15 Supra n 7 at 433-434 per Cooke J, with whose judgment both Richmond P and Woodhouse J agreed.

16 See *Bell Bros Pty Ltd* v *Sarich* [1971] WAR 157, 159 cited in *O'Halloran* supra n 7 at 44. In the case of an option it appears that the grantee (or optionee) may exercise the option on behalf of the nominee even though the nomination has already been made: *Sidney Eastman Pty Ltd* v *Southern* (1963) 80 WN (NSW) 548; referred to in *O'Halloran* ibid at 45.

that C will do everything reasonably necessary to implement the contract, such as signing any memorandum of the agreement sufficient to satisfy the Statute of Frauds.[17]

III Contract of Sale "Subject to Finance"

The question whether a contract of sale which is expressed to be "subject to finance" or to be "conditional on the purchaser obtaining satisfactory finance" is valid or void for uncertainty, has been raised in a number of cases in recent years and a marked divergence of views on the part of the judiciary has become evident. To put the matter succinctly, the prevailing opinion in New South Wales and Victoria appears to be that such a qualification renders the contract void for uncertainty, while the diametrically opposed view is taken in Queensland and New Zealand. As far as Australia is concerned, the matter obviously awaits authoritative determination by the High Court of Australia. Before the various decisions are canvassed some preliminary observations should be made.

In the first place, a "subject to finance" clause would appear to be used mainly by land agents, being avoided by lawyers because of the uncertainties it produces. Most solicitors would undoubtedly prefer to obtain an option to purchase from the vendor for a period long enough to see if finance can be obtained, rather than rely on such a nebulous clause. If a solicitor is forced to use such a clause, he will invariably word the condition as precisely as possible, specifying as many of the details as he can so as to minimize the area of uncertainty. Thus, he will indicate the maximum amount of finance required, the type of lending institution to be approached, the security to be offered, the maximum rate of interest and the terms of repayment which are acceptable to the borrower and so on, and in such a case the contract would undoubtedly be held to be valid.

But where the clause states baldly that the contract is "subject to finance" or "subject to finance satisfactory to the purchaser", problems arise. It is true that even where the clause is reasonably specific, indicating perhaps the type of lender and the amount sought eg, "subject to bank finance of $8,000 being obtained by the purchaser", there has been litigation. The decisions indicate that the courts are inclined to uphold the validity of a contract where the clause gives such details, being prepared to imply reasonable terms as to interest and repayment to fill the gaps. Certainly, the more specific the clause is, the greater the likelihood of its being upheld. Thus, in *Zieme* v *Gregory,*[18] where the contract was conditional on the purchaser obtaining a first mortgage loan of $4,000 on the security of the land from a life assurance society or other lending institution, and in *Tait* v *Bonnice,*[19] where the condition referred to the purchaser obtaining a loan of not less than $15,000 from a specified building society, the clause was upheld as valid.

Nevertheless, the fundamental question must always be — does the clause mean anything at all, and in answering this question the exact wording of the clause used is vital.

The usual reason for litigating "subject to finance" clauses is the attempt by the purchaser to recover the deposit paid by him on the

17 Cf *Lambly* supra n 7 at 429, 433.
18 [1963] VR 214.
19 [1975] VR 102.

ground that the clause is too vague and uncertain to have any meaning, that it vitiates the whole contract, and hence, even if finance is available, that he is entitled to recover his deposit as money had and received to his use. It is clear of course that the clause is not a meaningless addition to the substance of what was agreed on so that it can be ignored in accordance with the principle expounded in *Fitzgerald* v *Masters*[20] but is, on the contrary, an essential feature of the bargain. There is no intention by the parties that the contract should be binding irrespective of whether or not the provision has any meaning, and it must therefore follow that if the clause is held to be too uncertain, the whole contract is vitiated and the purchaser can recover his deposit.[21]

Recovery of the deposit is however not the only reason for litigation and the decisions show that actions have been brought by the vendor for specific performance or for damages for breach of contract,[22] by the purchaser seeking specific performance, or damages for loss of his bargain[23] and by the vendor seeking a declaration that the contract has been rescinded and claiming possession and damages.[24]

1 *Validation by Extrinsic Evidence*

The first matter for determination is whether a "subject to finance" clause must be construed from the words in the contract alone or whether extrinsic evidence is admissible to amplify it and if so to what extent. This question was considered in the New Zealand case of *Eastmond* v *Bowis*[25] a decision which emphasises that "subject to finance" clauses do not exist in a vacuum but must be read subject to the context in which they are found. Richmond J considered that a bare "subject to finance" clause did not have a "fixed meaning not susceptible to explanation" so as to render extrinsic evidence inadmissible in accordance with the rule in *Bank of New Zealand* v *Simpson*.[26] However, evidence by the plaintiff purchaser as to the meaning which he himself intended the clause to bear was clearly inadmissible as the ambiguity in the words was patent, whereas direct evidence of intention was admissible only in the case of an "equivocation" or latent ambiguity. The evidence which in his Honour's opinion was properly admissible for the purposes of interpretation was evidence of surrounding circumstances.[27]

It thus appears that extrinsic evidence is admissible as to the circumstances forming the background against which the parties entered into the contract, as opposed to their negotiations, so that an objective examination may be made of the surrounding facts to ascertain the meaning to be given to ambiguous words.

20 (1956) 95 CLR 420. See also *Nicolene Ltd* v *Simmonds* [1953] 1 QB 543; *Bosaid* v *Andry* [1963] VR 465.

21 *Moran* v *Umback* [1966] 1 NSWR 437, 440 (CA); *Grime* v *Bartholomew* [1972] 2 NSWLR 827, 837.

22 *Knotts* v *Gray* [1963] NZLR 398; *Gagliardi* v *Lamont* [1976] QdR 53.

23 *Grime* v *Bartholomew* supra n 21; *Tait* v *Bonnice* supra n 19; *Bradford* v *Zahra* [1977] QdR 24; *Scott* v *Rania* [1966] NZLR 527; *Janmohamed* v *Hassam* (1976) 126 New LJ 696.

24 *Zieme* v *Gregory* supra n 18.

25 [1962] NZLR 954.

26 [1900] AC 182.

27 Supra n 25 at 959. His Honour referred to *Blakely and Anderson* v *De Lambert* [1959] NZLR 356, 367 and *Inglis* v *Buttery & Co* (1878) 3 App Cas 552. See also *Howard Smith & Co Ltd* v *Varawa* (1907) 5 CLR 68, 73; *Prints for Pleasure Ltd* v *Oswald-Sealy (Overseas) Ltd* supra n 4 at 762.

This approach has been endorsed by the Supreme Court of Western Australia in *Jones* v *Walton*[28] where the clause in issue was a condition that bank finance would be available by a specified date, and extrinsic evidence was adduced to construe the provision. The Court's approach can be itemised in this way:

(i) Where there is a contract in writing, extrinsic evidence cannot be used to contradict, vary, or add to the terms of the document or to prove that the intention of the parties was other than appears on the face of the instrument.

(ii) The problem is not to find what the parties meant, but what their agreement means.

(iii) In construing a written document, evidence can be adduced of the circumstances which formed the background against which the parties entered into the contract. The court ought to know the surrounding circumstances so as to place itself as nearly as possible in the position of the parties, for their intention is expressed in words used with regard to particular circumstances and facts.

In the light of the surrounding circumstances, the court in both *Eastmond* v *Bowis* and *Jones* v *Walton* was able to interpret the "subject to finance" clause so as to give it a precise meaning. It should be added that, as already mentioned, the court is, if necessary, prepared to imply that the finance sought will be on reasonable terms as to interest and repayment of capital,[29] and in so doing it is not making a contract for the parties for the criterion of what is reasonable is an external one — the current rates prevailing in the market place for the type of security in question.

2 *Where No Extrinsic Evidence Available*

What is the position if surrounding circumstances are of no help in explaining the meaning to be given to a bare "subject to finance" clause? A conflict of authority on the point is immediately apparent. In *Hines* v *Good*[30]Macrossan CJ considered that the clause could be interpreted to mean that the contract was subject to the purchaser being able to obtain a loan on reasonable terms, both of interest and repayment, of an amount reasonably necessary to complete the contract.[31] This paraphrase of the elliptical condition was criticised by Hanger J in *Atherton* v *Flodine*[32] on the ground that the decision in *Hines* v *Good* assumed that a meaning could be given to the clause without giving it any

28 [1966] WAR 139. Extrinsic evidence was admitted in *Mulvena* v *Kelman* [1965] NZLR 656 to show that the finance contemplated by the parties was to be raised from a particular source and also to show the amount which it was anticipated would be required to be raised.

29 See *Barber* v *Crickett* [1958] NZLR 1057; *Jubal* v *McHenry* [1958] VR 406; *Eastmond* v *Bowis* supra n 25.

30 [1951] QWN 3.

31 His Honour's view was obiter, for his actual decision was that at no time was the purchaser able to obtain a loan on reasonable terms.

32 [1959] QdR 364, 371 (FCt).

approval.[33] His Honour was careful to express no opinion as to whether any definite meaning could be given to the clause and similar criticisms were voiced by O'Bryan J in *Jubal* v *McHenry*[34] and by Richmond J in *Eastmond* v *Bowis*[35] both of whom thought that in the absence of any other evidence no meaning could be given to the term with any reasonable certainty. On the other hand, in *Barber* v *Crickett*[36] where the clause was a little more precise in that it referred to the purchaser arranging the necessary mortgage finance to purchase the property within thirty days, Cleary J relied on *Hines* v *Good* in rejecting the plea of uncertainty and held that the amount of finance could not be left to the capricious determination of the purchaser.[37]

(a) New South Wales — contract invalid.

In *Moran* v *Umback*[38] the contract was for the sale of a wine saloon business subject however to finance being arranged on a £1,000 deposit. The amount of finance required was therefore ascertainable, even if an allowance were made for stamp duty and legal costs.[39] Nevertheless, the New South Wales Court of Appeal held that the condition was so vague that no precise meaning could be attributed to it and consequently no binding contract of sale had ever been made. The decision can perhaps be explained on the ground that it was a case involving not the sale of land but the sale of a business, and that there are many different methods of financing the purchase of a wine saloon. In the absence of any evidence as to the method of financing contemplated by the parties, it would not be possible to determine the criteria on which a court could decide what was reasonable.

In the light of the decision of the New South Wales Supreme Court in *Grime* v *Bartholomew*[40] however it would seem that this explanation of the case is doubtful. *Grime's* case involved the sale of land and the contract was expressed to be "subject to finance being arranged". The purchaser obtained the necessary finance within nine days of entering into the agreement and when he advised the vendor of his success he was met by a refusal to proceed as the vendor had obtained a higher offer from a third party. Holland J, following the dictum of O'Bryan J in *Jubal* v *McHenry*, regarded the clause as too uncertain to operate as a condition and hence held that the whole contract failed for uncertainty.

33 With respect, this explanation of the decision in *Hines* v *Good* is open to question. Macrossan CJ. supra n 30 at 4-5. began his paraphrase of the condition thus: "What does this phrase 'This sale is subject to finance' mean? Well, I think, from the least favourable point of view—looking at it from the point of view of the purchaser—that it should be considered to mean thus: subject to the purchasers being able to obtain a loan on reasonable terms, both of interest and repayment, of an amount reasonably necessary for the purchasers to complete the contract in accordance with the terms. It may even be susceptible of the construction that it was subject to the purchasers being able to obtain such a loan of an amount which they bona fide thought necessary for them to complete the contract in accordance with the terms."

34 Supra n 29 at 409-410.

35 Supra n 25 at 958.

36 Supra n 29.

37 Ibid at 1062. His Honour relied on extrinsic evidence to ascertain the amount of finance required.

38 Supra n 21.

39 As to this, see *Hines* v *Good* supra n 30.

40 Supra n 21.

His Honour made no reference to the admission of extrinsic evidence, being content to say that the clause was silent as to amount, term of the loan, rate of interest, conditions of repayment, class of lender, secured or unsecured, or form of security.

Holland J dealt with the argument that as the condition was inserted entirely for the benefit of the plaintiff purchaser he could waive the benefit[41] and sue for specific performance, by holding that such a principle applied only to a clause which was not too uncertain to operate as a condition and was valid.

After *Grime* v *Bartholomew* it would be a bold man who would say that a "subject to finance" clause was valid in New South Wales, even where there was extrinsic evidence available to interpret it.

(b) Queensland — contract valid.

The next development was the decision of the Supreme Court of Queensland in *Gagliardi* v *Lamont*.[42] The relevant clause in a contract for the sale of land provided that the purchaser should forthwith make application to any bank or finance company for suitable finance, and on making such application the contract was conditional on such finance being available within thirty days. It will be noted that the clause was not merely a bare "subject to finance" one but indicated that the type of finance should be that from a bank or financier, although no amount was specified and the stipulation was that the finance should be suitable.

Matthews J held that the clause was not void for uncertainty. His Honour referred to the differing views that had been advanced as to the meaning of "subject to finance" but regarded the various decisions as of limited assistance since in none of the cases were the words used the same as appeared in the agreement before him. He continued:[43]

> I think it important in this behalf that the purchaser was required and had the right to make the application for finance and I am of opinion that he was the one to decide the basis of it and the amount of the loan and terms of the loan required by him. He was the arbiter of those matters and although he could not be heard to say that he had a right thereby to act unreasonably or capriciously the position had been reached that so far as the two parties to the contract were concerned there was no term upon which they still had to agree. In these circumstances I do not think it could be said that the clause is meaningless or uncertain and although something still had to be determined, the determination did not depend upon the agreement between the parties. . . .

With respect, there appears to be an element of circuity of reasoning in the approach adopted by Matthews J. His Honour first assumed that the

41 See *Scott* v *Rania* supra n 23 where it was held that any waiver must be effected before the expiry of the time allowed to fulfil the condition. In *Tait* v *Bonnice* supra n 19 at 104-106 a subject to finance clause was held to be for the benefit of the purchaser alone. This matter is discussed infra pp 24-25.

42 [1976] QdR 53. The decision in *Bishop* v *Taylor* [1968] QdR 281; affirmed (1968) 118 CLR 518. assumed that a contract "subject to satisfactory finance" was valid, a decree for specific performance being refused because of uncertainty as to the meaning of "one-third share of crops".

43 Ibid at 56, referring to *May & Butcher Ltd* v *The King* [1934] 2 KB 17, 21 per Lord Dunedin. The point that Lord Dunedin sought to make in his judgment was that a concluded contract was one which settled everything necessary to be settled and left nothing to be settled by future agreement between the parties. Something might still have to be determined, but this must not depend on further agreement between the parties.

contract was binding so that the purchaser was required to make application for finance and then concluded that since the parties had agreed on how the amount and terms of the loan were to be ascertained, by the purchaser acting reasonably, there was no element of uncertainty in the agreement and it was binding. No doubt a similar circuity of reasoning is to be found in many cases where the maxim "that is certain which can be made certain" is applied.[44]

On the approach adopted by Matthews J it would seem that, given that the buyer is required under the contract to make reasonable efforts to obtain the necessary finance, most agreements expressed to be "subject to finance" will be valid. There is no need to consider whether extrinsic evidence to interpret the condition is admissible, since the parties are agreed on how the amount and terms of the loan are to be fixed—by the purchaser acting reasonably. It is true that in *Gagliardi* v *Lamont* the reference was to the obtaining of "suitable finance", which may be interpreted as meaning "finance suitable to the purchaser", but this merely emphasises that the purchaser, albeit acting objectively, is to be the arbiter of the terms and conditions of the loan. There are a number of decisions on the effect of such phrases as "satisfactory mortgage finance" or "finance satisfactory to the purchaser". Where the former language is used, it is established that the phrase means finance "which a reasonable man acting fairly would consider to be satisfactory in the circumstances of the particular case"; the objective test is applied.[45] It is true that in *Lee-Parker* v *Izzet (No 2)*[46] it was held that the concept of a satisfactory mortgage was too indefinite to be given practical meaning as it left everything at large and that therefore the contract was void for uncertainty, but this decision was not followed in the case of *Janmohamed* v *Hassam*[47] where the condition in the agreement referred to finance satisfactory to the purchaser.

3 *A Subjective or Objective Test of "Reasonableness"?*

It might be thought that a "subject to finance" clause in the latter terms would import a subjective test, with the satisfaction being that of the particular purchaser concerned, provided only that he was acting bona fide in expressing his dissatisfaction with the finance offered, but Slade J in *Janmohamed* v *Hassam,* found himself able to imply a term that in such a case the purchaser would not unreasonably withhold his satisfaction, and it was on this ground that his Lordship distinguished *Lee-Parker* v *Izzet (No 2).*

It is submitted that in the light of *Janmohamed* v *Hassam* there is no real distinction between "satisfactory finance" and "finance satisfactory to the purchaser". In both cases, the objective test will be applied.

44 Cf *Bushwall Properties Ltd* v *Vortex Properties Ltd* [1976] 1 WLR 591, 599, 604-605.

45 *Knotts* v *Gray* supra n 22; *Martin* v *MacArthur* [1963] NZLR 403; *Lee-Parker* v *Izzet* [1971] 3 All ER 1099, 1105. The onus is on the purchaser to show that his decision rejecting the available finance as unsatisfactory was a fair and reasonable one: *Knotts* v *Gray.*

46 [1972] 1 WLR 775. Goulding J held that the term "This sale is subject to the purchaser obtaining a satisfactory mortgage" was a condition precedent to the existence of a binding contract of sale.

47 Supra n 23.

A decision which appears to run counter to this view is *Katz* v *Jones*[48] where the relevant condition referred to the arranging of mortgage finance (over the land being bought) which was suitable to the purchaser. Tompkins J assumed that the conditional agreement was valid but regarded the requirement of finance suitable to the purchaser as importing a subjective test, with the buyer being the sole judge of what finance he required or what was satisfactory for his purposes. This was not a case however of the purchaser seeking to escape from a contract on the ground that the finance available was unsatisfactory. On the contrary, the vendor had repudiated the contract and the buyer was seeking a decree of specific performance. The main issue before Tompkins J was whether the necessary finance had been obtained within the time specified in the contract and his Honour held that the purchaser did not need to have a legally binding agreement for a loan by way of mortgage by the required date — a promise to lend was enough, being covered by the term "arranging" — and further, that the buyer was entitled to say that a smaller sum was suitable to him in lieu of his original loan request for a higher amount.

In reaching his conclusion in *Gagliardi* v *Lamont* Matthews J may have been influenced by the decision of the High Court of Australia in *Godecke* v *Kirwan*[49] although he made no reference to that case in his judgment. The contract for the sale of land in that case contained a clause that the purchaser would, if required by the vendor, execute a further agreement containing specified particulars "and such other covenants and conditions as [the vendor's solicitors] may reasonably require". The vendor alleged that no binding contract existed but this submission was rejected by the High Court. It was held firstly that the case was one in which the parties intended that a further formal contract should be executed but did not intend to make the execution of a formal contract a condition of the coming into existence of a binding agreement.[50] Secondly, while it was clear that the parties intended that the formal contract might introduce new terms, this did not prevent a binding contract being made to begin with. What the relevant provision left to be determined was not dependent upon any further agreement between the parties. A binding contract could be made on the basis that a matter was left to be determined by one of the contracting parties, although it might well be that certain limitations were to be imposed such as that the fresh terms must be reasonable in an objective sense and should not be inconsistent with the terms of the original contract. What the clause meant was not that the parties had not got beyond the stage of negotiation, but that one party agreed as part of the bargain to accept such additional provisions as the other party or a third party might require, provided they satisfied the criteria of consistency and reasonableness.

One reservation to this principle was stated by Gibbs J. If the agree-

48 [1967] NZLR 861.

49 (1973) 129 CLR 629.

50 See *Masters* v *Cameron* (1954) 91 CLR 353; *Niesmann* v *Collingridge* (1921) 29 CLR 177. It will be recalled that a condition "subject to contract" or "subject to formal contract" raises a presumption, but no more, that the parties have not got beyond the stage of negotiation. This presumption was rebutted in the instant case. The matter is one of construction of the agreement in each situation . See also *Reid Motors Ltd* v *Wood* [1978] 1 NZLR 319 (agreement to complete usual hire purchase agreement).

ment leaves a matter to be decided by one party as opposed to a third party, in such circumstances that it gives him an option or discretion as to whether he will perform his side of the bargain, the so-called contract is in reality illusory. Gibbs J appeared to take the view that in any case where an *essential* term was left to be fixed by one of the contracting parties, as opposed to a third person (albeit the solicitor for a contracting party) that party had a discretion or option as to whether he would carry out his undertaking and there would therefore be no contract. It follows from this view that only where agreement has been reached on all essential terms and only subsidiary matters have been left for determination by one of the parties, can there be a valid contract.[51] The question no doubt comes down to asking whether the parties have a present contractual intention as opposed to an expectation of future agreement and if so, whether they have agreed upon all terms, whether essential or subsidiary, or have agreed on how some of those terms are to be determined, be it by one of the contracting parties or by a third person. It is submitted, with respect, that the fact that A and B agree that B is to fix an essential term does not necessarily give B an option as to whether or not he will carry out his undertaking. In any contract a party has the power to refuse to perform his side of the bargain and he has an option in that sense, but that does not prevent a contract from arising. In the instant case it is suggested that if B fails to fix that term he will be liable in damages for breach of a collateral warranty if not for breach of the main contract. This follows from the principle, *certum est quod certum reddi potest.*

This appears to have been the approach adopted by Bray CJ in *Powell* v *Jones*[52] a decision which, together with *Sweet & Maxwell Ltd* v *Universal News Services Ltd*[53] influenced the High Court of Australia in *Godecke* v *Kirwan.* Both cases involved leases of land. In *Sweet & Maxwell* the lease contained a clause giving the lessee a right of renewal on the basis that the renewed lease should contain such other covenants and conditions as should be reasonably required by the lessor. The English Court of Appeal refused to hold the agreement void for uncertainty, Pearson LJ remarking that the formula of reasonableness was a convenient and effective means of dealing with the position where the parties had agreed on the main points but had not yet settled the details, and wished to make a binding agreement immediately. By using a formula which introduced the objective test of reasonableness, the parties avoided making a mere agreement to agree which would be unenforceable. It was for the court to decide on the reasonableness of a requirement if the parties were unable to agree.[54]

In *Powell* v *Jones* the vital formula of reasonableness was missing, the agreement for a lease merely stating that it was to be in terms and to contain such special clauses as the landlord might require. Bray CJ took the view that while the condition left something still to be determined, such determination did not depend on any further agreement between the parties. It did not matter whether under the agreement certain terms were to be settled by a third party or by one of the contracting parties, so long as that party was not left with an option as to whether there should

51 Supra n 49 at 646-647.
52 [1968] SASR 394.
53 [1964] 2 QB 699.
54 Ibid at 733; at 735 per Buckley J.

be any performance at all, and so long as all the other terms had been agreed upon.[55] His Honour regarded the absence of any requirement as to reasonableness as irrelevant and said that there was nothing in *Sweet & Maxwell* to indicate that the English Court of Appeal would have held the agreement to be unenforceable if the word "reasonably" had been omitted.[56] His Honour was however prepared to read into the condition the qualification that the terms and special clauses were not to be inconsistent with the express provisions of the agreement already reached and he went on to suggest that they must be reasonable as well, at least insofar as a litigant was seeking to obtain a decree of specific performance.[57]

The debt owed by the High Court of Australia to these two decisions is apparent. *Godecke* v *Kirwan* is a major step along the road towards the liberalising of the approach of the courts to the problem of uncertainty. As indicated above, the High Court decision was not referred to by Matthews J in his judgment in *Gagliardi* v *Lamont* but it is a reasonable supposition that he had it in mind when he reached the conclusion he did.

4 *Validation by Subsequent Events?*

There is only one further case on "subject to finance" clauses to which reference should be made and that is the decision of the Supreme Court of Queensland in *Bradford* v *Zahra*.[58] A contract for the sale of land contained a term that it was "subject to the purchasers' obtaining suitable finance". The finance was forthcoming but the vendor pleaded the uncertainty of the term as a defence to an action for specific performance.

Kneipp J said that the question whether the condition was too vague to be enforceable had not been decided in Queensland. His Honour accepted the view of *Hines* v *Good*[59] taken in *Atherton* v *Flodine*,[60] that Macrossan CJ merely assumed for the purpose of dealing with submissions made to him that the construction suggested by him was a possible one without in fact deciding that such was in fact the case.[61] Kneipp J referred to the conflict of authority on the matter and while expressing his personal preference for the reasoning and results in the New Zealand decisions upholding the validity of the clause, felt that the weight of authority especially that of the New South Wales Court of Appeal in *Moran* v *Umback*[62] was the other way.

However, his Honour found a way around the difficulty by praying in aid the principle applied in *Macaulay* v *Greater Paramount Theatres Ltd.*[63] If the part of the contract which was not certain or could not be specifically performed had been rendered certain or had been performed

55 Supra n 52 at 398.
56 With respect the existence of the formula of reasonableness seems to have been regarded as highly relevant in *Sweet & Maxwell* supra n 53. See *Godecke* v *Kirwan* supra n 49 at 647 per Gibbs J.
57 Supra n 52 at 402.
58 [1977] QdR 24.
59 Supra n 30.
60 Supra n 32 at 371.
61 The view has already been expressed that this explanation of the decision in *Hines* v *Good* is open to doubt.
62 Supra n 38.
63 (1922) 22 SR (NSW) 66.

before suit was brought, the court could order specific performance of the contract. It is submitted with respect that this proposition is untenable in the context of "subject to finance" clauses. The question is whether a contract exists or not, and that issue must surely be decided at the time of entry into the agreement. An agreement which is too uncertain to be a contract at its inception does not thereafter become a contract once the uncertainty is removed. In the case relied on by Kneipp J no argument was advanced that the contract as originally formed was too uncertain to be a contract. The only question was whether there could be specific performance of the defendant's obligation to supply plans and specifications so as to enable the plaintiff to apply for the consent of the lessor which he had contracted to get. There was nothing in the contract to show what the plans and specifications were to be, but this difficulty was removed when the defendant supplied the necessary data. This principle, applied with reference to the granting of a discretionary equitable remedy, is a far cry from saying that an agreement which is too uncertain to be a contract becomes a contract retrospectively as soon as and because the uncertainty is removed.

If Kneipp J is right, then the decision of the New South Wales Supreme Court in *Grime* v *Bartholomew*[64] is wrong, because the facts in that case showed that finance had been obtained by the purchaser and he had so advised the vendor before the latter repudiated the transaction.

5 *Condition Precedent or Condition Subsequent?*

It remains to say this, if a "subject to finance" clause is valid, then it will be a condition of the contract, and it will usually be a condition subsequent; that is, the agreement will be binding but may be determined on the failure to obtain the requisite finance.[65] The purchaser who seeks to rely on the non-fulfilment of the condition must of course establish that he has made reasonable efforts to obtain the necessary finance, as otherwise he would be relying on his own default to get out of the bargain.[66] This is so even though the agreement provides that on non-fulfilment of the condition the contract is to be null and void. The word "void" is to be construed as meaning "voidable at the instance of the party not in default", or, if neither party is in default, at the instance of either party.[67] In the case of a "subject to finance" clause it has been

64 [1972] 2 NSWLR 827.

65 *Zieme* v *Gregory* [1963] VR 214; *Tait* v *Bonnice* [1975] VR 102.

66 *Barber* v *Crickett* [1958] NZLR 1057, 1060; *Scott* v *Rania* [1966] NZLR 527, 534; *Zieme* v *Gregory* ibid at 223. In *Mulvena* v *Kelman* [1965] NZLR 656 it was held that the duty to take all reasonable steps to obtain finance was an implied contractual term with the onus of proof that he had done so resting on the plaintiff purchaser, and this view was endorsed in *Gardner* v *Gould* [1974] 1 NZLR 426, 428, 436-437, 440. Of course, if the obligation to obtain finance is not limited to the purchaser alone but extends to both parties the position is more complicated and may amount to neither party being obliged to make reasonable efforts to obtain finance or conversely both parties being equally under an obligation to do so: see *Gardner* v *Gould* (interconnected contracts of sale).

67 *Barber* v *Crickett* ibid at 1059-1061, citing *Suttor* v *Gundowda Pty Ltd* (1950) 81 CLR 418 and *New Zealand Shipping Co Ltd* v *Société des Ateliers et Chantiers de France* [1919] AC 1; *Raysun Pty Ltd* v *Taylor* [1971] QdR 172. Cf *Scott* v *Rania* ibid at 535.

held that it is one for the benefit and protection of the purchaser alone,[68] and accordingly he may waive fulfilment of the condition at any stage and insist on completion of the contract.

However, in both *Mulvena* v *Kelman*[69] and *Scott* v *Rania*[70] a "subject to finance" clause was held to be a condition precedent whereby liability under the agreement arose only after the fulfilment of the condition, with the result that on failure to arrange the finance within the stated period the contract automatically came to an end and was not merely voidable. This result is subject to the principles outlined above. Firstly, a party cannot take advantage of the failure of the condition unless he has carried out any term implied in the contract to take all reasonable steps to fulfil the condition,[71] and secondly, the party for whose benefit the clause is inserted has the right to waive performance of the condition, but only up to the time for its fulfilment allowed by the contract.[72]

Whether the "subject to finance" clause amounts to a condition precedent or a condition subsequent may therefore be of some importance and the sole test of this is the plain intention of the parties to be determined from the text of the contract.[73] It would seem that if an offer is made subject to the condition that the offeror is able to arrange the necessary finance and the offer is accepted on that basis, the contract may be subject to a condition precedent.[74] As already pointed out however, this whole discussion is predicated on the clause in question being regarded as valid and not too uncertain to vitiate the contract. If a court holds that the clause is so uncertain that the parties must be considered as having failed to reach an enforceable agreement at all, it does not matter whether the clause is a condition precedent or subsequent. Likewise, any question of waiver is irrelevant.[75]

IV Agreements Where Price or Rental is Not Expressly Fixed

It is clear from the foregoing that there is a conflict of authority on the validity of contracts containing a bare "subject to finance" clause, a situation which should be a matter of concern to the legal practitioner

68 *Barber* v *Crickett* ibid at 1060; *Tait* v *Bonnice* supra n 65 at 104-106; *Zieme* v *Gregory* supra n 65; *Gardner* v *Gould* supra n 66 at 439.

69 Supra n 66.

70 Supra n 66. See the principles governing the operation of conditions precedent discussed at 534.

71 *Mulvena* v *Kelman* supra n 66. But if the vendor by his actions prevents the purchaser from meeting the condition the latter is not required to perform; cf *Whitehall Estates Ltd* v *McCallum* (1976) 63 DLR (3d) 320.

72 *Scott* v *Rania* supra n 66.

73 *Griffiths* v *Ellis* [1958] NZLR 840, 863; *Mulvena* v *Kelman* supra n 66 at 657; *Scott* v *Rania* ibid at 531, 533. In a contract of the type under discussion, the intention is generally shown by the form of the clause. See also McKenzie, " 'Subject to Solicitor's Approval' Clauses" (1981) 5 Otago LR 145 where the question is explored in depth.

74 Cf the clause in *Scott* v *Rania* ibid ("This offer is subject to my being able to arrange mortgage finance of £2,000 on the security of the property within fourteen days of acceptance hereof") with that in *Barber* v *Crickett* supra n 66 ("This agreement is conditional on the purchaser arranging the necessary mortgage finance to purchase the property within thirty days. . . . In the event of his being unable to secure the finance this agreement will become null and void") and *Zieme* v *Gregory* supra n 65 ("This contract is conditional upon the purchaser obtaining a first mortgage loan . . . on or before settlement"). Cf *Tait* v *Bonnice* supra n 65.

75 *Grime* v *Bartholomew* supra n 64 at 838.

for such clauses are commonly used in practice.[76] There appears to be a similar divergence of opinion on the part of the judiciary in relation to the validity of agreements for the sale or lease, usually of land, where the price or rental is not expressly stated by the parties and attention must now be drawn to such cases.

It is appropriate to begin with the decision of the High Court of Australia in *Hall* v *Busst*,[77] a case which involved the sale of an island off the coast of Queensland. A sold the land to B and at the same time obtained agreement from B that she would not transfer or lease the land without A's consent and that if she wished to sell she would give A the first option to repurchase the island at the price paid by B plus the value, as at the date of exercise of the option, of all additions and improvements to the property since the date of purchase, less the value of all deficiencies of the chattels and a reasonable sum to cover depreciation of the buildings et cetera. When B resold the land to a third party in defiance of this agreement, A sued for damages for breach of covenant but failed in his action, the High Court holding by a bare majority of three to two that there was no enforceable contract.

Obviously, there are overtones in the case of a restraint on alienation and indeed one ground for the decision was that the agreement was void as being a contractual restraint on such alienation. The other ground for the decision was however that the option to repurchase was unenforceable because the price was too indefinite. The view taken by the majority was that there was no external standard to assess the value of additions or deficiencies nor any means by which a reasonable sum to cover depreciation was to be arrived at. A "fair value" to be found by the court or a jury could only be ascertained if a recognised standard of value existed which was not the case.[78] Where the parties were silent as to price, there could not, in the case of a sale of land, be implied a term that a reasonable price was to be paid. If the actual price was not fixed by the parties it could only be fixed by the court in an action, and in such a case the party bringing proceedings came into court without a complete cause of action. It was as though he said: "Complete our contract for us and then enforce it."

It is submitted with respect that the majority decision in *Hall* v *Busst* is wrong. Surely it is a matter of evidence as to what might be the value of improvements or deficiencies on an island off the Queensland coast. The dissenting judgments of Windeyer and Kitto JJ are clearly right in holding that an agreement to sell land at a reasonable price is valid, so long as the reasonable or fair value of the land is an ascertainable objective fact. There is no uncertainty as the parties have fixed the price by reference to a standard of what is reasonable, and that can be ascertained by the law.

In contracts for the sale of goods it was established by decisions in the

76 In *Bradford* v *Zahra* supra n 58 Kneipp J regarded the use of such clauses as common in Queensland and said that in his experience their use did not appear to have caused great difficulty.

77 (1960) 104 CLR 206.

78 The attitude of Fullagar J was that a meaning could be given to "value" and to a "reasonable sum to cover depreciation", but that the exercise of the option by A would not create a binding contract as no price had been fixed.

nineteenth century and embodied in the Sale of Goods Act[79] that where the price was not otherwise determined, a promise to pay a reasonable price was to be implied. The majority decision in *Hall* v *Busst* purported to draw a distinction between contracts for the sale of land and improvements and those for the sale of goods, regarding the rule in the latter case as anomalous. It is submitted that this is a distinction without a difference, and that *Hall* v *Busst* is wrongly decided.[80]

Hall v *Busst* must be contrasted with the decision in *Smith* v *Morgan*[81] where land was sold on the basis that for five years the vendor would not sell adjoining land retained by her and that if thereafter she was minded to sell it she would give the purchaser first option to buy "at a figure to be agreed upon". The vendor later took the view that this undertaking was not binding on her as no agreement had been made as to price or the means by which the price was to be determined.

Brightman J held that the agreement imposed an obligation on the vendor to make the purchaser an offer to sell at a price she was bona fide willing to accept. The agreement did not contemplate a concluded contract of sale, but the submission of an offer naming a figure at which a sale could be made, and the words "at a figure to be agreed upon" were irrelevant to the offer, although essential if a contract were to result. It appears that in this case the price indicated in the offer was not necessarily to be the market price or such value as the court might determine but the price which the vendor was bona fide willing to accept. The obligation was not to sell at a reasonable price but at a figure which was genuinely satisfactory to the vendor. In practice, the vendor could place an unrealistically high figure on the land and it would be difficult to show that in so doing he was not acting bona fide, a problem of which Brightman J appeared to be only too well aware in his judgment.

Stocks & Holdings (Constructors) Pty Ltd v *Arrowsmith*[82] is another case in which the High Court of Australia asserted the proposition that if the parties have not agreed on the price or on a method of determining the price, without the further concurrence of the parties, there is no contract. The agreement was for the sale of land to be subdivided by the purchaser, with the price to be fixed by multiplying a stated sum by the number of allotments produced by the subdivision. The agreement stipulated that any subdivision was to be subject to the approval of the vendor. This clause was interpreted as meaning that the vendor had a complete discretion to give or withhold his approval as he thought fit and that therefore no price was agreed upon which was either certain or capable of being rendered certain without the future agreement of the parties. It is suggested that the High Court of Australia could have decided the case on the basis that as the vendor was under no obligation to approve *any* subdivision at all, his promise to sell was in fact an illusory consideration for the promise to buy. There can be no contract if,

79 See *Acebal* v *Levy* (1834) 10 Bing 376; 131 ER 949; *Hoadly* v *M'Laine* (1834) 10 Bing 482; 131 ER 982; Sale of Goods Act 1896, s 11 (Qd). See also *Wenning* v *Robinson* (1964) 64 SR (NSW) 157 (sale of a business with stock "at valuation" held to be valid, the term importing a sale of the stock at a fair or reasonable value).

80 This may be of small comfort to a litigant who will have to take his case at least to the High Court of Australia in a bid to have the decision in *Hall* v *Busst* reversed.

81 [1971] 2 All ER 1500.

82 (1964) 112 CLR 647.

on the true analysis of the situation, a promise is supported by an undertaking by the promisee to do something in return only "if he feels like it".

A similar case of an illusory promise is illustrated by the High Court's decision in *Placer Development Ltd* v *Commonwealth of Australia*,[83] where the agreement provided for the Australian Government to pay a subsidy to an importer of timber from New Guinea if the latter were to be called on to pay customs duty. The undertaking was to pay a subsidy of an amount or at a rate determined by the Commonwealth from time to time but it was not to exceed the amount of the duty paid. The majority of the High Court interpreted this undertaking as giving the Government a complete discretion as to whether it would carry out the promise and held that it was therefore illusory.

The promise of a subsidy was meaningless in the absence of a specific amount or some basis for calculation. It could not be implied that a reasonable subsidy would be paid as no standard of reasonableness existed in such a case, and it was simply a promise to pay such subsidy if any as might be decided upon from time to time.

A strict approach was again taken by the High Court of Australia in *Whitlock* v *Brew*[84] where the purchaser of certain land covenanted that he would on taking possession, grant a lease of part thereof to an oil company for the sale of petroleum products on "such reasonable terms as commonly govern such a lease." A further term provided that in the event of a dispute as to the interpretation of this clause, the matter would be referred to arbitration. The majority of the High Court held that the clause was too uncertain for it did not specify either the term of the lease or the rent, and that as it was a material and inseverable part[85] of the contract of sale, there was no concluded agreement between the parties. It was further held that the provision for arbitration as to the interpretation and operation of the clause did not authorize an arbitrator to fix either the rent or the term. The basis for the decision appears to be that there was no previous course of dealing between the parties, no ascertainable set of reasonable terms in common use to which reference could be made to fix the period of the lease, rental et cetera,[86] and that the arbitration clause was of no effect if no contract existed at all. The agreement did not stipulate that a third party (the arbitrator) was to fix reasonable terms; but only that a dispute as to the terms commonly used in such a lease should be resolved by him.

With this case must be contrasted the decision of the New Zealand Court of Appeal in *Attorney-General* v *Barker Bros Ltd*[87] where the Court was able to take advantage of the more liberal approach to the question of uncertainty exemplified by such decisions as *Brown* v

83 (1969) 121 CLR 353. The view of the minority (Menzies and Windeyer JJ) was that the Commonwealth was contractually bound to fix a subsidy, its only discretion being as to amount.

84 (1968) 118 CLR 445.

85 Where one term is uncertain and the rest is not, the uncertain term may be severed if the contract is divisible. See *Life Insurance Co of Australia Ltd* v *Phillips* (1925) 36 CLR 60, 72; *Duggan* v *Barnes* [1923] VLR 27; cited ibid at 462.

86 If there had been in existence terms commonly used in such a lease there would have been no uncertainty: *Sweet & Maxwell Ltd* v *Universal News Services Ltd* supra n 53 at 726, 735.

87 [1976] 2 NZLR 495.

Gould,[88] *Godecke* v *Kirwan*,[89] *Bushwell Properties Ltd* v *Vortex Properties Ltd*[90] and *Cudgen Rutile (No 2) Pty Ltd* v *Chalk*.[91] In the last case, in a passage cited by the New Zealand Court of Appeal,[92] Lord Wilberforce said:[93] "Their Lordships consider that, in modern times, the courts are readier to find an obligation which can be enforced, even though apparent certainty may be lacking as regards some term such as the price, provided that some means or standard by which that term can be fixed can be found. . . ." In *Barker Bros* a clause in a lease gave the lessee the option of renewing it for a further period and went on to provide that "[t]he terms and conditions of any such renewed lease shall be as agreed upon by the parties at the time, but the rent shall not be less than the amount payable hereunder." The lessee purported to exercise its option, but the parties could not agree on the rental for the renewal. When the lessee sought to invoke an arbitration clause in the lease under which any *difference* or dispute arising in respect thereof was to be submitted to arbitration, the lessor took the view that the agreement was void for uncertainty.

The Court of Appeal rejected this contention, holding that the arbitration clause was available as a machinery for settling the disagreement between the parties.[94] It was pointed out that the parties had intended to enter into a binding agreement for renewal and had provided a machinery but no stated formula to guide the arbitrator. An appropriately worded arbitration clause could fill the gap even where important terms had been left unsettled,[95] and the reference to any difference between the parties as well as to any dispute covered a failure to agree.[96] While there was no stated formula to assist the arbitrator, their Honours felt that the proper approach to adopt was "that once the court is satisfied that the parties have provided, by means of an arbitration clause, a machinery to settle terms and conditions of a renewed lease, then the court should give effect to that intention unless it can be seen that the lack of some stated formula or standard will render the task of the arbitrators impossible in practice."[97]

Hence, if the situation is one where the parties have provided a machinery but no formula to cure an apparent lack of certainty, this will not necessarily mean that the contract is void for uncertainty. In the instant case, the court indicated that the obvious starting point was the terms of the existing lease and it was then for the arbitrator to decide whether in relation to the rent or any other term any change was reasonably required due to changed or unforeseen circumstances or the like. As regards the rent, the question was, what was fair and reasonable.[98]

88 [1972] Ch 53; discussed infra pp 30-31.
89 (1973) 129 CLR 629.
90 [1976] 1 WLR 591.
91 [1975] AC 520.
92 Supra n 87 at 499.
93 Supra n 91 at 536.
94 It was accepted by the lessee that had there been no arbitration clause in the agreement, there would have been no enforceable right of renewal. See supra n 87 at 498. The lessor declined to rely on the fact that the difference or dispute arose in respect of a renewal as opposed to the original lease.
95 Reference was made to *Foley* v *Classique Coaches Ltd* [1934] 2 KB 1 where the court implied a standard (a reasonable price) which the arbitrator could invoke in determining the price.
96 See *F & G Sykes (Wessex) Ltd* v *Fine Fare Ltd* [1967] 1 Lloyd's Rep 53, 60.
97 Supra n 87 at 503 per Richmond P.
98 Idem.

There are of course obvious differences between this case and *Whitlock* v *Brew*. In the first instance, the issue in *Barker Bros* involved the validity of a renewal of a lease which had been in existence for five years; it was not a question of what were the terms of a lease which was being challenged ab limine. It is of course vital (and stress was laid on this in *Barker Bros*) that the parties should intend to enter into an immediate and binding agreement and should intend that the machinery provided, ie the arbitration clause should be used to resolve any differences or disputes. In such a situation, as *Foley* v *Classique Coaches Ltd* and *F & G Sykes (Wessex) Ltd* v *Fine Fare Ltd* show, the arbitration clause can be used to fill any gaps, but it is important to note that in both these cases the contract which was challenged had been in operation for some time and the court had some data on which to base its implications as to a reasonable price for petrol supplied and a reasonable supply of broiler fowl respectively. Secondly, the arbitration clause must be drawn widely enough to meet the disagreement which has arisen between the parties. In *Barker Bros* the clause was drawn very widely whereas the corresponding clause in *Whitlock* v *Brew* was in a much narrower form. Finally, the members of the Court of Appeal in *Barker Bros* placed some importance on the fact that the fixing of a rental by arbitration on the renewal of a lease where agreement could not be reached, was a familiar practice in New Zealand.

In reaching its conclusion, the New Zealand Court of Appeal adopted and applied the opinion of Megarry J in *Brown* v *Gould*.[99] In that case an option to renew a lease "at a rent to be fixed having regard to the market value of the premises at the time of exercising this option, taking into account to the advantage of the tenant any increased value of such premises attributed to structural improvements made by the tenant" was upheld as valid. The clause provided no machinery for fixing the rent and Megarry J drew a distinction between three types of option—firstly where the renewal was simply "at a rent to be agreed" with no formula or machinery for quantifying the rent being laid down; secondly where the option was exercisable at a figure to be determined according to some stated formula (as for instance a sale "at a fair valuation" or a lease at a "fair and just rent") without any effective machinery being provided to work out that formula; and thirdly, where both a formula and machinery to apply it were provided. His Lordship regarded the first case as being prima facie no more than a mere agreement to agree in the future;[1] but he held that the second case, which was the situation before him was not too uncertain, since, where no effective machinery existed to work out the formula, the court had jurisdiction to determine it, provided always that the formula itself was not too uncertain. So far as the third case was concerned, his Lordship considered that it likewise was

99 Supra n 88 at 58.

1 There are many cases where an option for renewal of a lease "at a rental to be agreed upon" has been held void for uncertainty in the absence of machinery to meet a failure to agree. The courts are not prepared to imply any provision that in the absence of agreement the rental shall be a reasonable one. See eg *Beattie* v *Fine* [1925] VLR 363; *Eudunda Farmers Co-op Society Ltd* v *Mattiske* [1920] SALR 309; *Randazzo* v *Goulding* [1968] QdR 433; *King's Motors (Oxford) Ltd* v *Lax* [1970] 1 WLR 426. Cf *Re Nicholas & Grant's Lease* (1923) 44 ALT 169 (option to renew subject to lessor's right to review or increase the rental held not too uncertain as it would be implied that the lessor would act reasonably).

not too uncertain, but he agreed that if the option provided some machinery for fixing the price or rent, then the court would not step into the breach and provide some other machinery if the specified machinery broke down. To do so was to make an agreement for the parties which they had not made themselves.[2]

In the result, Megarry J held that the formula set out for fixing the rent payable on renewal was not too uncertain and that as no machinery for applying it was specified, the court could adopt any means it wished to ascertain the appropriate figure. In doing so, regard was to be had to the market value of the premises and the increased value due to improvements effected by the tenant as provided in the formula.

In the light of *Attorney-General* v *Barker Bros Ltd* a fourth type of option can be listed, namely one where the parties have provided a machinery, such as arbitration, but have provided no stated formula to assist the arbitrator in his task. In such a case the court should give effect to the parties' intention unless the lack of a formula renders the task of the arbitrator impossible.

The decision in *Brown* v *Gould* is a further refutation of the unsatisfactory principle applied in *Hall* v *Busst* where the formula set out by the parties in their agreement could surely have been worked out in appropriate fashion by the High Court of Australia. The classification evolved by Megarry J, although limited in terms to options for renewal of a lease is clearly of more general application. In *Bushwall Properties Ltd* v *Vortex Properties Ltd*[3] Oliver J appeared to regard the classification as applicable to contracts for the sale of land and the Court of Appeal did not dissent from this view,[4] reversing his Lordship's finding on the ground that as no formula or machinery was provided in the contract and as no reliance was placed on any implied term, resort was had to the general law which in the circumstances could not cure the uncertainty.

It is true that the formula itself may in a particular case be too uncertain to be implemented by the court[5] but it is submitted that such was not the position in *Hall* v *Busst*. But even if no workable formula had been provided in that case it would appear on the authority of *Smith* v *Morgan*[6] that the option to purchase would have been valid, the obligation of the vendor being merely to offer to sell at a figure she was bona fide willing to accept. The distinction drawn in *Smith* v *Morgan* between an option to buy at a price to be agreed and an option to take a renewal of a lease at a rental to be agreed, is that the situation in the former case is one step further back from a concluded agreement than is the case where the option to renew a lease is exercised. Agreement as to price is no part of the offer to sell that the vendor is bound to make,

2 Supra n 88 at 58-60, citing *Milnes* v *Gery* (1807) 14 Ves 400; 33 ER 574.
3 [1975] 1 WLR 1649; at 1657 Oliver J referred to *Brown* v *Gould* as indicating that the approach of the courts to problems of uncertainty was the same regardless of the type of document under consideration.
4 Supra n 90. See also *Att-Gen* v *Barker Bros Ltd* supra n 87 at 499.
5 See *Bushwall Properties Ltd* v *Vortex Properties Ltd* supra n 3 at 1654 where Oliver J referred to *Lee-Parker* v *Izzet (No 2)* [1972] 1 WLR 775.
6 [1971] 2 All ER 1500.

whereas agreement as to the rent is an integral part of the acceptance of a standing offer to renew a lease.[7] In the latter case there can be no contract in the absence of any formula for fixing the rent.

Even if a formula has been provided in the agreement and it is one which can be implemented by the court, the agreement may still fail for uncertainty if, in the circumstances of the case, the parties have not got beyond the stage of negotiation. In *Courtney* v *Fairbairn Ltd* v *Tolaini Bros (Hotels) Ltd*[8] the arrangement between the parties was to negotiate a fair and reasonable price for certain construction work based on estimates which had yet to be agreed between them. There was thus no machinery for ascertaining the price except by negotiation between the parties and the Court of Appeal held that no contract existed. It refused to recognise a contract to negotiate, Lord Denning MR remarking that "[i]f the law does not recognise a contract to enter into a contract (when there is a fundamental term yet to be agreed) it seems to me it cannot recognise a contract to negotiate."[9]

The final decision to which reference will be made illustrates the point made by Megarry J in *Brown* v *Gould* in relation to the third type of case in his classification; where both a formula and machinery are provided by the parties the court will not lend its assistance if the stipulated machinery breaks down. In *Re Nudgee Bakery Pty Ltd's Agreement*[10] there was an agreement by the bakery to buy all its requirements of flour for a five year period from A at the maximum price fixed for the time being under the Profiteering Prevention Acts 1948-1959 (Qd). The Supreme Court of Queensland held that the agreement became unenforceable when flour later ceased to come within the ambit of the legislation and hence there was no longer any fixed maximum price in respect of it. The basis for the decision of Matthews J was as indicated above correct in principle, that where an agreement provides expressly for the method of fixing the price the court is not at liberty to substitute a different method should the stipulated mode fail. Nevertheless, the evidence showed that for three years after the flour had ceased to be within the ambit of the legislation the bakery had continued to obtain its requirements of flour at prices fixed from time to time by the local Flour Millers' Association,and it is at least open to argument that the parties had by conduct varied the original contract accordingly. It does not appear that this point was ever argued or considered by the Court,[11] but it may well be that any such variation would have been unenforceable by virtue of section 4 of the Statute of Frauds or its counterpart in the Sale of Goods Act.[12]

As the decision stands, it is authority for the proposition that where the method of fixing the price agreed on by the parties fails for one

7 In the words of Megarry J in *Brown* v *Gould* supra n 88 at 58: "Under an option, only one step is normally needed to constitute a contract, namely the exercise of the option. Under a right of pre-emption, two steps will usually be necessary, the making of the offer in accordance with the right of pre-emption, and the acceptance of that offer."

8 [1975] 1 WLR 297.

9 Ibid at 301.

10 [1971] QdR 24.

11 But Matthews J ibid at 28, did say that he did not think that the dealings of the parties in the three year period affected the construction of the agreement itself.

12 Sale of Goods Act 1896, s 12 (Qd). The Statute of Frauds Act 1972 (Qd) had not then been enacted. See also *Noble* v *Ward* (1867) LR 2 Ex 135.

reason or another, no account is to be taken of the practice subsequently adopted by the parties. The agreement is unenforceable and suspended until the agreed method of fixing the price revives.

V Conclusion

What conclusions can be drawn from this welter of apparently conflicting decisions? An obvious starting point is the statement of general principle to be found in *May & Butcher Ltd* v *The King*,[13] *Foley* v *Classique Coaches Ltd*[14] and other cases that an agreement between two parties to enter into an agreement in which some critical part of the contract matter is left undetermined is no contract at all; that a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties; that there is not a contract if a material term is neither settled nor implied by law and the document contains no machinery for ascertaining it.

This principle may be qualified by saying that the courts are reluctant to hold void for uncertainty any provision that is intended to have legal effect and will strive to give business efficacy to commercial transactions if at all possible.[15] There may be general agreement also with the view of Lord Tomlin in *Hillas & Co Ltd* v *Arcos Ltd*[16] and with that of Richmond P in *Attorney-General* v *Barker Bros Ltd*[17] that ultimately each case must depend on its own facts and that therefore there is no point in endeavouring to reconcile apparently irreconcilable decisions. Thirdly, the view can be taken that while lip service has been paid to the principle requiring all the terms to be settled before a contract is arrived at, this principle has been greatly eroded in practice.

Throughout this article, the fundamental principle has been stressed that the parties must intend to enter into an immediate and binding agreement, in which case the court will do its utmost to give effect to that intention. The test of intention is to be found in the words used in the agreement. If these words considered liberally and with due regard to all just implications fail to evince any definite meaning on which the court can act, there is no contract. However, an apparent lack of certainty will be cured if some means or standard can be found whereby that which has been left uncertain can be rendered certain.[18] A matter is not left undetermined if the parties have agreed on a method of determining it, even if that method be the determination of the other party to the contract. But the party who is to fix the term must be under an obligation to do so—it is not enough if he has an option or discretion whether to act or not—and it appears that he must act reasonably in carrying out his obligation.[19] If the parties have agreed on a method of

13 [1934] 2 KB 17.
14 Supra n 95 at 13. See *Smith* v *Morgan* supra n 6 at 1502-1503.
15 *Brown* v *Gould* supra n 88 at 56-57; *Prints for Pleasure Ltd* v *Oswald-Sealy (Overseas) Ltd* [1968] 3 NSWR 761, 765 citing *Hillas & Co Ltd* v *Arcos Ltd* [1932] All ER Rep 494, 499.
16 Ibid at 499; cited in *Prints for Pleasure Ltd* v *Oswald-Sealey (Overseas) Ltd* ibid.
17 Supra n 87 at 498.
18 See the summary in the judgment of Richmond P in *Att-Gen* v *Barker Bros Ltd* ibid at 498-499.
19 *Godecke* v *Kirwan* supra n 89.

determination, that method alone can be used and if it fails the court cannot intervene, for to do so would be to make a different kind of contract for the parties.[20]

If the parties have agreed on a formula for fixing the price or rental but have provided no machinery to enable that formula to be worked out, the court can use any appropriate means of applying that formula to arrive at a determination. Thus, a sale "at valuation" or "at a reasonable price" will be valid. It is suggested that the court abdicates its function if it does not supply the necessary machinery to enable the formula to be applied provided always that the formula agreed upon by the parties is clear and sufficiently certain. The High Court of Australia, notably in *Hall* v *Busst,* has however shown a reluctance to adopt methods for giving effect to what would seem to be a clear-cut formula for ascertaining the price.

It is suggested that it is not enough to say that where there is an established market for a commodity a promise to pay a reasonable price is sufficiently certain, but that apart from this, an agreement for sale with an implied promise to pay what the goods are worth might not always be certain.[21] The value of goods is surely a matter of evidence for the party relying on the agreement to adduce, and for the court to decide in the circumstances of the case. As in the case of the award for damages for breach of contract a court should not be able to evade its responsibilities on the ground that the value of the subject matter is too difficult to assess.[22]

If no formula is agreed upon by the parties, the court will not imply that the price, rental et cetera, shall be reasonable in the circumstances. There is one apparent exception to this however. In cases dealing with "subject to finance" clauses in Queensland and New Zealand, the courts are prepared to spell out reasonable terms, but this approach can be explained on the ground that the courts have an external yardstick by which to measure reasonableness in the shape of extrinsic evidence as to what the parties had in mind or the rates prevailing in the market place; or alternatively, the cases can be explained on the basis that the parties have agreed on a formula for determining what is reasonable, namely, that the purchaser acting reasonably must so decide.

In *Attorney-General* v *Barker Bros Ltd* the New Zealand Court of Appeal embraced the principle that existence of a machinery to settle terms might suffice in the absence of any stated formula, but the authorities on which it relied were all cases where there had been a previous course of dealing which provided necessary guidelines to assist in filling any gaps. It would seem that in the absence of any external yardstick, course of dealing or formula to which reference may be made, the agreement must fail, for the courts will not make a contract for the parties.[23]

20 *Brown* v *Gould* supra n 88 at 59; *Re Nudgee Bakery Pty Ltd's Agreement* supra n 10; Sale of Goods Act 1896, s 12(1) (Qd).
21 *Hall* v *Busst* (1960) 104 CLR 206, 234 per Menzies J.
22 *Chaplin* v *Hicks* [1911] 2 KB 786.
23 See *Whitlock* v *Brew* supra n 84.