MEEHAN v JONES and OTHERS

HIGH COURT OF AUSTRALIA

GIBBS CJ, MASON, MURPHY, AICKIN* and WILSON JJ

24, 25 June 1981 — Brisbane 17 September 1982 — Canberra

Contract — Sale of land — "Subject to finance" clause — Whether void for uncertainty — Whether terms and conditions satisfactory from point of view of purchaser — Object of such clause — Circumstances in which contract void for uncertainty — Whether necessary to imply a condition that the purchaser would act honestly or honestly and reasonably.

By a contract in writing, the appellant (the purchaser) agreed to buy certain land from the first respondents (the vendors) on the condition contained in Special Condition 1(b) that the purchaser received "approval for finance on satisfactory terms and conditions". The vendors subsequently purported to rescind the contract on the ground, *inter alia*, that it was void for uncertainty and entered into a contract to sell the land to the second respondent. The purchaser sought a decree for specific performance of the contract.

Held, *per curiam:* (i) Special Condition 1(b) was clearly directed to the question whether the terms and conditions of finance supplied were satisfactory from the point of view of the purchaser.

(ii) The object of such a clause was to benefit or protect the purchaser.

Zieme v Gregory [1963] VR 214; *Barber v Crickett* [1958] NZLR 1057; *Beauchamp v Beauchamp* (1972) 32 DLR (3d) 693 (affirmed (1974) 40 DLR (3d) 160); *Weston v Collins* (1865) 34 LJ (Ch) 353; *Gilbert J McCaul (Aust) Pty Ltd v Pitt Club Ltd* [1959] SR (NSW) 122, applied.

(iii) The contract was not void for uncertainty because:—

Per Mason and Wilson JJ: The courts should be astute to adopt a construction which would preserve the validity of the contract.

Per Gibbs CJ and Murphy J: It was only if the court was unable to put any definite meaning on the contract that it could be said to be uncertain.

Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd (1968) 118 CLR 429 (per Barwick CJ at 436), applied.

Obiter, per Gibbs CJ, Mason and Wilson JJ (Murphy J dissenting): It was an implied term that the purchaser would act honestly in deciding whether the terms and conditions on which finance was available were satisfactory.

Scott v Rania [1966] NZLR 527; *Gardner v Gould* [1974] 1 NZLR 426; *Zieme v Gregory* [1963] VR 214; *Gagliardi v Lamont* [1976] Qd R 53; *Bradford v Zahra* [1977] Qd R 24; *Repetto v Friary Steamship Co Ltd* (1901) 17 TLR 265; *Haegerstrand v Anne Thomas Steamship Co Ltd* (1904) 10 Com Cas 67 (affirmed by Court of Appeal 10 Com Cas 71); *Diggle v Ogston Motor Co Ltd* (1915) 84 LJ (KB) 2165; *Niarchos (London) Ltd v Shell Tankers Ltd* [1961] 2 Lloyd's Rep 496; *Canada Egg Products Ltd v Canadian Doughnut Co Ltd* [1955] 3 DLR 1, applied.

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* Aickin J died before judgment was delivered

Obiter, per Gibbs CJ and Murphy J (Mason and Wilson not deciding): In order to give business efficacy to a contract it was unnecessary to imply a condition that the purchaser would make reasonable efforts to obtain finance.

Obiter, per Mason and Wilson JJ: Each party had the right to avoid the contract on the non-performance of the condition, notwithstanding that the non-performance may occur without default on the part of the purchaser.

New Zealand Shipping Co v Societe des Ateliers et Chantiers de France [1919] AC 1; *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418, applied.

Appeal

This was an appeal against a decision of the Supreme Court of Queensland which held that a contract for the sale of land was void for uncertainty. The facts and circumstances appear from the reasons for judgment.

B H McPherson QC and *P D Robin*, for the appellant.

G N Williams QC and *C J Brabazon*, for the first respondents.

C E Hampson QC and *F L Harrison*, for the second respondent.

Cur. adv. vult.

Gibbs CJ. The most important question on this appeal, and that on which the learned judges of the Full Court of the Supreme Court of Queensland were in disagreement, is whether a contract of sale of land was binding when it included a term which made the contract subject to certain conditions — particularly a condition making it subject to the purchaser or his nominee receiving approval for finance on satisfactory terms and conditions.

The facts of the case are more fully stated in the judgment of my brother Mason, which I have had the advantage of reading, and I need set out only enough to provide a basis for my own observations.

By a contract in writing, dated 14 March 1979, the first respondents (the vendors) agreed to sell, and the appellant (the purchaser) agreed to buy, certain land at Roma in Queensland, on which an oil refinery had been built, for $800,000. The contract recited (untruly) that the vendors had received the sum of $80,000 by way of deposit and in part payment of the purchase money and continued as follows: ". . . provided that if the deposit is paid by cheque which is not duly honoured on presentation, the vendor may at his option cancel this contract. The said deposit shall be retained in the trust account of the solicitors for the vendor until the date of completion when it shall be accounted for to the vendor, but if this sale shall not be completed for any reason other than the default of the purchaser the said deposit shall be refunded to the purchaser."

The printed clauses which dealt with payment of the balance of the purchase price had been deleted, but the contract provided for completion on "such date as may be agreed upon between the parties or

failing agreement on the Thirty-first day of August 1979". Time was stated to be of the essence of the contract. Special Condition 1 of the contract was in the following terms:—

"This contract is executed by the parties subject to the following:—

(a) The Purchaser or his nominee entering into a satisfactory Agreement or arrangement with Ampol Petroleum Limited for the supply of a satisfactory quantity of crude oil until such time as the Purchaser or his nominee has received the approval of the Federal Govt or the appropriate empowered authority for a crude oil allocation of 500 barrels per day or better;

(b) The Purchaser or his nominee receiving approval for finance on satisfactory terms and conditions in an amount sufficient to complete the purchase hereunder;

and should either of the above conditions not be satisfied on or before the Thirty-first day of July 1979 (or such extended time as the parties may agree upon) then this Contract (other than for the provisions of this Clause) shall be null and void and at an end and all monies paid hereunder by the Purchaser shall be refunded in full."

On 30 July 1979 the solicitors for the purchaser and for International Oil Proprietary who was stated by the purchaser to be its nominee, sent a telex to the vendors giving them notice that:—

"1. The Nominee of the Purchaser (International Oil Proprietary) has entered into a satisfactory agreement with Ampol Petroleum Limited for the supply of a satisfactory quantity of crude oil to the refinery until such time as International Oil Proprietary has received the approval of the Federal Government to a crude oil allocation of 500 barrels per day to International Oil Proprietary.

"2. International Oil Proprietary has arranged finance on satisfactory terms and conditions to enable them to complete the purchase."

There was evidence that the facts asserted in the notice were true. The question that therefore arises is whether, assuming that the condition was satisfied within the time stipulated, a binding contract resulted.

The submission advanced on behalf of the vendors and the second respondent was that the inclusion of Special Condition 1 had the result that no binding contract was made between the parties. The submission rested on a number of alternative propositions which may be summarized as follows: First, the word "satisfactory" in both paras (a) and (b) refers to the satisfaction of the vendors as well as to that of the purchaser and the nominee, so that the clause leaves vital matters to be agreed between the parties; accordingly, there is no more than an agreement to agree. Secondly, the language of the clause is so imprecise and indefinite that it is not possible for the court to say what events would satisfy the conditions which are described. Thirdly, the clause leaves it to the discretion of the purchaser whether he will perform the obligations which the contract purports to describe, so that what appears to be a contract is really illusory. It was further said that there was no concluded bargain because the contract left a vital matter to the determination of one of the parties, but in the circumstances of this case that was only another way of saying that the contract was illusory

The first of these submissions may be dealt with quite shortly. It was submitted that the vendors, as well as the purchaser, were interested in the nature of the agreement or arrangement to be made with Ampol Petroleum Limited (Ampol) for the supply of crude oil, and in the terms and conditions on which finance was to be supplied. The vendors' interest in the proposed supply arrangement was said to result from the fact that they were indebted in the sum of $200,000 to Ampol, and were bound by a processing agreement which they had made with Ampol. It is unnecessary to discuss the evidence with regard to those matters, because it is clear that the agreement or arrangement mentioned in Special Condition 1(a) has nothing whatever to do with the vendors' indebtedness or with their liability under the processing agreement. Special Condition 1(a) was plainly inserted in the interest of the purchaser or his nominee, in an endeavour to ensure that if the contract was completed, and the purchaser or his nominee became the owner of the refinery, a sufficient supply of crude oil would be available to enable the refinery to be continued in operation. The vendors' interest in the terms and conditions on which finance was to be supplied was said to be due to the fact that it had been contemplated in discussions between the parties that the vendors might make $250,000 available on second mortgage to enable the purchase to be completed, and was therefore interested in the terms on which any finance might be obtained on first mortgage. Again, the basis in fact of that submission need not be discussed, because the contract makes no reference to any loan being made by the vendors, or to the possible position of the vendors as holders of a second mortgage, and Special Condition 1(b) is clearly directed to the question whether the terms and conditions of finance supplied are satisfactory from the point of view of the purchaser. This first submission fails; Special Condition 1, on its proper construction, affords it no support.

The second submission raises a question that has given rise to considerable differences of opinion in the cases in which the courts have been called upon to give effect to contracts which are made conditional upon the obtaining of finance or suitable or satisfactory finance. Of course it is obvious enough that every such case must depend on the particular words of the contract in question, and that it is not profitable to compare with each other cases decided on different contractual provisions. However, it may be possible to state principles which will provide some guidance through the thicket of decisions.

When the words of a condition state that a contract is subject to finance, or to suitable finance, or to satisfactory finance, the question immediately arises whether the test which is required to be applied is a subjective or an objective one. On the one hand, the contract may be conditional upon the purchaser obtaining finance which he finds sufficient or satisfactory — such finance as he honestly thinks he needs to complete the purchase. On the other hand, the condition may be fulfilled if finance is available which the purchaser ought to find sufficient, or which ought reasonably to satisfy him, even though he honestly, but unreasonably, regards it as insufficient or unsatisfactory

The fact that opinions may differ as to which of these two meanings is given to the words of the clause does not mean that the clause is uncertain. If the court, in construing the contract, can decide which of the two possible meanings is that which the parties intended, there will be no uncertainty. As Barwick CJ said in *Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd* (1968) 118 CLR 429 at 436: "But a contract of which there can be more than one possible meaning or which when construed can produce in its application more than one result is not therefore void for uncertainty. As long as it is capable of a meaning, it will ultimately bear that meaning which the courts, or in an appropriate case, an arbitrator, decides is its proper construction . . . ." It is only if the court is unable to put any definite meaning on the contract that it can be said to be uncertain.

If the words of the condition are understood to import a subjective test — if the condition is fulfilled if the purchaser honestly thinks that the finance is satisfactory — it is impossible, in my opinion, to regard the condition as uncertain. The question whether the purchaser does think the finance satisfactory is a simple question of fact. In most cases it will be a question easily answered; if the purchaser thinks the finance satisfactory, he will normally seek to complete the contract, whereas if he does not think it satisfactory, usually he will not attempt to complete. In any case, whether the purchaser is satisfied is simply a question of fact, because, to use the well known words of Bowen LJ, "the state of a man's mind is as much a fact as the state of his digestion" (*Edgington v Fitzmaurice* (1885) 29 Ch D 459 at 483). However, if the test is purely subjective, the question will arise whether any binding agreement has been made at all. That is a question which I shall later discuss.

On the other hand, if the test is an objective one, and the question is whether the finance ought reasonably to be regarded as satisfactory, I should not have thought that the clause is too indefinite for the courts to be able to attribute any particular contractual intention to the parties. It is true that the condition may, as Holland J said in *Grime v Bartholomew* [1972] 2 NSWLR 827 at 838, be "silent as to amount, term of the loan, rate of interest, conditions of repayment, class of lender, secured or unsecured or form of security". Nevertheless, a court which had evidence of the financial position of the purchaser, the amount required to complete the contract and the prevailing rates and conditions on which loans are made by various classes of lenders should not find it unduly difficult to decide what finance a reasonable man, in the position of the purchaser, would regard as satisfactory.

There are only four reported decisions of the English courts which have discussed this question. In *Re Rich's Will Trusts* (1962) 106 Sol Jo 75, Russell J held that it was impossible to place any certain meaning on the expression "a suitable mortgage advance" and in *Lee-Parker v Izzet (No 2)* [1972] 1 WLR 775; [1972] 2 All ER 800, Goulding J held that a condition making a sale "subject to the purchaser obtaining a satisfactory mortgage" was "too indefinite for the court to give it practical meaning". Both judges followed *Scammell and Nephew Ltd v Ouston* [1941] AC 251, where the reference to "hire purchase terms"

rendered the contract uncertain. On the other hand in *Lee-Parker v Izzet* [1971] 3 All ER 1099 at 1105, Goff J held that the words "arranging . . . a satisfactory mortgage" meant a mortgage to the satisfaction of the purchaser acting reasonably, and that a clause containing those words was not uncertain. This case was followed in *Janmohamed v Hassam* (1976) 126 NLJ 696 by Slade J, who held that in a contract containing such a clause a term should be imported that satisfaction should not be unreasonably withheld. In some cases in New Zealand also it has been held that satisfactory finance is "finance which a reasonable man acting fairly would consider to be satisfactory in the circumstances of the particular case", and that a condition that the purchaser obtain or arrange satisfactory finance is accordingly not uncertain: see *Knotts v Gray* [1963] NZLR 398; *Martin v Macarthur* [1963] NZLR 403. A similar view was taken by Matthews J in *Gagliardi v Lamont* [1976] Qd R 53. Other cases have left open the question whether a clause which makes a contract subject to finance imposes an objective standard, so that the test is whether the finance is available on terms that would suit or satisfy a reasonable man, or a subjective standard, so that it is left to the purchaser himself to decide whether the finance is sufficient or satisfactory, and, if that standard is subjective, whether the decision must be made in good faith: see *Hines v Good* [1951] QWN 2; *Zieme v Gregory* [1963] VR 214 at 223. It is unnecessary to review all of the decisions, some of which were given in relation to clauses which specifically define the nature and amount of the finance required. However, in Australia and New Zealand the courts, except in New South Wales, have shown a disposition to hold that clauses which make a contract subject to finance are not void for uncertainty. In New South Wales the view has been taken that a subject to finance clause is void, whether it imports an objective or a subjective test: *Moran v Umback* [1966] 1 NSWR 437.

It seems to me that unless a clause of this kind makes a clear indication to the contrary, its natural effect is to leave it to the purchaser to determine whether or not the available finance is suitable to his needs. A clause such as Special Condition 1(b), which speaks of "satisfactory terms and conditions", in its natural meaning requires that the purchaser be satisfied. A cautious purchaser might be satisfied only with finance which was repayable over a long term and at comparatively low rates of interest, whereas a more adventurous purchaser might wish to proceed with the sale even though the term of the loan was short and the rate of interest high. It would be strange if an adventurous purchaser, having obtained finance on terms which were satisfactory to him, but at which a reasonable man might cavil, could be told by the vendor that the sale would not proceed, although the vendor was to be paid out in full and would have no interest in the purchaser's financial situation thereafter. Equally it would hardly seem likely that the parties would intend that a purchaser should be bound to complete if he honestly regarded the terms and conditions on which finance was available as unsatisfactory, notwithstanding that a court might take a different view The intention of such a clause in my opinion is to leave it to the purchaser himself to

decide whether the terms and conditions on which finance is available are satisfactory. The condition prevents a purchaser from being obliged to go through with a sale when he does not believe that he can raise the necessary funds. Such a condition is generally entirely for the protection of the purchaser, and it is the satisfaction of the purchaser, not that of some hypothetical reasonable man, that will satisfy the condition. No doubt it may be implied that the purchaser will act honestly in deciding whether or not he is satisfied. However, it does not seem to me necessary, in order to give business efficacy to a contract, that a condition should be implied that the purchaser will make reasonable efforts to obtain finance. The parties may expect that he will, but he does not contract to so do.

Although there is nothing uncertain about a clause which speaks of terms and conditions which satisfy the purchaser, the question nevertheless arises, when a contract is made conditional on such a clause, whether the contract is illusory. There is a well settled general principle which was expressed as follows by Kitto J in *Placer Development Ltd v Commonwealth* (1969) 121 CLR 353 at 356: ". . . wherever words which by themselves constitute a promise are accompanied by words showing that the promisor is to have a discretion or option as to whether he will carry out that which purports to be the promise, the result is that there is no contract on which an action can be brought at all." His Honour went on to refer to the statement of principle in *Leake on Contracts* 8th ed, 1931, p 3: "Promissory expressions reserving . . . an option as to the performance do not create a contract." The submission on behalf of the respondents in the present case was that the condition left a discretion or option to the purchaser to decide whether he would carry out the contract and that the purported contract was therefore illusory. In my opinion that principle does not apply where the discretion or option of the contracting party relates, not to the performance of the contractual obligations themselves, but only to the fulfilment of a condition upon which the contract depends. That this is so is illustrated by the case of an option to purchase which is, in many cases at least, a contract to sell the land upon condition that the grantee gives the notice and does the other things stipulated in the option: see *Laybutt v Amoco Australia Pty Ltd* (1974) 4 ALR 482 at 496-7; 132 CLR 57 at 75. Such an option gives the grantee a right, if he performs the stipulated conditions, to become the purchaser. However the fact that the grantee has a discretion as to whether or not he performs those conditions does not render the option illusory. The case of a conditional agreement is analogous. The fact that the condition is one whose performance lies wholly or partly within the power of one of the parties to the contract does not mean that there is no binding contract once the condition is fulfilled. There is a concluded agreement as to the terms of the contract which, if the condition is satisfied, leaves no discretion in either party as to whether he shall carry them out. Once the condition is fulfilled, within the time allowed by the contract for its fulfilment, the contract becomes completely binding

It is clear that the condition in Special Condition 1(b) is not a condition precedent to contract. Certain obligations under the contract attached immediately the contract was signed although the condition had not been fulfilled. For example, the provisions with regard to the deposit, and with regard to the giving and answering of requisitions on title, became immediately effective. Whether the contract is described as a condition precedent to completion, or as a condition subsequent, seems largely a matter of words. A similar question was discussed in *Perri v Coolangatta Investments Pty Ltd* (1982) 41 ALR 441; 56 ALJR 445. The condition in that case made the sale subject to the purchasers completing a sale of their property. It was within the power of the purchasers to prevent the fulfilment of such a condition; in that respect they had a discretion as to whether they would completely perform the contract. Nevertheless, it was not doubted that a binding contract had been concluded.

For these reasons, Special Condition 1(b) effectively and certainly described a condition on whose fulfilment the obligation to complete the contract depended. The possibility that the satisfaction might be that of the nominee did not introduce an element of uncertainty, for on no view was the satisfaction of the vendors necessary. Once approval was given by any lender for the making of a loan on terms and conditions regarded as satisfactory by the purchaser or his nominee the condition was fulfilled. Thereafter both the vendors and the purchaser were bound to complete.

What I have said in relation to Special Condition 1(b) applies, in substance, to Special Condition 1(a) also. Once the purchaser or his nominee had made with Ampol an agreement or arrangement which the purchaser or his nominee regarded as satisfactory the condition was satisfied and both parties were bound.

For these reasons I have concluded that the majority of the Full Court were in error in holding that Special Condition 1 was uncertain, or that it left it to the purchaser to decide whether he would proceed with the contract.

Certain other arguments were advanced on behalf of the respondents. These were not accepted in the Supreme Court, and they have been dealt with by my brother Mason in his judgment in this case. In relation to those aspects of the matter I agree with my brother's reasons and need add nothing to them. I may add that it was held in the Supreme Court that the vendors had waived their right to rescind the contract on the ground that the deposit was not paid as the contract required, and that this matter was not relied on by the vendors in argument before us.

I would allow the appeal.

Mason J. The issue here is whether Dunn J at first instance and on appeal the Full Court of the Supreme Court of Queensland (Lucas and D M Campbell JJ; Kneipp J dissenting) were right in refusing to make a decree in a purchaser's suit for specific performance of a written contract for the sale of land on which was conducted an oil refinery at Roma Special Condition 1(b) of the contract, a "subject to finance

clause", was the rock on which the appellant's case for specific performance foundered. Dunn J, and the majority in the Full Court, thought that the clause was so vague as to be uncertain and that its presence rendered the contract void for uncertainty. The appellant's challenge to this finding is the principal question in the present appeal. The respondents support the correctness of the judgments below and, in addition, argue:—

(1) that Special Condition 1(a) is also void for uncertainty;
(2) that, even if the two conditions are valid, they were not complied with by 31 July 1979, the date fixed by the contract for compliance;
(3) that the appellant failed to nominte International Oil Pty Ltd (International) as the purchaser in whom title was to be taken — the relief sought by the appellant specifying that company as the person to take title; and
(4) that, the purpose of the written contract being to enable the appellant to deceive potential lenders, the defence of illegality should prevail.

The contract was dated 14 March 1979. It provided for the sale of certain land at Mitchell Road, Roma, owned by the first respondents, members of the Jones family, on which they conducted an oil refinery under the name "Maranoa Oil and Refining" for the sum of $800,000. The contract contained an acknowledgment by the vendors that they had received $80,000 by way of deposit. In fact no deposit had been paid. The contract provided that if the deposit was paid by a cheque not honoured on presentation the vendor could "at his option cancel this Contract". It also provided that if the sale should not be completed for any reason other than the default of the purchaser the deposit should be refunded to the purchaser.

Special Condition 1 was in this form:—

"1. This Contract is executed by the parties subject to the following:
(a) The Purchaser or his nominee entering into a satisfactory Agreement or arrangement with Ampol Petroleum Limited for the supply of a satisfactory quantity of crude oil until such time as the Purchaser or his nominee has received the approval of the Federal Govt. or the appropriate empowered authority for a crude oil allocation of 500 barrels per day or better;
(b) The Purchaser or his nominee receiving approval for finance on satisfactory terms and conditions in an amount sufficient to complete the purchase hereunder;

and should either of the above conditions not be satisfied on or before the Thirty-first day of July 1979 (or such extended time as the parties may agree upon) then this Contract (other than for the provisions of this Clause) shall be null and void and at an end and all monies paid hereunder by the Purchaser shall be refunded in full."

The date for completion, fixed by a schedule to the contract, was "such date as may be agreed upon between the parties or failing agreement on the Thirty first day of August 1979" Clause 22 made time of the essence Clause 1 and part of cl 2 which provided for payment of

the balance of the purchase price were deleted. The significance of the deletion is by no means clear; the deletion is relied upon to support the conclusion that the contract was void for uncertainty.

The written contract had been preceded by an earlier oral agreement made in December 1978, the terms of which differed in several respects from the later written contract. The vendors were in financial difficulty. They were conducting the refinery at a loss, largely due to the oil-pricing policies pursued by the Federal Government. The vendors were therefore anxious to make a sale and to complete it as quickly as possible. At the time of the making of the oral agreement in December 1978 the parties contemplated completion of that agreement at a much earlier date than the date specified for completion in the later written contract. Indeed, it was suggested that completion might take place at various times between March and May 1979. The terms of payment in the oral agreement were that the purchaser would assume all the vendors' existing liabilities in respect of the land and the business; that he would pay $250,000 by four equal annual instalments, the first such payment to be made "as soon as possible". The purchaser would have the benefit of all accounts receivable and deposits; the purchaser's obligations were conditional upon his obtaining finance and Charles Herbert Jones (Charlie Jones) would remain to assist the purchaser for a period of three months after settlement and he would assist the purchaser in taking all necessary steps to become the lawful operator of the refinery.

Charlie Jones expressed to the appellant his dissatisfaction with the written contract before he executed it, asserting his preference for the oral agreement. The appellant stated that the purpose of the written contract was to satisfy the requirements of potential lenders and that he would abide by the terms of the oral agreement. The respondents relied on this conversation as showing that the written contract was not intended to create binding legal relations. The primary judge rejected this contention and it no longer forms part of the respondents' case.

To the appellant's solicitors' efforts to obtain answers to requisitions on title the vendors' solicitors responded with requests that a new written contract should be executed incorporating the terms of the oral agreement. The vendors' solicitors also suggested an early date for settlement, first on 1 March, then on 1 April and subsequently on 1 May.

The appellant had commenced to make efforts to raise suitable finance as soon as the oral agreement was reached in December 1978. Despite the confident predictions of his financial adviser, Lewgold Pty Ltd, his efforts met with no success. The continuing delay in completion became a matter of acute embarrassment to the vendors who were having very great difficulty in paying wages. It was this difficulty and the expectation that the appellant would be able to secure the necessary finance that led to the parties taking steps to enable Sunshine Oil Pty Ltd (Sunshine), a company formed by the appellant, to become the operator of the refinery before the appellant made arrangements for the necessary finance and, needless to say, before the contract was completed Documents were brought into existence providing for the cessation of

business by the vendors and the transfer of their business name to Sunshine. Necessary arrangements, including the provision of security, were made with the Customs Department and a manufacturer's licence under the Excise Act 1901 (Cth), as amended, effective from 1 May 1979, was issued to Sunshine on 28 May 1979. Other arrangements were made between Sunshine, the Workers' Compensation Board and the Roma Town Council. Increased insurance, effective from 1 July, was arranged with respect to the refinery, its operations and its vehicles. In that policy Sunshine was named as the insured. The expense involved in making these arrangements was incurred by or at the direction of the appellant and he assumed the contingent liabilities which were involved.

In April 1979 Sunshine became the paymaster of the refinery staff. It also met other necessary expenses, though the vendors met some expenses out of processing fees paid to them. The refinery business was conducted on this footing until Charlie Jones ceased to rely on the appellant's repeated assurances that finance was about to be obtained.

The primary judge rejected the contention that the vendors gave possession of the refinery to Sunshine. His finding on this point has not been challenged. He also rejected the suggestion that the expenditure incurred by Sunshine on wages and other outgoings was an agreed equivalent for the payment of the deposit under the written contract. The correctness of this finding has not been challenged.

The second respondent, Bunny Industries Ltd (Bunny), a property developer, initially explored the possibility of entering into a joint venture with the appellant or Sunshine. It subsequently withdrew from negotiations with the appellant with respect to a joint venture. The appellant then began negotiations with International. These negotiations resulted in a letter of intent dated 13 July 1979 which contemplated that International would enter into a fresh agreement for purchase of the refinery business from the vendors.

However, the signing of the letter of intent coincided with a firm decision by Charlie Jones, taken on behalf of himself and the other vendors, to rescind the written contract. By a letter dated 13 July, hand delivered on 16 July, the solicitors for the vendors gave notice to the appellant's solicitors of rescission of the contract on the ground that the deposit had not been paid, claiming in the alternative that the contract was void for uncertainty. By the middle of July the refinery had ceased to rely upon Sunshine as its paymaster. Charlie Jones did not give the appellant advance notice of his intention to terminate the arrangements with Sunshine in this respect.

On 23 July the vendors entered into a contract to sell the land and the refinery to Bunny, negotiations between Bunny and Charlie Jones having commenced some time previously.

On 30 July the solicitors for the appellant and International sent a telex to the vendors in these terms:—

"WE HEREBY GIVE YOU NOTICE IN RELATION TO THE CONTRACT OF SALE DATED 14 MARCH 1979 BETWEEN CHARLES HERBERT JONES, ANN CAROL JONES, CHARLES CRAIG JONES AND KEVIN CHRISTOPHER JONES AS VENDOR AND MARTIN DOUGLAS MEEHAN OR NOMINEE AS PURCHASER THAT

"1. THE NOMINEE OF THE PURCHASER (INTERNATIONAL OIL PROPRIETARY) HAS ENTERED INTO A SATISFACTORY AGREEMENT WITH AMPOL PETROLEUM LIMITED FOR THE SUPPLY OF A SATISFACTORY QUANTITY OF CRUDE OIL TO THE REFINERY UNTIL SUCH TIME AS INTERNATIONAL OIL PROPRIETARY HAS RECEIVED THE APPROVAL OF THE FEDERAL GOVERNMENT TO A CRUDE OIL ALLOCATION OF 500 BARRELS PER DAY TO INTERNATIONAL OIL PROPRIETARY.

"2. INTERNATIONAL OIL PROPRIETARY HAS ARRANGED FINANCE ON SATISFACTORY TERMS AND CONDITIONS TO ENABLE THEM TO COMPLETE THE PURCHASE.

"PLEASE ADVISE WHAT SOLICITORS ARE ACTING FOR YOU AS COMPLETION OF THE CONTRACT IS DESIRED BY THE EARLIEST POSSIBLE DATE AND IN ANY EVENT NOT LATER THAN 31 AUGUST 1979."

The telex was confirmed by a letter. Under cover of a letter dated 7 August the solicitors for the appellant tendered to the solicitors for the vendors a bank cheque for $80,000 as the deposit under the written contract. The cheque was returned the next day.

It is convenient to examine the validity of Special Condition 1(b)before turning to Special Condition 1(a). In the Full Court it became the critical question.

Special Condition 1(b)

The respondents' case rests on three propositions:—

(1) a contract which is expressed in language "so obscure and so incapable of any definite or precise meaning that the court is unable to attribute to the parties any particular contractual intention" is void for uncertainty (*Scammel and Nephew Ltd v Ouston* [1941] AC 251 at 268);

(2) a contract which reserves to a party a discretion or option whether he will carry out what appears to be a promise on his part is also void for uncertainty (*Thorby v Goldberg* (1964) 112 CLR 597 at 605); and

(3) there can be no concluded bargain if a vital matter has been left to the determination of one of the parties (see *Godecke v Kirwan* (1973) 1 ALR 457; 129 CLR 629 at 647, per Gibbs J).

It is argued that the concept of "finance on satisfactory terms and conditions" is altogether too uncertain and indefinite to admit of a precise meaning. The thrust of the argument is that the absence of agreement as to the amount to be borrowed, and perhaps the term of the loan and the rate of interest, make it impossible for a court to decide what finance is contemplated by the contract as being "satisfactory" (see *Lee-Parker v Izzet (No 2)* [1972] 1 WLR 775; [1972] 2 All ER 800; *Re Rich's Will Trusts* (1962) 106 Sol Jo 75). This point would have force if the contract left the court at large to assess what is "finance on satisfactory terms and conditions", yielding no indication as to what the parties meant by that expression. But in the context of a contract for the sale and purchase of real estate which contains a condition that the purchaser or his nominee receives approval for such finance so that the deposit is to be refunded to the purchaser if the condition is not satisfied, there can be no doubt that "satisfactory" ordinarily means "satisfactory to the purchaser or his nominee"

Primarily the object of such a clause is to benefit or protect the purchaser (*Zieme v Gregory* [1963] VR 214 at 216 and 222; *Barber v Crickett* [1958] NZLR 1057 at 1058; *Beauchamp v Beauchamp* (1972) 32 DLR (3d) 693, affirmed (1974) 40 DLR (3d) 160), by ensuring that he is not under a binding obligation to complete if he is unable to obtain finance. Here there is nothing in the contract or other materials to suggest that the object of the clause was not to protect the purchaser, though there is the question whether the condition is exclusively for his benefit, a matter to be discussed later. The primary object of the condition being the protection of the purchaser, it is sensible to treat it as stipulating for finance that is satisfactory to the purchaser or his nominee, subject to an implied obligation that he will act honestly, or honestly and reasonably, in endeavouring to obtain finance and in deciding whether to accept or reject proposals for finance.

In general this is the view which has been taken in New Zealand (*Barber v Crickett* — where the contract was made conditional on the purchaser "arranging the necessary mortgage finance to purchase the property"; *Scott v Rania* [1966] NZLR 527; *Gardner v Gould* [1974] 1 NZLR 426 at 428); in Victoria (*Zieme v Gregory:* cf *Jubal v McHenry* [1958] VR 406); in Queensland (*Gagliardi v Lamont* [1976] Qd R 53; *Bradford v Zahra* [1977] Qd R 24; cf *Hines v Good* [1951] QWN 2). In New South Wales a contrary view has been taken. The Court of Appeal in *Moran v Umback* [1966] 1 NSWR 437 held that a contract made "subject to finance being arranged on $1000 deposit" was void for uncertainty, even though it meant finance in an amount equal to the difference between the purchase price and the deposit of $1000. And in *Grime v Bartholomew* [1972] 2 NSWLR 827, Holland J decided that a contract with a clause "subject to finance being arranged" was void because it 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" (at 838). His Honour was influenced by *Jubal v McHenry* and the comments of Macrossan CJ in *Hines v Good*. His attention was not directed to *Zieme v Gregory*, the subsequent comments on *Hines v Good* (see *Bradford v Zahra* at p 25) nor to the New Zealand decisions.

To say that clauses of this kind are void for uncertainty is to ignore the traditional doctrine that courts should be astute to adopt a construction which will preserve the validity of the contract. Moreover, it is a draconian solution — one which is best calculated to frustrate the expectations of the parties, because in an increasing number of cases purchasers depend on the provision of finance in order to complete. The problems of uncertainty can be avoided by drafting a clause which specifies the details of the finance to be sought, but such a clause, by reason of its greater precision, may be too inflexible in its operation.

It has sometimes been urged that there is a relevant distinction between "subject to satisfactory finance" or "subject to suitable finance" and making the contract "subject to finance". The suggestion is that in the first case it is easier to imply that the finance is to be satisfactory to the purchaser Even if this be so, I would have no difficulty in reading a "subject to finance" clause as requiring finance in an amount and on

terms satisfactory to the purchaser, in the absence of some indication that the clause had another meaning.

To say that a "subject to finance" or "subject to finance on satisfactory terms and conditions" clause denotes finance which is satisfactory to the purchaser is not to say that he has an absolute or unfettered right to decide what is satisfactory. To concede such a right would certainly serve the object of the clause in protecting him. But it would do so at the expense of the legitimate expectations of the vendor by enabling the purchaser to escape from the contract on a mere declaration that he could not obtain suitable finance. With some justification the vendor can claim that the agreement made by the parties is not an option but a binding contract which relieves the purchaser from performance only in the event that, acting honestly, or honestly and reasonably, he is unable to obtain suitable finance.

There is in this formulation no element of uncertainty — the courts are quite capable of deciding whether the purchaser is acting honestly and reasonably. The limitation that the purchaser must act honestly, or honestly and reasonably, takes the case out of the principle that: ". . . where words which by themselves constitute a promise are accompanied by words which show that the promisor is to have a discretion or option as to whether he will carry out that which purports to be the promise, the result is that there is no contract on which an action can be brought": see *Thorby v Goldberg* (1964) 112 CLR 597 at 605, citing *Loftus v Roberts* (1902) 18 TLR 532 at 534; *Placer Development Ltd v Commonwealth* (1969) 121 CLR 353 at 359-61, cited by Gibbs J in *Godecke v Kirwan* (129 CLR) at 647. The judgment of the purchaser as to what constitutes finance on satisfactory terms is not an unfettered discretion — it must be reached honestly, or honestly and reasonably.

It has often been held that, where under a contract the delivery of a ship or of goods is expressed to be subject to the buyer's approval, the buyer may disapprove so long as he acts honestly (*Repetto v Friary Steamship Co Ltd* (1901) 17 TLR 265; *Haegerstrand v Anne Thomas Steamship Co Ltd* (1904) 10 Com Cas 67 at 70; affirmed by the Court of Appeal 10 Com Cas 71). In the last case Vaughan Williams LJ (at 72) spoke of the relevant condition making "the view of the purchaser final if honestly arrived at": see also *Diggle v Ogston Motor Co Ltd* (1915) 84 LJ (KB) 2165, and especially *Niarchos (London) Ltd v Shell Tankers Ltd* [1961] 2, Lloyd's Rep 496 at 507-9. In *Canada Egg Products Ltd v Canadian Doughnut Co Ltd* [1955] 3 DLR 1 the Supreme Court of Canada held that a provision in a contract which entitled the purchaser to return the goods if they were not "satisfactory" was not uncertain and that his rejection of the goods was authorized by the provision if he honestly rejected them.

There are cases in which it has been said that a capricious withholding of approval will not do (*Dallman v King* (1837) 4 Bing (NC) 105 at 109; 132 ER 729 at 730; *Repetto* at 265). Whether "capricious" is there used in the sense of "not honestly" is uncertain, though McNair J in *Niarchos* (at 508) thought that "capriciously" was used by Tindal LCJ in *Dallman* in a different sense, perhaps signifying "arbitrarily" or "without

reasonable cause": see *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 26 ALR 567 at 578; 53 ALJR 745 at 749. There was no suggestion in any of the cases mentioned in this and the preceding paragraph that the buyer's right to withhold approval led to invalidity of the contract on the ground of uncertainty.

In this case it is not necessary to decide whether the purchaser, in deciding whether finance is on satisfactory terms, is bound to act honestly or whether he is also bound to act reasonably. The cases already mentioned appear to support the first rather than the second alternative. And there is some ground for thinking that the parties contemplated that the question was to be left to the honest judgment of the purchaser rather than to the judgment of a court as to whether the purchaser acted reasonably in the circumstances.

On the other hand, it has been said that a condition of this type imports an obligation or promise on the part of the purchaser to act honestly and reasonably (*Barber v Crickett; Scott v Rania* (at 539, per Hardie Boys J); *Gardner v Gould*). McCarthy J, who in *Scott v Rania* (at 534) preferred to base his reasoning on the principle that a party to a contract cannot be permitted to rely on his own wrong, later in *Gardner v Gould* (at 428) adopted the implied promise theory. The reasoning which underlies the decisions of this court upholding the implication of an obligation on the part of a party to a contract to do all that was reasonable on his part to obtain a statutory consent applies with equal force here. In *Butts v O'Dwyer* (1952) 87 CLR 267 at 280, Dixon CJ, Williams, Webb and Kitto JJ, said: "It has been held in cases too numerous to mention both before and after the classic statement of Bowen LJ in the case of *The Moorcock* (1889) 14 PD 64 at 68, that the law raises an implication from the presumed intention of the parties where it is necessary to do so in order to give to the transaction such efficacy as both parties must have intended that it should have."

Here the expressed intention of the parties was that the purchaser would obtain finance; his obtaining of finance on satisfactory terms was necessary to give the transaction its intended efficacy. The consequence would be that he had an obligation to do all that was reasonable on his part to obtain that finance. It would make for greater consistency to say that, if the purchaser is bound to act reasonably in seeking to obtain finance, he is bound to act reasonably as well as honestly in deciding whether the finance was satisfactory. So understood the special condition would preserve an even balance between the vendors and the purchaser. However, I have no need to decide the question. Here it makes no difference whether the purchaser was under an obligation to act honestly or honestly and reasonably in deciding whether the terms of an offer of finance were satisfactory.

Although the binding words of the special condition suggest that its effect is to make the existence of the contract conditional, it is more sensible to regard the provision as one which provides for the determination of a valid and binding contract in the event that the purchaser or his nominee is unable to obtain approval for satisfactory finance on or before the appointed date In accordance with the

principle established in *New Zealand Shipping Co v Societe des Ateliers et Chantiers de France* [1919] AC 1 and extended in *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 440-2, each party has the right to avoid the contract on the non-performance of the condition, notwithstanding that non-performance may occur without default on the part of the purchaser; ie he may fail to procure finance despite every endeavour on his part. I say "each party" because it seems to me that, although the primary object of the condition is to protect the purchaser, it is perhaps difficult to assert that the clause is for his benefit exclusively when it states that the result of non-performance is that the contract shall be null and void, rather than null and void at the option of the purchaser. I see no justification for implying a right of avoidance on the part of the purchaser alone. In other circumstances, to make this implication would be to reach a one-sided interpretation, allowing the purchaser to keep the contract on foot, despite non-performance of the condition, but denying the vendor the right to avoid. Here the vendors were protected by the fixing of the date for completion and the making of time of the essence. Even so, there is no adequate basis for concluding that the special condition authorized the purchaser alone to terminate.

Whether the condition is to be described as precedent or subsequent is an artificial and theoretical question. In one sense performance of the condition or non-avoidance for breach of it is precedent to the right of a party to call for the performance of a contract. In another sense there is a valid and binding contract which may be determined for non-performance of the condition, and in this sense the condition is subsequent, not precedent.

For the reasons I have given Special Condition 1(b) is valid.

Special Condition 1(a)

The attack on the validity of this condition raises considerations similar to those already examined. "Satisfactory" here again means satisfactory to the purchaser or his nominee in relation to the agreement contemplated and as to quantity, provided of course that the purchaser or his nominee acts honestly and reasonably. I reject the argument that in Special Condition 1(a) satisfactory means "satisfactory to both parties", together with the related submission that the contract was conditional upon the parties arriving at a further consensus as to the supply of oil by Ampol to the purchaser or his nominee.

The vendors were bound by a current processing agreement with Ampol and were indebted to that company in the sum of $200,000 (approximately). Ampol and the purchaser or his nominee, if at liberty to have exclusive regard to their own interests, might arrive at an agreement which left the vendors with liabilities still owing to Ampol. So much may be admitted without acknowledging that it constitutes a case for reading Special Condition 1(a) as prescribing that the agreement to be entered into should be satisfactory to the vendors as well as to the other persons named.

It is evident from the nature of the contract and the terms of Special Condition 1(a) that the object of the condition was to protect the purchaser or his nominee The contract was a contract for the sale of an

oil refinery; its value to the purchaser depended on an assured supply of crude oil from Ampol until the approval of a crude oil allocation of not less than 500 barrels per day. There is nothing in the contract to suggest that the parties contemplated that the vendors could legitimately look to the agreement to be made by Ampol and the purchaser or his nominee as a mode of discharging the vendors' indebtedness to Ampol. That Special Condition 1(a) was inserted for the protection of the purchaser is reinforced by the close association of the clause with Special Condition 1(b), the object of which was also to protect the purchaser or his nominee.

Clauses 1 and 2

The second respondent argues that the deletion of cl 1 and the partial deletion of cl 2 also results in the contract becoming void for uncertainty because there is nothing in the contract to indicate how completion is to occur. The consequence of the deletion is that there is no specific provision in the contract providing for the manner in which the balance of the purchase price is to be paid. The answer to this submission is that the law implies that in the absence of a specific contractual provision the obligations of each of the parties under the contract are to be performed on or before the completion date, 31 August 1979. The general rule is that settlement and the giving of possession are to coincide: see *Travinto Nominees Pty Ltd v Vlattas* (1973) 129 CLR 1 at 12; *Godfrey Constructions Pty Ltd v Kanangra Park Pty Ltd* (1972) 128 CLR 529 at 536-7; *Cohen v Mason* [1961] Qd R 518 at 531.

Failure to Comply with Special Conditions 1(a) and (b)

The respondents began by submitting that it is necessary for the appellant to show that the purchaser, as distinct from his nominee, made satisfactory arrangements with Ampol and satisfactory arrangements for finance. This argument is based on the proposition that when a contract provides for a sale to the purchaser or his nominee, the purchaser's nominee does not become a contracting party; the vendor and the purchaser continue to be the sole contracting parties, the nominee being the person who takes title by the conveyance or transfer: see *Lord v Trippe* (1977) 51 ALJR 574 at 582; *Tonelli v Komirra Pty Ltd* [1972] VR 737. This does not, however, justify an interpretation which is at variance with the language in which the special condition is expressed. What the condition requires is something that is satisfactory to the purchaser or his nominee. If arrangements satisfactory to the nominee are made then the condition is satisfied.

Special Condition 1(a) was satisfied by a letter of intent dated 17 July 1979 made by International, the purchaser's nominee, and Ampol. By this document Ampol agreed to "use its best endeavours to maintain continuity of crude oil and condensate" to the refinery until such time as the refinery received its own allocation of crude oil. Special Condition 1(b) was satisfied by reason of International having available to it at 30 June 1979 cash at bank in the sum of $124,703 and a short term deposit of $750,000, both of which could be offered as payment of the purchase price under the contract

Notice of fulfilment of both conditions was given to the vendors by a telex dated 30 July 1979 and a confirmation letter of the same date. The primary judge found that the telex was sent by Messrs Tully & Wilson, solicitors for the appellant and International, with the authority of the appellant.

Nomination of International

The telex and the letter dated 30 July 1979 also gave notice that the appellant had nominated International for the purposes of the contract as his nominee. The validity of this nomination is attacked on the ground that the appellant had earlier nominated Sunshine.

I put to one side the question whether the contract permitted the appellant to make more than one nomination or to substitute a second nominee for a nominee already appointed under the contract. I incline to the view that the appellant was at liberty to substitute a second nominee for one already appointed provided that substitution did not prejudice the vendors.

But in any event the evidence does not establish that the appellant ever nominated Sunshine as its nominee for the purposes of the contract. The first respondent did not plead that the appellant nominated Sunshine and there was no finding of fact by the primary judge that such a nomination had taken place. The first respondent now relies on the acts which I have earlier recited on the part of Sunshine as amounting to a nomination by the appellant of that company. It will be recalled that Sunshine became the operator of the refinery and that documents were brought into existence providing for the transfer of the vendors' business name to Sunshine. A manufacturer's licence was issued to Sunshine and arrangements were made between it and various authorities. No doubt these steps indicated an intention on the part of the appellant to nominate Sunshine, but I do not consider that they amounted to an actual nomination. Nor does the evidence establish that the vendors were prejudiced by the subsequent nomination of International. No such prejudice was pleaded and no finding to that effect was made by the primary judge. It seems that the vendors were financially unable to continue to operate the refinery at the time when Sunshine commenced to operate it. Although the arrangements made for participation by Sunshine appeared to have conferred an advantage on the vendors, they suffered no detriment when International was nominated. The vendors, following the withdrawal of Sunshine and the nomination of International, incurred no expense in making and carrying out the new arrangements. What is more, it seems that the vendors unilaterally resumed operation of the refinery in July 1979. The arrangements previously made did not provide any serious obstacle to this resumption.

Illegality

This defence is based on the proposition that the appellant entered into the contract with the intention of using it to persuade potential lenders that the deposit had been paid, whereas in fact it had not been paid. The answer to it is that the primary judge expressly declined to make a finding that when the appellant entered into the contract with the first respondent he had no intention of paying the deposit His Honour

came to this conclusion having had the advantage of assessing the appellant's credibility as a witness. There is no basis on which we can disturb this conclusion of fact.

The second respondent puts an alternative submission that the appellant "by means of" the written contract falsely represented to various persons that the deposit for which the contract provided had been paid. The only evidence that any such representation was made was that given by McGuiness, an officer of the second respondent. The learned judge found that the appellant did make this representaiton to McGuiness. But in the absence of a finding that the appellant intended or contemplated when he entered into the contract that he would use it for this purpose the case of illegality fails. The mere circumstance that the appellant made a false representation, by means of the contract, to a third party does not provide any ground for concluding that the contract was illegal or unenforceable by the appellant as purchaser against the first respondent as vendor.

In the result I would allow the appeal and make an order for specific performance of the contract.

Murphy J. The Supreme Court of Queensland at first instance and on appeal refused the appellant's claim for a decree of specific performance of a contract for the sale of land, on the ground that the "subject to finance" clause contained in Special Condition 1(b) of the contract was so vague that the contract was void for uncertainty. The appellant challenges that conclusion.

Special Condition 1(b) of the contract provides:—

"1. This Contract is executed by the parties subject to the following:—

(a) . . .

(b) The Purchaser or his nominee receiving approval for finance on satisfactory terms and conditions in an amount sufficient to complete the purchase hereunder;

and should either of the above conditions not be satisfied on or before the Thirty-first day of July 1979 (or such extended time as the parties may agree upon) then this Contract (other than for the provisions of this Clause) shall be null and void and at an end and all monies paid hereunder by the Purchaser shall be refunded in full."

"Subject to Finance"

Clauses in contracts of sale which provide that the contract is subject to the purchaser obtaining satisfactory finance, or adaptations such as "subject to satisfactory finance" or "subject to finance", do not render the contracts illusory. The transactions are conditional contracts in the nature of options to purchase. On classical concepts of consideration, the purchaser's consideration is the obligation to pay a deposit or other obligations (even if they are conditional): see generally *Treitel: The Law of Contract* 5th ed, 1979, p 64 *et seq*. Such clauses are for the benefit of, and may be waived by, the purchaser: see *Weston v Collins* (1865) 34 LJ (Ch) 353 at 354-5; *Gilbert J McCaul (Aust) Pty Ltd v Pitt Club Ltd* [1959] SR (NSW) 122 at 125 If a purchaser erroneously believes that the

finance is available, and so informs the vendor, the principles of estoppel apply.

Such clauses leave satisfaction with the finance to the purchaser's discretion. Implication of the word "honest" as qualifying the satisfaction adds nothing. Also there is no justification for implying that the purchaser must act reasonably. If the parties wish to limit the discretion, they may do so, for example, by providing that certain terms of finance shall be deemed satisfactory. Unless this is done, the discretion is unlimited. Such clauses may also be subjected to special time limits as was done here, the effect of which is that unless the finance is obtained within a certain time, or the purchaser waives, the condition is not fulfilled and the vendor is relieved from the obligation to transfer. It follows that the contract was not void because of Special Condition 1(b).

The respondents, in this court, also contended that Special Condition 1(a) of the contract was void for uncertainty (or, if valid, had not been fulfilled). I accept the Chief Justice's analysis and conclusions on the application of Special Condition 1(a).

The purchaser is therefore entitled to specific performance. The appeal should be allowed.

Wilson J. I have had the advantage of reading the reasons prepared by Mason J. I agree with his Honour that each of the issues in the appeal should be resolved in favour of the appellant, with the result that there should be an order for specific performance of the contract. There is nothing of substance that I can usefully add to his Honour's reasons, but I wish to make some brief observations.

The first observation relates to the general question whether a purchaser, in deciding whether finance is on satisfactory terms, is bound to act both honestly and reasonably. It is not necessary to decide the question for the purposes of this case because the finance was obtained. It seems to me that the weight of the authorities discussed by his Honour favours the conclusion that, subject always to the construction of the contract in the particular case, the court will imply no greater obligation on the purchaser than that he is obliged to act honestly in determining whether the available finance is satisfactory. I am inclined to think there is force in this view. The clause is there for the protection of the purchaser. Clearly he must make reasonable efforts to secure finance. But the question whether he is able and willing to assume the burden involved in accepting particular terms may well be answered by reference to subjective considerations which cannot readily be the subject of objective assessment as to their reasonableness. The requirement of an honest judgment may be thought to provide the vendor with the maximum protection which is available under the clause. However, it is sufficient for me, like Mason J, to refrain from expressing a concluded view.

The second observation relates to the question whether Sunshine was ever nominated by the appellant. It seems to me to be clear that the evidence does not sustain the contention of the respondents Nor would

I think that such a nomination was to be expected merely from the fact that Sunshine, pursuant to an arrangement which was entirely collateral to the contract, undertook the operation of the refinery. The involvement of Sunshine as operator was entirely consistent with the nomination by the purchaser of another company as owner.

I make a third observation merely for the sake of completeness. Brief reference was made in the course of argument by the first respondent to Special Conditions 2 and 3 in support of a submission that the contract was not capable of specific performance. I do not think that these conditions are of any materiality to the resolution of the appeal. Condition 2 is set out in the judgment of Dunn J. It is merely an acknowledgment by the parties of the intention of the purchaser or his nominee to enter into an agreement with Charlie Jones in respect of his personal services and an undertaking by the purchaser to procure such an agreement at or prior to the completion date. Condition 3 is a clause solely for the benefit of the purchaser, and is waived by both the purchaser and his nominee.

I would allow the appeal, and make an order for specific performance.

Order

Appeal allowed with costs.

Order of the Full Court of the Supreme Court of Queensland set aside and in lieu thereof order that the appeal to that Court be allowed with costs.

Order of Dunn J set aside and in lieu thereof:—

(1) Order that judgment be given for the plaintiff on the claim and on the first defendant's counterclaim.

(2) Order that the first defendant specifically perform the contract dated 14 March 1979 alleged in para 2 of the statement of claim.

(3) Against the second defendant, declare that said contract is binding on the parties thereto.

(4) Order that the defendants pay the costs of and incidental to the action other than the counterclaim.

(5) Order that first defendant pay the plaintiff's costs of the counterclaim.

Solicitors for the appellant: *Tully and Wilson.*

Solicitors for the first respondents: *Chambers McNab and Co.*

Solicitors for the second respondent: *Morris Fletcher & Cross.*

J H A JACOBS
BARRISTER AT LAW