LAW AND SUBURBIA: CONTRACTS OF SALE SUBJECT TO FINANCE

A man's house is his castle:

Sir Edward Coke, Institutes.

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> The working-class immigrants who came to Australia from Britain had as their ideal the picture of lower middle-class life in the suburbs of the big industrial cities, and when they arrived they set to work to attain it. This explains the strong suburban character of the sea-board which so dismays visitors from abroad, a vast "sub-topia" which spreads over miles and miles of open country. Every man wants his little house in his plot of land, and most of them succeed in getting it.[1]

In 1964, Donald Horne referred to 'the essentially suburban character of Australia'[2] and stated:

> Few Australians have realized that theirs was one of the first modern suburban societies. By the third quarter of the nineteenth century Australia already possessed one of the highest proportions of city dwellers in the world. Australia may have been the first *suburban* nation: for several generations most of its men have been catching the 8.02, and messing about with their houses and gardens at the weekends.[3]

He added that 'the "home" occupies as central a position in Australian life as land in a peasant community . . . .'[4] Similar descriptions were given by commentators writing in 1966. Thus Craig McGregor wrote:

> Australians have always shown a penchant for living in a bungalow of their own surrounded by their lawn and garden, so that as

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> the land near the centre of the city was taken up they moved further and further out to acquire their own self-contained building block. The result: immense urban spread, huge residential suburbs . . . . Hence the impression which one often gets in Australia of vast, never-ending, shapeless expanses of suburbia.[5]

These expanses are seen by George Johnston as the expression of the ambition of the city dweller to achieve private dominion of his suburban plot:

> What this low-order homing instinct results in is sprawl. Sprawl is the consistent characteristic of the Australian cities . . . . Beyond the horizon-rim stretch the russet plains of suburbia. Red tiles mostly and red brick, ranging from the ruddy through the liverish to the apoplectic . . . . This is territory vehemently possessed. Per capita, the Australian is the world's most substantial owner of private housing and he accepts without complaint his crowded, hour-long journey to work by bus or train, or the infuriating lunacy of peak-hour motoring, if it entitles him to his own little private dominion around his domestic walls . . . . And so the sprawl spreads further.
>
> The molecular unit of sprawl is the five-roomed house.[6]

The purpose of this article is to discuss certain legal problems that arise on the sale and purchase of that molecular unit. It will be obvious that the attainment of a place, or a better place, in suburbia will involve a lot of Australians to some degree or other in the rules of law applicable to the selling and buying of real estate. It is therefore important that the law works effectively in this area and assists the persons concerned to attain their objective in a sure and safe manner.

The human drama involved in the purchase of a piece of suburbia varies little throughout the Anglo-Saxon countries of the Western world. The drama could be described as follows.[7] Sam and Sally Seller are trying to sell their residence. The "For Sale by Owner" signs on their lawn and the similar want-ads in the local newspaper have brought several lookers but no real prospects, so they have decided to list the house with Al's Real Estate Agency. Al's Agency's employee, Stuart Salesman, has several possible buyers ready to look at the house. Among them are Bill and Barbara Buyer, who can't

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quite afford a home as nice as the Sellers' but have decided to try to buy one anyhow.

With the actors in place, the drama begins. Salesman shows the home to Bill and Barbara Buyer. By that curious chemical reaction that so often takes the place of reasoning in the home-buying process, the Buyers decide that this is "it". They are excited. They return with Salesman to his office. Bill Buyer says he can't afford to offer more than $15,000 for the house, which is selling for $17,000, but Salesman asures him the chances of acceptance at that figure are excellent. Bill Buyer then says he'd like to consult a friend who's an officer with Corporate Lender and see about a loan before signing an offer. Salesman points out that Corporate Lender will probably not give a firm loan commitment until Bill has an accepted offer. "Besides," says Salesman "we'll just make the offer subject to your getting the finance you need."

So the Buyers agree to sign an offer then and there. Salesman asks how much of a loan they need, and Bill says $10,000. Salesman nods and writes into the offer, "This offer subject to buyer's obtaining $10,000 mortgage loan." Then Buyer adds that in order to get most of the $5,000 they must supply in cash, they will need to sell their present home and convert their "equity" in that house into cash. Salesman nods again, and writes in, "Also subject to sale of buyer's present home." Bill Buyer pays $1,000 deposit, and signs the offer when it is completed. Salesman hurries with it to the Sellers, both of whom sign the acceptance. Salesman hastens to take a copy of the accepted offer to the Buyers and tells them, "You've got a deal!"

But have they? The drama can continue in one of two ways. Perhaps the Buyers will sell their present home and will get the mortgage they need from Corporate Lender. The Sellers will wait patiently for the Buyers to attend to these matters, and then there'll be a harmonious settlement and transfer of possession. But on the other hand, less frequently but more dramatically, there can be trouble. The language put into the imagined offer and acceptance offers ample potential for difficulty. How long must Seller wait for Buyer to sell his house? Or to find finance? Or is the whole thing so vague Seller can back out now if he finds a better offer? Can Buyer back out by mere inaction, and recover his deposit? If Buyer's present house can be sold and needed finance for the new house can be obtained, but Barbara Buyer changes her mind and queers the sale by refusing to sign the transfer or loses the loan by refusing to sign the mortgage, what are the rights of the parties? And so on.

The discussion of the rights of the parties in these circumstances, which will be made in this article, will be based on the results of a limited empirical investigation of the handling of contracts of sale "subject to finance" in Western Australian real estate transactions. These results will give a factual basis against which the effectiveness and meaningfulness of the legal rules may be tested.

I. THE USE OF FINANCING CONDITIONS

NATURE AND SCOPE OF THE INQUIRY

The technique used to obtain the facts was that of the questionnaire. This was based on a questionnaire used by Associate Professor Walter B. Raushenbush of the University of Wisconsin in a survey of Wisconsin lawyers and brokers on the same problem conducted in 1959-1960.[8] After alterations, mainly to the wording and phraseology, the questionnaire was posted in 1966 (a) one to each legal firm listed in the 1966 Law Almanac compiled in the Central Office of the Supreme Court of Western Australia, and (b) one to each firm or person listed on the List of Members, 1966, of the Real Estate Institute of Western Australia (Incorporated). In a letter attached to the questionnaire and written by the Law Review editor, the recipients were advised that the Law School of the University of Western Australia wished to repeat in Western Australia a piece of legal research, originally undertaken in one of the United States of America, on the use in contracts for the sale of land of clauses making completion of the contract dependent on the buyers obtaining satisfactory finance for the purchase of the property, and the problems involved. They were also advised that the results of the research would be made available in this Law Review, that there was no need to show the name of their firm in the reply to the questionnaire and that copies of clauses used could be returned with the answer. The response may be tabulated as shown in Table 1.

This response appears to be equivalent to that obtained by Raushenbush,[9] and is sufficient in number and completeness to justify tabulation. Such tabulation is sometimes difficult due to the variety in the answers, and in such cases a table or chart will not be drawn and the responses will be quoted. Even where the majority of responses admit

[8] For the results of his survey see id. at 570-587. For an earlier study, see R. J. Aitken, *"Subject to Financing" Clauses in Interim Contracts for Sale of Realty,* (1960) 43 MARQ. L. REV. 265.

[9] Op. cit., n. 7, at 569.

of tabulation, there will sometimes be inadequate answers in some of the questionnaires on the particular questions under analysis, and allowance will be made for this in the table. Accordingly, the responses should not be judged for their statistical merit only but for the factual information which they supply. The tabulation will be made as a means to understanding the facts, but the facts will be no less important where they are not in tabular form.

Table 1

	Response to Questionnaire	
Recipients	Sent to	Replies from
Legal firms	63	12
Land agents	175	40

There were eleven main questions in the questionnaire, and the replies to each will be discussed separately.

FREQUENCY OF USE OF "SUBJECT TO FINANCE" CLAUSES

When preparing offers or contracts for the purchase of real estate, do you make the offer or contract subject to or conditional upon the buyer's ability to secure finance?

Table 2

	Often	Occasionally	Never	Totals
Lawyers		4	8	12
Land agents	26	13	1	40
Totals	26	17	9	52

This Table establishes the widespread use of "subject to finance" clauses among Land Agents and the comparative unpopularity of the same clause with lawyers. Of the eight lawyers replying that they never used such clauses, three stated that they preferred to give an option to purchase if the parties were not in a position to conclude a contract of sale. All of them regarded such clauses as entirely unsatisfactory due to the uncertainties which they produced. The attitude of the lawyers is well summed up in the following comment of one of them:

> . . . I regard with horror any proposal that a Contract of Sale should be "subject to finance". To my mind, unless the purchaser

> is able to pay unconditionally or the ability to pay later is within his power, the time has not arrived to enter into a contract of sale. I am afraid that all the trouble which has been experienced with such "contracts" is the creation of land agents who are anxious to obtain a purchaser whether he is able to pay or not.

Two of the Land Agents stated that they used the clauses very occasionally and that they preferred to secure the purchaser an option to buy.

Could you say what percentage of your offers or contracts are made in the above way?

Table 3

Percentages:	1-24%	25-49%	50-74%	75-100%	Totals
Lawyers	4				4
Land agents	18	4	5	13	40
Totals	22	4	5	13	44

Table 3 indicates that the use of the subject to finance clauses among Land Agents is not only widespread but also fairly intensive, at least among half of those using them. It also shows that those lawyers who do use the clause, do so infrequently. Even so, the surprising feature of the Table appears to be the relatively high proportion of agents using the clause infrequently.

The results of Table 3 do not appear to reflect the replies tabulated in Table 2. Perhaps this is due to the fact that some respondents may have been confused as to whether the percentage referred to in the question in Table 3 above referred to a percentage of their total business or only of those cases where the buyer's ability to secure finance is in question, a possible confusion which was suggested by at least two of the replies.

REASONS FOR USE OF CLAUSE

Respondents were asked, "Could you explain what is your motive in including such "subject to finance" clauses?" The varied responses do not admit to tabulation, but an attempt at distillation will be made here. The motives stated by the lawyers were as follows:

instruction from parties only;
finance is difficult at the moment;
to provide a let-out to the buyer where he requests it;
to enable purchasers to complete the terms and obtain title;

to protect against forfeiture of deposit and other payments;
because the purchaser wishes to finalise tentative financial arrangements already made.

Of the responses from the Land Agents, the most frequent was some variation of the explanation that the conditional clause was put in 'to protect the purchaser'. Several explanations were given as to what was meant by this:

to protect the purchaser from entering into a binding contract until he had verified that finance was available;
to protect the purchaser against the forfeiture of his deposit;
to reserve the property to the purchaser until he is able to find the finance;
to give the purchaser time to find finance;
to give the purchaser a contract with which he can approach a lending institution and obtain finance.

A typical reply of this sort read:

> The purpose of such a clause is to secure protection for a genuine prospective purchaser who has been verbally assured of finance from a lending institution but awaits official confirmation, perhaps from Head Office. Deposit refundable in case finance refused.

Some replies gave as their motivation a request from the purchaser.

Few replies showed any concern for the vendor. One stated that the clause was inserted 'to limit the vendor's time of "tie up" and preserve his liberty of action when the time has expired', and another stated that the clause protected the vendor against a useless contract. In both cases the comments concerning the vendor were supplemental to others concerning the protection of the purchaser.

Two replies reflected the agent's interest in the clause: one respondent described the clause as giving an option which if accepted prevented another agent from acting on the property, and another gave, somewhat frankly, as his sole motive in including the clause as being 'to complete a sale that might otherwise not be consummated'.

USE OF GENERAL LANGUAGE

What form do these "subject to finance" clauses usually take in contracts or offers you prepare? In particular, how often do they contain mere general expressions such as "subject to finance"?

Those who used general expressions, and Table 4 makes it apparent that these are clearly a minority, were also asked to explain when and why no greater detail was included. One replied, tautologically

and ungrammatically, 'because no other details is usually necessary', and this reflected the views of all those using such clauses that no greater detail was required. Some also stated that the general expression was useful where the avenue of finance was uncertain or the purchaser did not mind which source of finance was used.

Table 4

	usually	seldom	never	n.t.*	totals
Lawyers		1	3		4
Land agents	6	9	18	7	40
Totals	6	10	21	7	44

* n.t. will be used throughout tables in this article to refer to replies that are not able to be tabulated.

SPECIFICATION OF AMOUNT OF LOAN

When the clauses are more specific—how often do they specify the amount of the loan which must be provided if the deal is to go through?

Table 5

	always	usually	seldom	never	n.t.	totals
Lawyers	4					4
Land agents	12	9	4	7	8	40
Totals	16	9	4	7	8	44

Respondents were also asked to explain when and why the amount of the loan was specified. Of those making such explanations, the majority said that they specified the amount of the loan in order that the deal would be fully understood. A large number said that such specification was made to indicate to the purchaser exactly how much finance he would require and so that he could judge his ability to repay the loan which he proposed to obtain for the balance of the purchase price beyond the cash which he had available. Only three said that such specification was made to satisfy the vendor as to the purchaser's financial condition.

SPECIFICATION OF MAXIMUM RATE OF INTEREST

When the clauses are more specific—how often do they specify the maximum rate of interest?

> [A time limit] is always specified—normal period 28 days—but owing to shortage of finance, seldom practised. A time limit is considered necessary in order to speed up the settlement. However, if finance is not arranged within the specified period but there is a possibility of its being arranged within a reasonable time, the date of settlement is deferred accordingly.

SPECIFICATION OF TYPE OF LOAN

When the clauses are more specific—how often do they specify some particular type of loan which alone the buyer will find satisfactory—e.g. a War Service loan?

Table 10

	always	seldom	never	n.t.	totals
Lawyers	4				4
Land agents	23	4	3	10	40
Totals	27	4	3	10	44

The replies indicated that the lawyers or the agents would always include such specification if requested by the purchaser and it is in this sense that the heading "always" is used in Table 10.

SPECIFICATION BY COMBINATION OF ABOVE CONDITIONS

When the clauses are more specific—do you use a combination of the above conditions or some of them?

Table 11

	Yes	No	n.t.	Totals
Lawyers	4			4
Land agents	26	6	8	40
Totals	30	6	8	44

Respondents were asked to cite which clauses were used in combination but only seven replies indicated this and there was no meaningful pattern in their usage. There was also poor response to a request to state when and why combined conditions were used. The few replies that were given said either that the purchaser requested the combination or it was appropriate in the circumstances.

Several replies gave examples of the type of clauses used, and these indicated the type of combination which may occur:

subject to finance being confirmed by Bank of (named) by 12 noon Friday (7 days);
subject to your being able to raise $6,000 on the property for me by way of first mortgage fixed for 3 years at 7 per cent interest per annum payable quarterly, this to be notified by you to me within 14 days;
subject to War Service loan of $7,000 to be approved by October 28th, 1966;
subject to finding fixed mortgage of $6,000 at 8% int. for 3 years together with 2nd mortgage of $800 7% flat over 5 years.

RELATIVE IMPORTANCE OF VARIOUS CONDITIONS

Respondents were asked "what is your opinion of the relative importance of the various conditions (outlined above). Are any of them (or any combinations) more important than others? Which are they?" Replies were varied and difficult to tabulate. Nevertheless, more of the lawyers and the agents thought that specification of the maximum rate of interest and a limitation on the time within which the buyer must obtain finance were the most important conditions. Almost all the replies emphasised the importance of all the conditions.

SUMMARY OF DEGREE OF SPECIFICATION OF CONDITIONS

Table 12

	specified		not specified	
	Lawyers	Land Agents	Lawyers	Land Agents
Amount of loan	4	21		11
Maximum rate of interest	4	21		13
Minimum duration of loan	1	9	3	20
Lending institution	3	18		11
Time limit	3	35	1	1
Particular institution	4	23		7

In Table 12, a summary is made of Tables 5 to 11. The figures listed in these previous Tables under the headings "always", "usually", "sometimes" and "on request" have been combined under the heading "specified" as a total of the figures indicating that specification of the condition is preferred. The figures listed in the previous Tables

under the headings "seldom" and "never", have been combined under the heading "not specified".

SPECIFICATION OF CONSEQUENCES IF FINANCE NOT OBTAINED

In your offers or contracts for the purchase of real estate, do you spell out what is to happen if the buyer fails to obtain the specified financing, within any time specified? For example, that if the buyer cannot arrange finance the whole or part of his deposit is returnable, or is to be forfeited?

Replies from the land agents were as follows:

yes 18
on request 2
no 3
understood that deposit would be refunded as condition of contract had not been met . . 5
indicated deposit would be refunded but did not state whether this specified in offer . . 9.

Of the lawyers replying, four indicated that they made specific provision (usually being for the return of the deposit) and two stated they made no specific provision.

REASONS FOR SPECIFICATION OF CONSEQUENCES

If sometimes you do spell out in the offer or contract what is to happen if the buyer does not obtain finance, and at other times you do not, what makes the difference? The total amount of money involved, the size of the deposit, or some other circumstance or circumstances of the bargain? If the latter, what?

The previous paragraph indicated the high number of land agents specifying the consequences if finance was not obtained. Almost all of these stated that they always made such specification and that this present question was inapplicable to them. Of those only specifying sometimes, one said that the difference was accounted for by the size of the contract, another said that it was the degree of certainty felt about the obtaining of finance, another said that it was the purchaser's insistence, a further one said it was the vendor and purchaser's wishes, and another suggested that some other factor, such as the vendor having another purchaser waiting, may be relevant.

Of the two lawyers not specifying the consequences, one indicated that where he did specify the consequences, it was because of his instructions.

BUYER'S POSITION IN VARYING CIRCUMSTANCES

The questionnaire asked for opinion on the buyer's position in a number of circumstances, all of which constituted partial or total non-compliance with the condition. The first question was whether the buyer should get his deposit back and be free of all obligations if he can get no loan at all. Without exception the agents replied 'yes'. The reasons which they gave were usually that the obtaining of finance was a fundamental condition of the contract and in any event all offerees had been thoroughly vetted by them and this meant that if the purchaser had been unable to obtain finance it was not his fault and he should not bear responsibility for it. Two of the lawyers indicated that any answer they may give would be determined by whether the purchaser had been in possession or not, and that such questions as this were value judgments outside their sphere.[10]

The next question was whether the buyer should get his deposit back and be free of all obligations if he can get a loan but at a higher interest rate than specified. Only one agent replied 'no, provided the rate is reasonable (say not exceeding 10%) and not exorbitant'. All others answered the question either in the same way as their answer to the first question or by reference to that previous question. All emphasised that the purchaser's financial condition had been thoroughly investigated before the offer was made and that if he was held to terms beyond those stated in the offer, he would be exceeding his financial limitations. Applying this reasoning, all agents also replied 'yes' when asked whether the buyer should get his deposit back and be free of all obligations if he can get a loan but for a shorter term than specified. They indicated that the shorter term would involve higher repayments to which no buyer should be committed without fresh agreement.

Respondents were then asked whether the buyer should be in the same position if he can get a loan but not from the institution or class of institution specified. A majority considered that he should, since, if the institution had been specified, it was clearly a term of the contract. The minority felt that provided the other conditions of the loan

10 The writer would disagree with the concept of the role of the lawyer. While no lawyer can act either without instructions or outside the law, he is not precluded from judging the law as an instrument of social justice in the light of his close acquaintance with it. Such value judgments may not earn dollars and cents but, expressed through the appropriate channels, could result in lawyers playing a larger role in the initiation of legal reform, the major stimulus for which comes at present almost solely from extra-legal circles.

GENERAL COMMENTS BY RESPONDENTS

Questionnaires asked whether respondents had ever had any legal problems, or legal disputes, over an offer or contract containing a clause making it conditional on the buyer obtaining finance. All the agents denied having had any legal problems or disputes and most attributed this to the form of clause which they used, as well as the investigation they carried out into the purchaser's financial position prior to presenting the offer to the vendor. Several mentioned that any disputes that may arise were always overcome by mutual agreement.

Not many general comments were made by the agents. Some indicated that their offers were made in a letter to the vendor. One agent made the following lengthy comment which deserves repetition as a description of the problems faced by the agents in property transactions:

> A factor that determines most of the clauses you mention is the price of the property. If the agent considers that the price is low and that the residence is desirable, he would, in most cases, refuse to take an offer with subject clauses unless he were *absolutely* sure that the deal would go through—this he must do if he has the vendor's interests in mind as a subject offer could lose him a cash sale. My idea of taking a subject offer in the above instance would be that e.g. (1) Mr. Jones is prepared to pay $12,000.00 for the property, I consider this a really good buy. Mr. Jones has $4000.00 as a deposit, has banked with the Wales for 20 years (or 10 for that matter), owns a late model motor vehicle and is in government employ at a salary of $5000.000 yearly. Subject to him owning his furniture I would sign him up on a conditional offer because my experience tells me he is financiable, however I cannot accept the responsibility of signing Mr. Jones up on an unconditional offer or Mr. Jones will without doubt consider that I do not care whether finance is available or not—if he signs an unconditional offer and cannot raise finance—I still receive my commission from his deposit and the balance passes to the vendor—with a possible litigation pending. If I do not point out the advisability of the "subject to finance within 14 days" clause, I am not carrying out my responsibility to the public. I would advise Mr. Vendor to accept Mr. Jones' offer but between the time of accepting the offer and presenting it to the vendor, I would have checked Mr. Jones out at the bank. (2) If I consider that the property is grossly overpriced, I would not hesitate to submit an offer that may or may not be financiable.

Two of the lawyers reported having had one case each that involved litigation, but in both cases they stated that the clause had been drawn

by a real estate agent. One of the lawyers also reported three other instances of dispute that did not go to litigation. He commented as follows on these:

> The most serious difficulty that has arisen in the cases which we have handled is that it has been at least suspected in all of the cases that the Purchaser engineered his inability to raise the finance and in two cases it was admitted that he had done so but because the clauses had been badly drawn by agents, we advised that the Purchaser could still avoid the Contract. In one case where it was correctly drawn (by good fortune rather than skill) we advised the Purchaser to pay damages, to wit expenses in resale and interest on money owing from the date of the signing of the offer and acceptance to the date of resale.

SUMMARY OF REPLIES

Despite conceded limitations, the survey above described affords some useful evidence in support of several propositions:

(1) "Subject to finance" clauses are generally avoided by lawyers and when used by them are expanded to include specific details of the type of finance on which the sale is made conditional.

(2) "Subject to finance" clauses are widely used by real estate agents and play an important part in the drafting of offers and acceptances.

(3) The larger proportion of agents are aware of at least some of the problems such clauses can create, and try to do a fairly detailed job of drafting to meet these problems. The degree of specification is perhaps surprising and covers specification of the amount of the loan, the maximum rate of interest, the lending institution, the time limit within which finance must be found, and the consequences if finance is not obtained.

(4) Many agents use, at one point or another in their clauses, language which raises legal problems of which they are not aware.

(5) The overriding concern of the agents in the drafting and enforcement of the clauses is the capacity of the purchaser to pay. All agents regard themselves as having thoroughly investigated the purchaser's financial condition before the offer is prepared and do not wish to see him committed beyond the terms of the offer based on that estimate of his ability to pay.

(6) Nonetheless, there are significant variations in the extent to which agents use conditional clauses and in the attitudes they hold toward such clauses.

II. FINANCING CONDITIONS AND THE LAW

CLAUSES OVER WHICH LEGAL DISPUTE HAS ARISEN

Before stating the rules of law which are applicable to interpretation of subject to finance clauses, consideration will be given to those clauses over which legal dispute has arisen. In Australia, they have been as follows:

this sale is subject to finance;[11]

this sale is subject to Bank finance of £1500 being obtained for the purchaser;[12]

subject to finance being arranged through the Agricultural Bank;[13]

this contract is subject to the purchaser arranging finance within seven days from signing of this contract;[14]

this contract is conditional upon the purchaser obtaining a first mortgage loan of £4000 upon the security of the said land from a life assurance society or other lending institution on or before settlement;[15]

subject to finance being arranged on £1000 deposit;[16]

balance purchase price to be paid in full by cash within thirty days of offer provided that bank finance is available by that date.[17]

In New Zealand, the following clauses have resulted in litigation:

this agreement is conditional on the purchaser arranging the necessary mortgage finance to purchase the property within thirty days from the date of this agreement;[18]

subject to finance;[19]

this offer is made conditional upon my being able to arrange satisfactory mortgage finance on the property within seven days of date hereof;[20]

this agreement is subject to a condition that satisfactory finance is available by 15 February 1962;[21]

this offer is subject to my being able to arrange mortgage finance

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11 Hines v. Good, [1951] Q.W.N. 2.
12 Jubal v. McHenry, [1958] V.R. 406.
13 Atherton v. Flodine, [1959] Qd. R. 364.
14 Simon v. Fowler, [1960] Tas. S.R. 185.
15 Zieme v. Gregory, [1963] V.R. 214.
16 Moran v. Umback, [1966] 1 N.S.W.R. 437.
17 Jones v. Walton, [1966] W.A.R. 139.
18 Barber v. Crickett, [1958] N.Z.L.R. 1057.
19 Eastmond v. Bowis, [1962] N.Z.L.R. 954.
20 Knotts v. Gray, [1963] N.Z.L.R. 398.
21 Martin v. MacArthur, [1963] N.Z.L.R. 403.

of £2000 on the security of the property within 14 days of acceptance hereof.[22]

These clauses came to be litigated in one of four ways:

(1) by the purchaser's bringing an action against the vendor for recovery of the deposit as moneys had and received and held to the use of the purchaser on his failure to obtain bank finance. This is the most usual reason that subject to finance clauses are litigated.[23]

(2) by the purchaser's seeking specific performance of the contract.[24]

(3) by the vendor's bringing an action for damages for breach of contract.[25]

(4) by the vendor's seeking a declaration that the contract has been rescinded and claiming possession, an injunction, damages and mesne profits.[26]

Two comments may be made on the replies to the questionnaire in the light of this record of litigation. The first is that the proportion of litigation initiated by purchasers under contracts containing financing conditions supports the agents' belief that they should insert such clauses to protect the purchaser. Secondly, it is clear that litigation may arise as frequently when the clause is reasonably specific as when it is in mere general terms.

RECENT LEGAL DEVELOPMENTS

The last review of the case law on contracts of sale "subject to finance" was in 1964.[27] Since that review was written, there have been several further decisions on the matter: the decision of the Victorian Supreme Court in *Zieme v. Gregory*,[28] the decision of the Court of Appeal of the Supreme Court of New South Wales in *Moran v. Umback*,[29] the decision of the Western Australian Supreme Court in *Jones v. Walton*,[30] and the decision of the Chief Justice of

22 Rama v. Scott, [1966] N.Z.L.R. 176.
23 The cases referred to in footnotes 11, 12, 13, 16, 17, 18 and 19, supra, all arose in this way.
24 See cases mentioned in footnotes 14 and 22, supra.
25 See the two New Zealand cases referred to in footnotes 20 and 21, supra.
26 See Zieme v. Gregory, [1963] V.R. 214.
27 K. C. T. Sutton, *Contract of Sale "subject to finance"*, 5 THE AUSTRALIAN LAWYER 3-11.
28 [1963] V.R. 214.
29 [1966] 1 N.S.W.R. 437.
30 [1966] W.A.R. 139.

New Zealand in *Rama v. Scott.*[31] These decisions necessitate a further attempt at rationalisation of the case law on the subject.

The applicable rules would appear to be as follows.

(1) *When a contract is made subject to a financing condition, the fundamental problem to be resolved is whether the financing condition means anything.*

Obviously this makes the actual words of the particular condition of paramount importance. Variation of the words makes it difficult to generalize from the ascertained meaning of one condition to the meaning of another. The task of determining meaning is essentially a relative one.

(2) *The first question to arise in determining the meaning is whether the condition must be construed from the words in the contract alone or whether extrinsic evidence is admissible, and if so, to what extent. It seems clear that the court may properly consider evidence of surrounding circumstances in order to determine the meaning of the words.*

In *Eastmond v. Bowis,* Richmond J. considered that evidence given by the plaintiff as to the meaning which he himself intended the words "subject to finance" to bear was clearly inadmissible as the ambiguity in the phrase was patent whereas direct evidence of intention is admissible only in the case of an "equivocation" or latent ambiguity. The evidence which, in his opinion, was properly admissible was evidence of 'surrounding circumstances'.[32]

The approach of Richmond J. receives support from the decision of the Supreme Court of Western Australia in *Jones v. Walton.*[32a] The phrase to be interpreted was one that made the sale subject to a condition "that bank finance is available by that date". Extrinsic evidence was adduced at the trial, and the trial judge had no doubt that it was properly led,[33] citing as his authorities, *Howard Smith & Co. Ltd. v. Varawa,*[34] Halsbury's Laws of England,[35] *Inglis v. Buttery & Co.,*[36] and *Blakely & Anderson v. De Lambert.*[37] On appeal to the

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31 [1966] N.Z.L.R. 176.

32 [1962] N.Z.L.R. 954, 959.

32a [1966] W.A.R. 139.

33 Walton v. Jones, W35/1965 in the Supreme Court of Western Australia, unreported judgment of D'Arcy J.

34 (1907) 5 C.L.R. 68, 73.

35 Vol. 11, 405-407, and Vol. 22, 16 (3rd ed.).

36 (1878) 3 App. Cas. 552.

37 [1959] N.Z.L.R. 356; cited in Eastmond v. Bowis, [1962] N.Z.L.R. 954, 959.

Full Court, the appellant complained that the trial judge resorted to the extrinsic evidence of the parties to ascertain their intention and construe the proviso. The Chief Justice upheld the trial judge,[37a] considering that 'he carefully shut out any such consideration and used the surrounding circumstances, i.e. the vital evidence relating to obtaining bank finance in coming to a conclusion as to how the proviso came about. That was a necessary and permissible course: cf. *Clifton v. Coffey*.[38,39] The Court's approach was explained more fully by Jackson J.:

> Where parties have entered into a contract in writing, extrinsic evidence cannot be received to contradict, vary or add to the terms of the document, or to prove that the intention of the parties was other than appearing on the face of the instrument. 'The problem is not to find what the parties meant, but what their agreement means' (per Higgins, J., in *Bacchus Marsh Concentrated Milk Co. Ltd. v. Joseph Nathan Co. Ltd.*[40]). But in construing a written instrument it is always permissible to receive evidence of the circumstances which formed the background against which the parties entered into their contract. The court, it is said, ought to know the surrounding circumstances so as to place itself as nearly as it can in the position of the parties, for their intention is expressed in words used with regard to particular circumstances and facts: see Halsbury's Laws of England,[41] *Clifton v. Coffey*.[42]

In the trial court, the complete clause before D'Arcy J. for interpretation read:

> The terms of purchase shall be as follows:
> (1) By a deposit of £2150 . . .
> (2) The balance of purchase price as follows: £5 paid as option money. Balance of £19,340 to be paid in full by cash within 30 days of offer provided that transfer documents are prepared and signed by that date and that bank finance is available by that date.

The phrase "and that bank finance is available by that date" had been added to the offer and acceptance before signature, and the plaintiff purchasers contended that the added term constituted a fundamental condition of their offer. The defence of the vendor was that the only significance of the added term was that it allowed the

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37a Jones v. Walton, [1966] W.A.R. 139, 141.
38 (1924) 34 C.L.R. 434, 437, per Isaacs A.C.J. and Gavan Duffy J.
39 Jones v. Walton, [1966] W.A.R. 139, 142.
40 (1919) 26 C.L.R. 410, 444.
41 Vol. 11, 406 (3rd ed.).
42 (1924) 34 C.L.R. 434, 437.

plaintiffs a reasonable margin of time beyond the thirty days stipulated for payment of the balance of purchase price and so prevented time from being of the essence in that respect. The extrinsic evidence of the circumstances surrounding the clause (as accepted by the trial judge) showed that from the inception of negotiations the plaintiffs had made known to the defendant and his representatives what his financial position was. Stated summarily, it was to the effect that he had sold a property near Albany and would have about £17,000 available from the proceeds to buy the defendant's property and to carry on farming operations. He would, therefore, not have enough to pay the purchase price, which was first mentioned at about £22,500, much less be able to pay that and also meet the expenses of carrying on, and would have to borrow probably £6,000. Evidence was also given of the movements in the plaintiff's bank account and of a discussion by one of the plaintiffs with the agent of the defendant in which he had indicated that he may not be able to borrow money from the bank. Construing the added phrase in the light of this objective evidence, the judge held that it was from the inception, in mutual contemplation, that the plaintiffs would need bank finance to be able to complete, that the amount would be £6,000, the finance would be a bank loan, the security would be the property.

Adopting the language of Hanger J. in *Atherton v. Flodine*,[43] the financing condition can be regarded as being written in code, but when the parties put it in they may have understood it to have one precise meaning and, if so, at that time they had the key to the code. Evidence must be allowed to show whether there was in fact any agreement as to the key.

(3) *If the financing condition is worded in general language only, such as "subject to finance", and there are no surrounding circumstances to explain its meaning, there is a great likelihood of its being declared meaningless and the contract failing for want of agreement.*

This statement is not made without some hesitation. The writer is aware of the opinion of one writer that 'despite criticism in *Jubal v. McHenry*, *Atherton v. Flodine* and *Eastmond v. Bowis*, the judgments in *Hines v. Good* and *Barber v. Crickett* are authority for the view that an agreement "subject to finance" is not void for uncertainty. The clause is to be understood as meaning that the agreement is subject to an amount reasonably required to complete the purchase being raised on reasonable terms as to interest and repayment of

[43] [1959] Qd. R. 364, 372.

capital,'[44] and of another writer that 'where a contract is "subject to finance", it seems that it is subject to the purchaser being able to obtain a loan on reasonable terms, both as to interest and repayment, of an amount reasonably necessary for the purchaser to complete the contract'.[45] However, the above opinions were expressed before the publication of the second edition of Voumard's Sale of Land, which prefers the view that such a phrase is probably void for uncertainty,[46] and before the recent decision of the Supreme Court of New South Wales in *Moran v. Umback.*[47]

The issue for decision in the latter case was whether the District Court Judge had been correct in entering judgment in favour of the purchaser plaintiff for £120, being the part of the deposit retained by the defendant for his commission on a sale. The sale was the subject of an agreement whereby the plaintiff agreed to purchase a wine saloon business together with the goodwill of the business and other moveable property for the sum of £2,400, stock at valuation. There was a special condition which read "subject to finance being arranged on £1,000 deposit". The plaintiff's case was based upon the contention that, in all the circumstances, the agreement did not amount to a binding contract for sale and consequently the defendant was not entitled to retain as against the plaintiff the amount of the deposit retained.

Counsel for the appellant argued, on the authority of *Jubal v. McHenry,*[48] that it was proper to read into the condition the requirement that the finance obtained shall be on reasonable terms.[49] The Chief Justice considered that the clause meant that finance was to be arranged over and above the £1,000 deposit to the satisfaction of the purchaser but that the clause left open what was an arrangement satisfactory to the purchaser. He indicated that there were so many different methods of financing the purchase of a business. Rates of interest might vary between companies, terms of repayment might vary and sometimes the style of security varied. In these circumstances, he felt that the question was whether or not the contract with the special condition amounts to a valid and binding contract. The clause

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44 Sutton, op. cit., n. 27, at 8-9.

45 STONHAM, THE LAW OF VENDOR AND PURCHASER 31-32 (Sydney, 1964).

46 VOUMARD, THE LAW RELATING TO THE PURCHASE OF LAND IN VICTORIA 375 (2nd ed.), citing O'Bryan J. in Jubal v. McHenry, [1958] V.R. 406, 409-410, where he comments on Hines v. Good, [1951] Q.W.N. 2.

47 Moran v. Umback, [1966] 1 N.S.W.R. 437.

48 Jubal v. McHenry, [1958] V.R. 406, particularly at 411.

49 Moran v. Umback, [1966] 1 N.S.W.R. 437, 438.

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47 Moran v. Umback, [1966] 1 N.S.W.R. 437.

48 Jubal v. McHenry, [1958] V.R. 406, particularly at 411.

49 Moran v. Umback, [1966] 1 N.S.W.R. 437, 438.

gave no criterion by which the satisfaction of the purchaser as to the terms of the finance could be measured, and this is what distinguished *Jubal v. McHenry* where the condition included a reference to bank finance.

Moffit J., an Acting Justice of Appeal, approached the matter on the basis that the clause had read, "Subject to finance being arranged for the sum of £1,400". This could mean "subject to the purchaser (or vendor) being able, acting reasonably, to arrange finance on reasonable terms in the sum of £1,400" or it could mean "subject to the purchaser arranging finance in the sum of £1,400 on terms of which he approves". The Justice considered that on either interpretation the parties had not reached an agreement. On the former interpretation for which the appellant contended, the parties, in his view, had made no agreement as to the criteria upon which a judge or jury could determine what is reasonable. 'There is no definition whatever of the nature of the finance, such as who is to provide finance or as to the rate of interest or as to the term or the security to be provided.'[50] The difficulty was that the bargain of the parties provided no guide sufficient to enable a determination to be made of what is reasonable. He accordingly held the clause void for uncertainty.

It is possible to distinguish the decision in *Moran v. Umback* from other decisions on financing conditions on at least two grounds. The first is that it is not a case involving the sale of land. The second is that the decision was made in part (at least so far as the Chief Justice's decision was concerned) on the evidence of the many different methods of financing a wine saloon business. It is submitted that these distinctions are not of sufficient materiality to constitute real distinctions. Counsel for the appellant, as has been mentioned, argued his case in terms of *Jubal v. McHenry* and saw no obstacle to applying that decision concerning a financing condition in a land sale to the agreement for the sale of the wine saloon business. Furthermore, the Court distinguished *Jubal v. McHenry* solely on the ground that the financing condition in that case was of a more specific character.

Of the two cases said[51] to support the view that the mere general expression "subject to finance" is to be interpreted to mean an amount reasonably necessary to complete the purchase on reasonable terms, both of interest and repayment, only one can be considered at variance

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50 Id. at 439.

51 See Sutton, op. cit., n. 27, at 8-9.

with the decision in *Moran v. McHenry. Barber v. Crickett*[52] involved the interpretation of a condition reading "this agreement is conditional on the purchaser arranging the necessary mortgage finance to purchase the property within thirty days from the date of this agreement". This clause clearly gives the Court more of a criterion by which to measure the satisfaction of the purchaser as to the terms of the finance than the clause at issue in *Moran v. Umback*. The only remaining authority for the view, therefore, is the Queensland Decision of *Hines v. Good*.[53]

That case concerned the interpretation of an agreement whereby the purchasers agreed to purchase a farm for the sum of £4,150 payable as to £100 by way of deposit, and as to the balance in the following manner:

> Vacant possession shall be given and taken by the vendor and the purchasers respectively within twenty-eight days after the approval to this sale has been granted by the Delegate of the Treasurer, when all moneys owing under this contract shall become due and payable. This sale is to include all stock, plant, and improvements thereof as per inventory to be attached. This sale is subject to finance.

The purchasers, after making reasonable efforts, failed to obtain finance and brought an action to recover the deposit. MacCrossan C.J. considered that the condition should be considered to mean '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'.[54] This paraphrase of the elliptical condition was criticised by O'Bryan J. in *Jubal v. McHenry*,[55] by Hanger J. in *Atherton v. Flodine*[56] and by Richmond J. in *Eastmond v. Bowis*.[57] It does not accord with the decision in *Moran v. Umback*. It is submitted that such a paraphrase would not now be made by a court called on to ascertain the meaning of a financing condition in mere general language and without surrounding circumstances to explain its meaning.

(4) *The more specific the clause is, the greater the likelihood the*

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52 [1958] N.Z.L.R. 1057.
53 [1951] Q.W.N. 2.
54 Id. at 4.
55 [1958] V.R. 406, 409-10.
56 [1959] Qd.R. 364, 371. See Sutton, op cit., n. 27, at 6, for a discussion of Hanger J.'s opinion.
57 [1962] N.Z.L.R. 954, 958.

court will be able to give meaning to it. The court may do this by ascertaining what would be reasonable finance in the circumstances, and this involves the court in determining the amount of finance required to complete the purchase as well as the terms of interest and repayment of capital.

Thus in *Jubal v. McHenry* a condition that "this sale is subject to bank finance of £1,500 being obtained for the purchaser" was interpreted as follows by O'Bryan J.:

> In my opinion it is proper to read into this condition the requirement that the finance obtained shall be on reasonable terms. Paraphrased, the requirement is that the vendor shall obtain for the purchaser a loan from a bank of the sum of £1,500 on the security of the property sold on reasonable terms and at a reasonable rate of interest. Since the purchaser has not stipulated for a loan for any particular period of time or whether it is to be by way of overdraft or on credit foncier terms, the condition can be satisfied by the procurement of either. The fact that the parties have not stipulated for a particular kind of loan does not render the condition void for uncertainty. The condition is certain enough, but can be satisfied by more than one kind of loan. It is as though the parties had said there must be a loan of £1,500 from a bank whether by way of overdraft or other reasonable bank method of finance.[58]

In *Eastmond v. Bowis,* Richmond J. interpreted the expression "subject to finance" in the light of the surrounding circumstances,[59] to mean 'subject to the sum of £6,000 being raised on mortgage of the vendor's property by the purchaser or Mr Matson'. In the absence of surrounding circumstances to explain the terms of any mortgage to be obtained, he filled this remaining gap by the implication of the words 'on reasonable terms as to interest and repayment of capital'.[60]

(5) *In the event of the clause being meaningless, it will be very unlikely that the clause can be severed and the remainder of the contract enforced.*

Such a submission was made in *Moran v. Umback,*[61] on the authority of *Nicolene Ltd. v. Simmonds,*[62] *Fitzgerald v. Masters*[63] and

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58 [1958] V.R. 406, 411.

59 The presence of surrounding circumstances explaining the meaning of the general clause distinguishes this case from Hines v. Good, [1951] Q.W.N. 2.

60 [1962] N.Z.L.R. 954, 961.

61 [1966] 1 N.S.W.R. 437, 440.

62 [1953] 1 All E.R. 822.

63 (1956) 95 C.L.R. 420.

Bosaid v. Andry.[64] Acting Justice of Appeal Moffitt distinguished the clauses severed in those cases on the ground that they were provisions in the nature of additions to the substance of the matter agreed upon. In the case before him he regarded it as an essential feature of the proposed bargain that the purchaser could not provide the whole of the purchase price from his own pocket. 'To say the parties intended that the contract should be binding, irrespective of whether the purchaser could borrow money, would be to disregard what was expressly said, namely that whatever was agreed was "subject" to finance being arranged'.[65] The same reasoning had led one writer to suggest that the principle of severance could never apply to contracts of sale containing meaningless subject to finance clauses.[66] A submission regarding severance was made in *Walton v. Jones* by counsel for the defendant but the decision of the trial judge giving meaning to the clause meant that the point was not considered further.[67]

(6) *If the financing clause has meaning, it will be a fundamental condition of the contract. It becomes "an essential obligation".*[68] *If meaningful, the clause will usually be a condition subsequent.*

An agreement is said to be subject to a condition precedent if it provides that it is not to be binding until a specified event occurs and subject to a condition subsequent if it provides for its determination on the occurrence of some specified event.[69] In *Zieme v. Gregory* the trial judge interpreted the condition that "this contract is conditional upon the purchaser obtaining a first mortgage loan of £4,000 upon the security of the land from a life assurance society or other lending institution on or before settlement" to be a condition subsequent or resolutive. The Full Court on appeal upheld this having regard to the terms of the contract, and in particular the fixing of a date for payment of the balance of purchase money less than six weeks after the date of the document, the conditions incorporated from Table A of the Transfer of Land Act 1958 as to the delivery of requisitions or objections "within 14 days from the day of sale", and those contained in the special condition as to the purchaser being entitled to occupy part of the premises "as from the date hereof", on paying an occu-

64 [1963] V.R. 465.
65 [1966] 1 N.S.W.R. 437, 440.
66 Sutton, op. cit., n. 27, at 5-6.
67 W35/1965 in the Supreme Court of Western Australia, unreported judgment of D'Arcy J.
68 Jones v. Walton, [1966] W.A.R. 139, 143 (per Jackson J.).
69 TREITEL, THE LAW OF CONTRACT 39 (London, 1962).

pancy rent until the date of payment of the balance of purchase money and vacating the premises upon request "in the event of this contract of sale not being completed for any reason whatsoever".[70] In *Rama v. Scott,* there was considerable discussion during the argument as to whether the financing condition under consideration ("this offer is subject to my being able to arrange mortgage finance of £2,000 on the security of the property within 14 days of acceptance hereof") was a condition precedent or subsequent and accordingly whether, on the failure to arrange the finance within the stated fourteen days, the contract would be automatically void or merely voidable. The court (Barrowclough C.J.) considered it was quite clearly a condition subsequent.[71]

(7) *Non-fulfilment with the financing condition as a condition subsequent will normally render the contract voidable at the option of the purchaser.*

The purchaser will have a right either to treat the contract as at an end or to cause the contract to come to an end. 'According to the authorities . . . where the happening of the event may be brought about by failure on the part of one of the parties to take the necessary steps to ensure its fulfilment, the condition is not self-executing but is to be construed as making the contract voidable and not void: *New Zealand Shipping Co. Ltd. v. Societe des Aleliers et Chantiers de France,*[72] *Suttor v. Gundowda Pty. Ltd.*[73, 74] Even where the contract provides that it shall be void on default, that word is to be construed as meaning voidable at the instance of the party not in default, or, if neither party be in default, at the instance of either party.[75] Normally the condition will be inserted for the benefit of the purchaser and in such circumstances the vendor will be unable to avail himself of the right to avoid the contract on non-fulfilment of the condition. In circumstances such as in *Rama v. Scott,*[76] where the vendor had resold the land, there may be considerable argument for whose benefit the condition was included.

The purchaser's right to elect to treat the contract as at an end is

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70 Zieme v. Gregory, [1963] V.R. 214, 222.
71 Rama v. Scott, [1966] N.Z.L.R. 176, 179-180.
72 [1919] A.C. 1.
73 (1950) 81 C.L.R. 418.
74 Zieme v. Gregory, [1963] V.R. 214, 222-223.
75 Barber v. Crickett, [1958] N.Z.L.R. 1057, 1059.
76 [1966] N.Z.L.R. 176, 178-179.

subject to one important qualification, described as follows by the Victorian Supreme Court:

> But that right of the purchaser is not absolute. It is conditional upon the purchaser not being in default. Whether he is in default will depend upon whether any requirement is impliedly imposed by the provision itself for performance by him and what its terms should be taken to be. We think it is clear that it was not intended by the parties to this contract that the vendor's rights should depend upon the will or whim of the purchaser irrespective of what his conduct might be, and that there must be implied some requirement to be observed by the purchaser in relation to the obtaining of the loan. In its broadest form that requirement may be stated to be that he shall have taken all reasonable steps on his part to obtain the loan (cf. *Kennedy v. Vercoe*[77]). Any right accruing to the purchaser by reason of the condition depended upon the fulfilment of this requirement along with the other terms laid down by the condition of which it forms part. The onus was on him if he wished to rely on this resolutive condition, to establish that he had taken all reasonable steps to obtain a loan of the specified description on or before settlement, but that nevertheless he had ot obtained it (*Brauer & Co. (Great Britain) Ltd. v. James Clark (Brush Materials) Ltd.*;[78] *Barber v. Crickett*[79]).[80]

Where a meaningful finance condition is inserted as a condition subsequent for the benefit of the purchaser, he may choose not to avail himself of it. In such a case he will waive it, as the purchaser did in the circumstances of *Rama v. Scott*.[81]

SALE OF BUYER'S HOME

A condition, really a financing condition, may be included in real estate contracts of sale, referring to the sale of the buyer's present home.[82] The buyer needs such sale to take place to give him enough finance to purchase the new home. While this article deals primarily with the financing condition that looks to a mortgage loan on the new home, it is important to note that the home-sale contingency is a financing condition too. As such, it offers the same drafting problems. If it is too general, it may be meaningless and if it is specific to some degree, the remaining terms may be implied on terms of reasonable-

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77 (1960) 105 C.L.R. 521, 526.
78 [1952] 2 All E.R. 497, 501 (per Denning L.J.).
79 [1958] N.Z.L.R. 1057.
80 Zieme v. Gregory, [1963] V.R. 214, 223.
81 [1966] N.Z.L.R. 176, 178.
82 See the hypothetical facts at the commencement of this article for an example.

ness. There is an equal need for inclusion of details in the contract if the buyer is to be sure that his new purchase is to be contingent on his obtaining exactly the price he is after on the old house. It is worth noting that where a sale of land and a house, shop and fixtures thereon was made "subject to the *vendor* disposing of his business and stock within ninety days from the date hereof", Hudson J. of the Victorian Supreme Court held that the special condition was not void for uncertainty and that in the circumstances of the case, the special condition was subject to an implied term that the vendor should take reasonable steps to find a buyer and should avail himself of any opportunity to dispose of the business and stock in trade at a price and upon terms which bona fide he did not consider unreasonable.[83]

STATUTE OF FRAUDS

Section 4 of the Statute of Frauds provides that:

> No action shall be brought . . . upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised.

This part of section 4 applies in the Australian Capital Territory and in Western Australia and applies in the other States by similar provisions of State legislation.[84] The point in raising the Statute here is to ask the question whether it can be invoked to void a contract just because the finance condition is drawn incompletely. The matter does not appear to have been raised in any of the cases concerning such conditions in Australia, New Zealand or the United Kingdom but it has arisen in the United States.[85] However, its application there is limited and is not greeted with any enthusiasm,[86] and the history of the section in Australia[87] and the United Kingdom would suggest that there would be judicial reluctance to apply it here.

LAW AND THE LAND AGENT

In Western Australia, a land agent is defined by the Land Agents

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83 Lombardo v. Morgan, [1957] V.R. 153.

84 Conveyancing Act 1919-1962 (N.S.W.), s. 54a; Instruments Act 1958 (Vic.), s. 126; Statute of Frauds and Limitations 1867 (Qld.), s. 5; Law of Property Act 1936 (S.A.), s. 26(1); Conveyancing and Law of Property Act 1884 (Tas.), s. 36.

85 See Raushenbush, op. cit., n. 7, at 604-607.

86 Aiken, op. cit., n. 8, at 275-280.

87 CHESHIRE & FIFOOT, THE LAW OF CONTRACT 257-290 (Australian ed.).

Act 1921 and amendments to mean 'a person whose business, either alone or as part of or in connection with any other business, is to act as agent for a consideration in money or money's worth, as commission, reward, or remuneration, in respect of a land transaction; but does not include public accountants acting in the discharge of their duties as trustees, liquidators, or receivers.'[88] The same Act prohibits any person carrying on the business of a land agent unless he is the holder of a licence under the Act.[89] The Act also establishes The Land Agents Supervisory Committee of Western Australia which has general powers of supervision and inquiry over land agents with a view to seeing that they carry out the obligations imposed on them by the Act,[90] particularly in respect to the proper keeping of the trust account.[91]

We have already seen that the more specific the land agent is in drafting the offer and acceptance forms when these contain subject to finance clauses, the greater the likelihood of a certain bargain being reached. This raises the question as to how far the agent can go as a legal draftsman. It is obviously the intention of the legislature that the land agent should be able to express himself clearly, since regulations made under the Land Agents Act require the applicant for a licence to pass an examination (inter alia) in English Expression I.[92] But his opportunity to apply his ability at expression to legal draftsmanship is limited by the Legal Practitioner's Act (1893), the relevant sections of which read as follows:

> s. 77. No person other than a certificated practitioner shall directly or indirectly perform or carry out or be engaged in any work in connection with the administration of law, or draw or prepare any deed, instrument or writing relating to or in any manner dealing with or affecting real or personal estate or any interest therein or any proceedings at law, civil or criminal, or in equity; provided that nothing herein contained shall be construed to affect public officers acting in discharge of their official duty, or the paid or articled clerks of certificated practitioners, or any person drawing or preparing any transfer under the Transfer of Land Act, 1893.
>
> s. 78. Nothing in the last preceding section contained shall extend to make any person liable to any penalty if such person satisfies the court, judge, or justice, as the case may be, that he

88 Land Agents Act 1921-1964 (W.A.), s. 2.
89 Id., s. 3(1).
90 Id., ss. 14A-14F.
91 Id., s. 14G.
92 Id., s. 4(3)(a), and also the Land Agents Act Regulations 1965, reg. 5.

has not directly or indirectly been paid or remunerated or promised or expected pay or remuneration for the work or services so done.

Where such person directly or indirectly receives, expects or is promised pay or remuneration for or in respect of other work or services relating to, connected with or arising out of the same transaction or subject matter as that to which the said first-mentioned work or services shall relate, the provisions of this section shall not apply.

s. 81. Every person who acts contrary to the terms of this Act, or any section or part thereof or to any rule, shall be guilty of a contempt of the Supreme Court, and may be punished accordingly by the said court or a judge thereof in chambers on the motion of the Board and shall, whether any such motion has been made or not on conviction forfeit and pay for every such offence the sum of twenty pounds or such less sum (if any) as mentioned in the rules.

These sections came up for judicial consideration in the case of *In re McCombes and Edwards.*[93] The facts were that land agents had prepared a contract of sale in connection with the sale of certain real estate. Even though the agents did not make any specific charge for the service rendered in preparing the agreement, the court found them guilty of a contravention of section 77 on the ground that the preparation of that agreement was not in any way a necessary and integral part of the contractual duty which the land agents owed to their principals but was a service performed by them separately and quite distinct from their ordinary business as land agents of their principals. In the circumstances, the second paragraph of section 78 was held to apply.

In the course of his judgment, Walker J. said:

> A perusal of the agreement shows that it is in every sense a legal document dealing with real estate of a nature and for a purpose which obviously calls for preparation by a skilled legal practitioner to ensure that it will have the effect in law which it is intended to have. A land agent who is not also a certificated legal practitioner obviously is not bound contractually to prepare, but on the contrary will according to circumstances be prohibited from preparing such a legal document as the said agreement. There may lie upon him a moral obligation to inform the parties to the sale of the advisability of having such an agreement prepared and executed, but there his responsibility in relation to such agreement ends. If the parties heed his advice, then the preparation of such agreement is a matter for attention by a person qualified

93 (1952) 54 W.A.L.R. 62.

and permitted by law to engage in that kind of legal work.[94]

Walker J.'s description of the obligations of the land agent in this respect are reflected in the Code of Ethics of the Real Estate Institute of Western Australia Inc., the members of which are the land agents (as defined by the Land Agents Act) practising in Western Australia. The relevant articles of the code are as follows:

> Article 13: In justice to those who place their interests in his hands or seek his services, a member should endeavour to be informed always regarding the law, proposed legislation and other essential facts, and public policies which affect those interests.
> Article 19: When asked for a valuation of real property, or an opinion on a real estate problem, a member should never give an unconsidered answer; his counsel constitutes a professional service, which he should render only after having ascertained and weighed the facts, and for which he should make a fair professional charge. Unless a member is thoroughly informed and qualified, he should not undertake to give his client legal, engineering, architectural or other technical advice; he should refer him to an expert in the respective professions.

Similar articles are contained in the Code of Ethics of the Real Estate and Stock Institute of Australia.

The Land Agent may also be concerned with the law if he is seeking to recover his commission, or if questions arise concerning his fiduciary duties as an agent. Both of these questions lie outside the scope of this article; but it is worthy of note that the former question has been discussed fully elsewhere,[95] and that the Land Agents Act provides that

> a person shall not be entitled to sue for or recover any commission, reward, or remuneration for or in respect of a land transaction, made or effected by him in the course of business as a land agent unless—
> (a) he is the holder of a licence under the Act, and
> (b) his engagement or appointment to act as agent in respect of such land transaction is in writing signed by or on behalf of the person to be charged with such commission, reward, or remuneration.[96]

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94 Id. at 64-5.

95 G. H. L. Fridman, *Estate Agents' Commission,* 5 THE AUSTRALIAN LAWYER 97-101. See also A. Kiddle, *Remuneration of Commission Agents in Australia and New Zealand,* Vol. 2, ibid., 3 and 17; L. A. Harris, *Agent's Commission,* 3 AUSTRALIAN CONVEYANCER AND SOLICITOR'S JOURNAL 63 and 93; and case notes in Vol. 2, ibid., 160 and 188; Vol. 5, ibid., 60; and Vol. 6, ibid., 39. Note also J. Winneke, *Deposits paid to Agents before Contract,* 5 THE AUSTRALIAN LAWYER 28-34.

96 Land Agents Act 1921-1964 (W.A.), s. 12.

With regard to the application of agency law to a land agent, Professor Raushenbush has raised the following question:

> One may doubt the realism or good sense of applying traditional agency law to real estate brokerage. The broker's social and economic purpose is as an intermediary, bringing seller and buyer together and perhaps making both give a little bit in the process, for their own good. He has a sense of obligation to both, if he is conscientious, yet he really is a self-dealer, seeking monetary reward for fulfilling his useful social and economic role. The survey results . . . amply highlight his ambivalent role, as in the explanation by a majority of respondents that financing conditions are written in "to protect the buyer" by brokers who in such cases are almost uniformly agents of the seller, in the traditional view.[97]

Statute law may impose special obligations on the land agent in relation to the financing of contracts for the sale of land. For instance, the Estate Agents Act 1958 (Victoria) as amended by the Estate Agents Amendment Act 1960 provides in section 34 that the agent must, before obtaining the signature of a purchaser to any contract or before accepting a deposit, give to the purchaser a statement in writing stating (inter alia) whether or not the agent has made or offered to the purchaser any representation, promise or term[98] in respect of the availability of finance for defraying wholly or in part the purchase price, as well as the particulars of such representation, promise or term and the source of the finance. If the statement is not given as required, the purchaser may at his option by notice in writing within three months after he first signs the contract avoid such contract, provided that he has not paid the whole of the purchase money, or taken possession or accepted title. If finance is not available in compliance in every respect with the representations, promises or terms referred to in the statement, and the purchaser has done all things reasonably required to be done to obtain the finance, he may avoid the contract in a similar manner. Such legislation does not exist in Western Australia.[99]

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97 Raushenbush, op. cit., n. 7, at 594, and note also 595.

98 As to what will amount to a representation, promise or term, see National Trustees, Executors and Agency Co. of Australia Ltd. v. Abercromby & Beatty Pty. Ltd., [1965] V.R. 675. Note (1965) 39 LAW INSTITUTE JOURNAL 381.

99 For the position in Queensland, see J. P. Kelly, *Queensland Legislation Affecting Sale and Purchase of Land*, 7 AUSTRALIAN CONVEYANCER AND SOLICITOR'S JOURNAL 15.

III. CONCLUSION

In using financing conditions, land agents make certain assumptions about the law. Are such assumptions accurate? The principal assumption is that such conditions protect the purchaser. As we have seen, this protection may be understood to mean either protection from entering into a binding contract until availability of finance is verified or protection against the forfeiture of deposit. Clearly these are accurate assumptions, for so far as the financing condition is a fundamental condition of the contract, which it will usually be whether it is a condition precedent or subsequent, there will be no binding agreement or failure to fulfil the condition, and the deposit will be refundable.

But what attitude should the law take to financing conditions? Such a question really leads us into making a hypothesis about the intentions of the buyer and seller when they insert such conditions in their contract. So far as the agents are able to interpret the purchaser's motives, they see them as being to reserve the property until finance is found, in such a manner that the reservation will not be binding in the event of finance not being available. We may surmise that the vendor wishes to capture a purchaser who is able to pay but is prepared to give him some little time to find the necessary finance. At the same time, the purchaser is genuinely prepared to complete the purchase provided the financial conditions are met.

Since the financing condition is as much a product of the intentions of the parties as any other part of a contract, it ought to be treated in the same way as any contractual arrangement: effect is to be given to the intention of the parties so far as this is ascertainable. It is up to the parties to state their bargain and to make it as clear as possible. No court should make a bargain for them. The intention of the parties must be paramount, and where no intention is expressed there is nothing to which effect can be given. It is for this reason that courts will not seek to make a bargain out of a financing condition in general language. It is for the same reason that the parties and their agent should take care to specify as many details as possible.

Careful drafting of the condition will avoid subsequent disputes. The survey discloses a strong tendency among Western Australian land agents to specify the amount of the loan, the interest rate and a time limit in drawing financing conditions, and for this they are to be commended. This specification occurs after a thorough inquiry into the purchaser's capacity to pay, and where this capacity to pay

is dependent on the sale of the buyer's home, as much care will be needed in drafting a detailed condition as if a mortgage loan is sought. Perceptive drafting will protect the purchaser, by committing him only to finance within his capacity to pay, and will preserve the vendor's liberty of action by preventing the property being tied up beyond the specified date (time being of the essence).

Is a financing condition the best way to reconcile these interests of the vendor and purchaser? One writer has suggested that a better method is to create an option in the purchaser for a period sufficient to enable him to find out if he can get financing since 'sellers now give for nothing what are effectively options, without assurance that buyers actually will buy; and that buyers risk in deposits (and often lose, by negotiation or by litigation) far more substantial sums than they would be called upon to pay for equivalent options'.[100] This suggestion has been criticised by Professor Raushenbush, who suggests that the option does not reflect the intention of the parties, which is to bind the purchaser if he can afford to pay.[101] He suggests that a better method would be to provide for forfeiture of some of the deposit even if the loan is not available. The amount forfeited would compensate the vendor for the time his property was off the market and it would stimulate the purchaser to try hard to find the finance.[102] This suggestion appears to be founded on the doubtful belief that the prospect of purchase is not itself a sufficient inducement to the purchaser to make every effort, and it appears unlikely to work in a freely competitive market where there is no shortage of properties available. The financing condition, as a contractual condition able to be accurately shaped by the parties to the contract for the sale and purchase of the land, will continue to be used as the principal means of resolving the interests of vendor and purchaser in such circumstances.[103]

R. D. NICHOLSON*

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100 Aiken, op. cit., n. 8, at 300.

101 Raushenbush, op. cit., n. 7, at 621.

102 Id., at 623.

103 The writer wishes to thank: Professor Raushenbush—for making available the questionnaire used by him in his Wisconsin investigations and generally for allowing this study to be modelled on his own investigations; Mr R. W. Harding, the editor of this Law Review—for arranging the preparation and circulation of the questionnaire in Western Australia; Professor E. K. Braybrooke—for redrafting the Wisconsin questionnaire and adapting it to local conditions.

* *Barrister and Solicitor of the Supreme Court of Western Australia.*