# THE "SUBJECT TO FINANCE CLAUSE" IN THE OFFER AND ACCEPTANCE APPROVED BY THE LAW SOCIETY AND THE REAL ESTATE INSTITUTE OF WESTERN AUSTRALIA[1]

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It is the purpose of this article to examine Clause 3 of the conditions contained in the Standard Form Contract for the sale of land approved by the Law Society of Western Australia and the Real Estate Institute of Western Australia (1975 revision) (hereinafter called the Offer and Acceptance) and to investigate its workings in conjunction with Clause 16 of the Law Society of Western Australia General Conditions for the Sale of Land (1974 revision) (hereinafter called the General Conditions). Schedule A Part 1 of this article contains some recommended clauses which could replace the present Clause 3 of the conditions in the Offer and Acceptance and may provide some assistanec to those in the Western Australian legal profession who are faced with problems arising out of the present "subject to finance clause".

The General Conditions are deemed to be incorporated in the Offer and Acceptance insofar as they are not varied or inconsistent with its express terms.[2] It is further provided that words and expressions defined in the General Conditions shall have the same meaning as in the Offer and Acceptance unless otherwise required by the context.[3] Clause 3 of the conditions in the Offer and Acceptance contains what is generally called "the subject to finance clause".

> If Item I of the Particulars is completed in any respect then this contract is conditional on the Nominated Lender or any other Lender acceptable to the purchaser, approving on or before the latest date for approval therein specified, the purchaser's application for loan in accordance with Item I. The purchaser shall use his best endeavours to take all steps necessary to obtain the loan. In the event of the purchaser not obtaining approval for any reason not attributable to his own default then this contract shall be at an end on the day after the latest date for approval specified

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1 I am indebted to Louis Proksch, Senior Lecturer-in-Law, University of Western Australia for his helpful comments on this paper.

2 Clause (8) of the conditions of the Offer and Acecptance.

3 Ibid.

> in Item I or if none is specified then on the day after the expiry of 21 days from the date of the contract (unless the purchaser has previously given notice in writing to the vendor or to the vendor's agent stating that he waives the benefit of this condition) and all monies paid thereunder shall be repaid to the purchaser without deduction.

This clause is drafted with simplicity in mind and obvious regard for the need to protect a lay purchaser from signing what would otherwise be an unconditional contract. However, it is so drafted that it is confusing and wholly inadequate to meet the needs both of the vendor and the purchaser.

## 1. UNCERTAINTY

### (a) *Generally*

Item I of the Particulars of the Offer and Acceptance is headed "Particulars of Finance Required". The following matters are therein set out.

> The Nominated Lender;
> The Form of Security—First Mortgage, Second Mortgage;
> Latest Date for Approval;
> Minimum Amount of Loan.

Assuming always that Item I of the Particulars is completed *in full,* the question arises as to whether the clause is sufficiently certain to be an enforceable contractual term. This question is vital because it is clear that if the clause is uncetrain, then the whole of the contract clear that if the clause is uncertain, then the whole of the contract "subject to finance clauses" has been fully dealt with by John Phillips in a recent article in "The Queensland Lawyer"[5] who notes a divergence of views amongst judicial decisions in the various States.[6] It is by no means clear what degree of detail is required in the clause to ensure that it will not fail for uncertainty. The approach in Queensland and New Zealand is in marked contrast to that in Victoria and New South Wales.[7]

4 Grime v Bartholomew, [1972] 2 *N.SW.L.R.* 827 at 838 (per Holland, J.). Jubal v MacHenry, [1958] V.R. 406 at 409 per O'Bryan, J.).

5 Phillips, "Subject to Finance Clauses in Real Estate Contracts" (1976 Vol. 3 Pt. 3 *The Queensland Lawyer* 113 ff.

6 Id. at 114.

7 Id. at 115.

In Queensland and New Zealand the approach of the Courts has been to uphold finance clauses framed in very general terms.[8] The courts in Victoria and New South Wales, on the other hand, have required some degree of particularity, in the absence of which the clause is likely to be considered uncertain.[9] Where a clause is framed in general terms, it may be necessary for the court to imply a term to cover the area of uncertainty.[10]

The question arises as to whether it is open to the purchaser to determine subjectively the reasonableness of the amount of the loan and its terms, or must the court lay down an objective test of what is reasonable? Whilst this question is by no means settled, Phillips examines some of the authorities and concludes that an objective standard of reasonableness has to be applied by the court in the final analysis.[11] He goes on to note that where the clause expressly leaves it to the purrhaser's discretion to determine the adequacy of the finance, the position is then more confused. Such a clause "in effect gives the purchaser an option exercisable at his own caprice of whether he is to complete the purchase or not. It constitutes a situation in which one party is not really bound to perform at all if he does not wish to, and in such a situation it is trite law that no contract exists."[12] Unless the court can imply a term that the purchaser should not unreasonably withhold his consent to an offer of finance, the position is that the purchaser is not bound because he has never reached an agreement and therefore neither is the vendor bound. The agreement is incomplete in the same way as the Hire-Purchase Agreement in *G. Scammell and Neplew Ltd. v. H. C. & J. G. Ouston*[13] was incomplete. The law stated quite clearly in *May & Butcher v The King*:[14]

> To be a good contract there must be a concluded bargain and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties. Of course, it may leave something which has still to be determined but then that determination must be a determination which does not depend upon the agreement between the parties.

8 Hines v Good, [1951] Q.W.N. 2; Bradford v Zahra, *Qld. Law Reporter* (1976) No. 20; Knotts v Gray, [1963] *N.Z.L.R.* 398; Barber v Crickett, [1958] *N.Z.L.R.* 1057; Scott v Rania, [1966] *N.Z.L.R.* 527.

9 Grime v Bartholomew; Jubal v MacHenry. See supra note 4.

10 Hines v Good. See supra note 8.

11 Supra note 5 at 115.

12 Id. at 116.

13 [1941] A.C. 251.

14 [1934] 2 K.B. 17 (per Viscount Dunedin).

Even if this problem can be overcome by the court implying a term that the purchaser should not unreasonably withhold his consent to an offer of finance, the court will still be faced with the task of ascertaining what is reasonable, both in relation to amount and terms, in the circumstances of the particular case.

"The crucial point is that the failure to specify the amount of finance leaves the purchaser in the position where his view of what is a loan of a reasonable amount may well be different from the court's view and if he refuses to accept a loan which the court, exercising the prudence of hindsight, later finds to be of an amount that is reasonable, he will be in breach of contract."[15] It may well be that clauses referring generally to "suitable" or "satisfactory" finance will, in the particular case before the court, be held to be obscure and incapable of precise meaning, so that the court will be forced to conclude that there is no contract. In *G. Scammell & Neplew Ltd. v H. C. & J. G. Ouston*[16] Lord Wright dealt with the question of words having no definite meaning in their context.

> There are, in my opinion, two grounds on which the court ought to hold that there was never a contract. The first is that the language used was 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. The object of the court is to do justice between the parties, and the court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention, looking at substance and not mere form. It will not be deterred by mere difficulties of interpretation. Difficulty is not synonymous with ambiguity so long as any definite meaning can be extracted. But the test of intention is to be found in the words used. If these words, considered however broadly and untechnically and with due regard to all the just implications, fail to evince any definite meaning on which the court can safely act, the court has no choice but to say that there is no contract.[17]

Phillips concentrates his attention upon examining the various matters specified by Holland J. in *Grime v Bartholomew*[18]; namely, the form of security, the class of lender, interest rates and the terms of repayment and the amount of finance. It is by no means clear, even

15 Supra note 5 at 117.
16 See supra note 13.
17 Id. at 268.
18 See supra note 4.

in New South Wales, that all these matters must be specified in detail before the clause will be upheld in every case.[19]

(b) *The Form of Security*

With regard to the form of security, Phillips notes that "in view of the lack of a definite statement as to whether the form of security should be expressly specified, the approach of the cautious draftsman should be to ensure that such information is expressly included."[20] In coming to this view, he takes into account the decision in *Jubal v MacHenry*[21] where the clause in question was held to be certain even though the loan was not expressed to be either secured or unsecured. Phillips notes that O'Bryan J. took the view that because finance was to be obtained from a bank, that necessarily implied that the loan was to be secured by way of mortgage over the property sold.[22] He argues that "O'Bryan's emphasis on this point indicates that he regarded it of importance that it must be possible to deduce the form of security as a necessary inference from other information in the clause (in this case, the class of lender), even though the form of security is not mentioned expressly in the clause".[23]

(c) *The Class of Lender*

As far as the class of lender is concerned, Phillips advises the cautious draftsman to include the class of lender in the clause.[24] Notwithstanding that the decision in *Zeime v Gregory*[25] appears at first sight to be authority for the view that it is unnecessary to specify the class of lender, he notes that in a later case[26] the Supreme Court of New South Wales stated that the term "Lending Institution" was so imprecise that the court could not define its meaning. Phillips examines the question of interest rates and terms of repayment and submits that where the form of security and the class of lender are each specified in the clause, then the clause will be sufficiently certain to enable the courts to imply a term that "reasonable" interest rates should be paid.[27] These rates would be the normal interest rates for

19 Supra note 5 at 118.
20 Id. at 119.
21 See supra note 4.
22 Supra note 5 at 118.
23 Ibid.
24 Id. at 119.
25 1963 V.R. 220.
26 Morgan v Cambridge Acceptance Pty. Ltd., [1966] 2 N.S.W.R. 556 at 560.
27 Supra note 5 at 121.

the kind of finance specified. However, in the absence of the above details, it appears that the question remains open as to whether a court is free to imply a term that reasonable interest rates should be paid and then to rule what is reasonable in all the circumstances of the case.

A failure to stipulate rates of interest and terms of repayment, where no mention is made in particular of the class of lender, may well result in a court holding the agreement to be incomplete, notwithstanding the decision in *Zeime v Gregory*.[28] Because the matter is far from being free of doubt, where a class of lender is specified in the contract, it would appear that the loan should be expressed to be repayable upon the nominated lender's "current terms and conditions". (See clause (a) of Schedule A Part 1.)

(d) *The Amount of Finance*

As to the amount of finance, Phillips notes "it is perhaps not insignificant that in all the Victorian and New South Wales cases where the finance clause has been held sufficiently certain the amount of the finance has always been specified".[29] He argues that it is desirable for the purchaser to state the maximum amount possible that he may need in a situation where he cannot specify the precise amount required. "If the purchaser is not able to state precisely what amount he will require he should state the maximum possible amount he may need, because if he only manages to borrow a lesser amount and he finds that this smaller sum is sufficient for him to complete the purchase, he can, as we shall see, waive the benefit of the clause. If, in the result, the purchaser finds that he cannot complete without borrowing the stated maximum amount, and he cannot obtain such a loan after taking reasonable steps to do so, he will not be obligated to complete. On the other hand, if the amount stated in the clause is such that the purchaser may possibly require a greater amount to complete (for instance, because he cannot realise other assets he hoped to sell) then the purchaser will be in breach of contract if he can borrow the stated amount, but is still not able to complete the purchase".[30] Phillips concludes the section of his article dealing with the question of uncertainty by recommending that to ensure the contract will not fail for uncertainty, the amount of finance, form of security and class

28 See supra note 25.
29 Supra note 5 at 121.
30 Ibid.

of lender should be specified in the clause.[31] Approval should be given to these suggestions and, for the reasons outlined above, the loan should be expressed to be repayable "upon the Nominated Lender's current terms and conditions".

On examination of Particulars I of the Offer and Acceptance, it is apparent that, except as regards the terms and conditions of the loan, all the above requirements are satisfied. The amount of finance is expressed under the sub-particular "minimum amount of loan". It would appear appropriate that the word "minimum" should read "maximum" for the reasons outlined by Phillips.[32] The sub-particular, "Nominated Lender", refers to the class of lender whilst the form of security is referred to by way of first or second mortgage. The sub-particular "latest date for approval" delineates the maximum amount of time that the purchaser has to secure approval of finance. Without a specified "latest date for approval" it would be open to either party to insist that the contract was still in existence at all material times up to and including the time of settlement. Except in this one respect, the sub-particular "latest date for approval" has no bearing on the issue of the certainty or otherwise of the "subject to finance clause."

(e) *The words "in any respect"*

It seems, therefore, that where each of the sub-particulars within Particular I are completed in full, there is no doubt whatsoever that the clause will be upheld as sufficiently certain. However the words "in any respect" in Clause 3 of the conditions of the Offer and Acceptance give cause for consideration. A failure by the purchaser to fully complete the particulars relating to the form of security, class of lender, and amount of finance, set out in Item I, may, as has been seen, result in the contract failing for uncertainty.[33] It can be submitted that the words "in any respect" are likely to result in the contract *being construed* as "subject to finance" where *some* of the sub-particulars are completed within Item I. If it was necessary to complete *all* the sub-particulars of Item I before the contract could be construed as "subject to finance", then any failure to so complete would appear to result in the contract being construed as unconditional, even though it may have been the intention of the purchaser to make the contract "subject to fianance." However, where the sub-particulars

31 Id. at 122.
32 Supra
33 Supra.

of Item I are not fully completed, whilst the contract may become subject to the construction that it is "subject to finance", the question of whether such a clause is effective will, at the end of the day, depend upon whether it is sufficiently certain. The words "in any respect" cannot make an otherwise uncertain clause certain. Therefore the words "in any respect" make the contract subject to the construction that it is "subject to finance", but have no bearing whatsoever on the question of certainty. If the words "in any respect" were omitted from clause 3 completely, then, in the absence of full completion of the sub-particulars within Item I, the contract would not fail for uncertainty, but would simply be unconditional; the condition precedent to the operation of Clause 3 (rather than to the contract as a whole) never becoming operative. It is for this reason that it is vital for the protection of purchasers that the words "in any respect" are retained. The method adopted in the Offer and Acceptance of including the precise sub-particulars required to be completed, goes a long way towards ensuring that the contract will not fail for uncertainty and is to be applauded. However, it seems most appropriate that a notice appear in a conspicuous form on the face of the Offer and Acceptance making it clear for the benefit of purchasers that a failure to complete the particulars contained within Item I "in any respect" will make the contract unconditional and that, as far as possible, the sub-particulars should be fully completed to ensure that the contract is certain. (See Schedule A Part II to this article where a recommended notice is set out.)

## 2. THE STATUS OF THE SPECIAL CONDITION

The words "this contract is conditional on" make it clear that the contract is subject to a special condition. Howeer, no indication is given as to whether that special condition is a condition subsequent or precedent. It seems that the question of whether a particular clause is a condition precedent or subsequent is a matter of construction in each case. In *Zeime v Gregory*[34] the Full Court of the Supreme Court of Victoria agreed with the trial judge at first instance, that the special condition was a condition subsequent, but they made it clear that in coming to that view it was necessary to look at the contract as a whole.[35]

34 See supra note 25.
35 Breckwoldt v Colonial Guano Co. Ltd., (1890) 16 V.L.R. 166.

> The learned trial judge held that the defendant was not entitled to avoid the contract on the ground of non-fulfilment of the special condition and that the contract was lawfully rescinded by the plaintiff by reason of the defendant's default in payment of the balance of purchase money. In arriving at these conclusions, the trial judge treated special condition 5 as a condition subsequent or resolutive. Indeed, it had not been pleaded as a condition precedent. 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 special condition 6 as to the purchaser being entitled to occupy part of the premises as from the date hereof, on paying an occupancy rent until the date of payment of the balance of purchase money on vacating the premises upon request in the event of this contract of sale not being completed for any reason whatsoever, I agree with the view taken by the trial judge of the nature of special condition 5".[36] Again, in *Walter* v *Nelms*[37] the special condition was treated by Sholl J. as a condition subsequent on a construction of the contract as a whole. I am of the opinion that when the clause is considered in conjunction with the rest of the contract, and particularly when regard is had to the long interval between, on the one hand, the dates of the contract and of payment of deposit and, on the other hand, the date of possession, the preferable view is that the clause states a condition subsequent and not a condition precedent.

However in *Rechichi & Anor v Collett & Anor*[38] an unreported decision as first instance in the Supreme Court of Western Australia, Wallace J., and counsel in the case, simply assumed that the special condition was a condition subsequent. The case concerned a sale of land, the terms of which were contained in an Offer and Acceptance form, which was then approved by the Law Society and the Real Estate Institute of Western Australia. At the time of signing the Offer and Acceptance the defendant vendor signed a document prepared by his agent which was subsequently assented to by the purchasers which read "(1) The sale will be subject to the vendor of the above-mentioned property receiving approval of finance from Town & Country Building Society for an amount not exceeding $12,000 for future purchase of house to maximum value of $15,000 and final date for approval shall be 14th September, 1974".

36 See supra note 25 at 222.
37 [1954] V.L.R. 398 at 399.
38 22 Dec. 1975, No. 5353, 1975.

As authority for the proposition that the special condition was a condition subsequent, the learned judge referred to Voumard: Sale of Land 2nd ed. p. 376: "A condition that the contract is conditional upon the purchaser obtaining a mortgage of a specified description (as, for example 'a bank mortgage') on or before completion is a condition subsequent". However the learned author cites *Zeime v Gregory* as authority for that statement! The case was decided on the basis that the defendant failed to take all reasonable steps to obtain the finance but Wallace J. indulged in some very confusing dicta: "In my opinion the condition subsequent does not render the contract void for uncertainty for want of identification of particulars of finance required but that there should be implied therein the particulars relative to the plaintiffs reservation for finance required and the provisions of condition (3) on the back of the Offer and Acceptance form". The learned judge seems to be implying that, standing alone, the particulars of finance in the vendor's special condition were wanting for sufficient particularity which, without more, would have rendered the contract void for uncertainty. But in what respects was the special condition wanting? The nominated lender and the amount of the loan were both stipulated as was the latest date for approval. Whilst no mention was made of the form of security, there would have been no problem in implying that the loan was to be secured by way of mortgage over the property sold in the same way as the same implication was made in *Jubal v MacHenry*.[39] It seems almost incomprehensible that the learned judge should seek to rely on the construction of the special condition for the benefit of the vendor so as to imply particulars of finance required in like terms to those set out in the purchasers' special conditions contained within clause (f) and condition (3) on the back of the Offer and Acceptance. Quite apart from the fact that such an implication was not necessary to give effect to the vendor's special condition, it is impossible to accept that on the facts of the case the learned judge had any valid legal basis for adopting such a technique of construction. Having incorporated the purchasers' special condition, no sense at all can then be made of the vendor's special condition.

Phillips argues that it is important to characterise the special condition as a condition subsequent to ensure that the purchaser can waive the benefit of the finance clause, providing always that the clause is sufficiently certain. "It is doubtful if the benefit of the

[39] Supra note 4.

finance clause can be waived if the finance clause is regarded as a condition precedent to the existence of the contract simply because until the condition is fulfilled, there is no contract and nothing, therefore, that the purchaser can waive. It thus becomes of some importance to determine whether the finance clause is to be characterised as a condition precedent to the existence of a contract or a condition subsequent".[39a]

Phillips notes that the learned author Robinson has argued that finance clauses should always be characterized as a condition subsequent on the basis "that a condition subsequent rather than a condition precedent, always exists when one party may affect (sic) the happening or non-happening of the event subject to which the contract is expressed to be conditional".[40] It seems to me however, that the views of both Phillips and Robinson are based on a failure to analyse the precise nature of a condition subsequent and precedent.

The learned authors McGarvie, Pannan and Hocker,[41] define a condition precedent and subsequent in the following manner. "Where the existence or happening of some fact or event causes an obligation to arise under an existing contract, we refer to the fact or event simply as a condition precedent.[42] Where, under an existing contract an obligation is, or all of the obligations under the contract are, to come to an end upon the happening of some fact or event, we refer to the fact or event as a condition subsequent".[43] It is clear that in both instances, the condition precedent or subsequent is superimposed on an existing contract, but where the existence of a contract between the parties depends upon the existence or happening of some fact or event, the fact or event is characterized as an external condition precedent to the existence of the contract.[44] It seems true to say, in respect of the external condition precedent only, that unless and until the existence or happening of some fact or event actually occurs the benefit of the finance clause cannot be waived by the purchaser, until the condition is fulfilled there is no contract and therefore nothing for the purchaser to waive. But in the case of a condition precedent under an existing contract, I see no reason at all why the

39a Supra note 5 at 127.
40 Id. at 128 and note 94.
41 McGarvie, Pannam & Hocker, *Cases and Materials on Contract* (3rd ed. 1975).
42 Id. at 151-2.
43 Id at 2.
44 See supra note 42.

purchaser should not be able to waive the benefit of the clause just as easily as if it were a condition subsequent. The happening or non happening of the event subject to which the contract is expressed to be conditional applies equally to both the condition subsequent and precendent.

Whether a condition precedent is precedent to the existence of the contract or part of the contract itself, or a condition which pending its fulfilment leaves the contract subsisting and effective, although its non-fulfilment may subsequently prevent the contract as a whole or a particular part thereof from coming fully into operation, is a matter of construction in each case.[45] The distinction between an external condition precedent and a condition precedent was made clear by Denning L.J. in *Transtrust S.P.R.L. v Danubin Trading Co. Ltd.*[46] The issue there was a stipulation in a sale of goods contract which related to the buyer opening a bankers confirmed credit in favour of the seller: "[w]hat is the legal position of such a stipulation? Sometimes it is a condition precedent to the formation of a contract, that is, it is a condition which must be fulfilled before any contract is concluded at all. In those cases the stipulation subject to the opening of a credit is rather like a stipulation subject to contract. If no credit is provided, there is no contract between the parties. In other cases, a contract is concluded and the stipulation for a credit is a condition which is an essential term of the contract. In those cases the provision of credit is a condition precedent, not to the formation of a contract, but to the obligation of the seller to deliver the goods. If the buyer fails to provide the credit, the seller can treat himself as discharged from any further performance of the contract and can sue the buyer for damages for not providing the credit".

Stoljar has argued[47] that the distinction between the condition precedent and subsequent is false, useless and misleading. "To make any sense at all, the words precedent and subsequent must at the very start be connected with a definite point of reference. For the words precendent and subsequent express a relationship in time. Any fact or event is precedent to what comes after and is subsequent to what has gone before. Therefore, before speaking of the conditioning fact as a condition precedent or a condition subsequent I must know what it is to which we are relating it. Precedent to what? Subsequent to what?

45 Cheshire & Fifoot, *Law of Contract* (3rd Australian Edition) p. 119 and there notes 37 and 38.
46 [1952] 2 Q.B. at 304.
47 Stoljar, *The Contractural Concept of Condition,* 1969 *L.Q.R.* 485.

And once I decide, as indeed I must, to make the duty of performance this point of reference, the condition precedent becomes the operative fact which must occur before a duty of immediate performance can arise. But how, then, do we define the condition subsequent? The usual answer is that, unlike the condition precedent, the subsequent condition terminates or extinguishes or divests the duty of performance".[48]

If a condition subsequent is one which divests the duty of performance after it has once accrued, then it can have no application to a "subject to finance clause" because the obligation to perform (which performance would be payment of the balance of the purchase monies on settlement day) does not arise unless and until the condition is met. Having then accrued, the contract becomes unconditional. The duty of performance arises only when the condition is met; thus in reality the special condition is always a condition precedent whether expressed as such or not. For an obligation to come to an end on the happening of some fact or event it must have already accrued. The obligation to pay the balance of the purchase monies on settlement day does not accrue until the condition is met.

None of the authorities on "subject to finance clauses" indicate that where the special condition is characterized as a condition precedent this will deprive the purchaser of his right to waive the benefit of the finance clause. In *Scott v Rania*[49] the New Zealand Court of Appeal characterized the special condition as a condition precedent and went on to indicate that the result of the case would have been the same whether the special condition was a condition precedent or a condition subsequent. It appears that the real significance of the distinction lies in the burden of proof. In the case of a condition precedent, the onus of proving that the condition has been fulfilled is upon the party who seeks to impose the obligation, whereas in the case of a condition subsequent, it is for the party who relies upon the dischage of the obligation to show that the condition has been met.[50] In *Zeime v Gregory*[51] the parties signed a contract of sale which contained the following term. "This contract of sale is conditional on the purchaser obtaining a first mortgage loan of $4,000 upon the security of the said land from a life assurance society or other lending institution on or before settlement". The court was at pains to emphasise that the

48 Id. at 506.
49 See supra note 8.
50 P. v P., [1957] *N.Z.L.R.* 854.
51 See supra note 25.

purchaser's rights to terminate the agreement depended upon him not being in default and that in turn depended upon the implied requirement that he take all reasonable steps to obtain the loan. Where the special condition was a condition subsequent, then the onus was upon the purchaser to satisfy that important requirement but not where the special condition was a condition precedent.

> According to the authorities, in a case such as this, where the happening of the event may be brought about by failure on the part of one of the parties to take 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: . . . 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. . . . 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 not obtained it. . . . The position is different in the case of a condition precedent as in *Caney v Leith* [1937] 2 All E.R. 532, which was cited in argument.[52]

Stoljar appears correct in his view that "faulty analysis will lead us to regard as conditions subsequent what are in fact conditions precedent where for purely equitable reasons the burden is placed on the defendent."[53] It is for this reason alone that the courts have consistently been prepared to characterise the "subject to finance clause" as a condition subsequent. The problem can be overcome very simply, by making express provision in the agreement providing that the purchaser shall take all reasonable steps on his part to obtain a loan and that in the event of his failing to do so, placing upon him the

52 Id. at 222.
53 Supra note 47.

obligation to furnish the vendor with written evidence of such failure. This is incorporated in the suggested clauses (b) and (e) in Schedule A Part I. If these clauses are adopted, nothing will turn on the so-called "distinction" between the condition subsequent and the condition precedent. Furthermore, there will no need to characterize them as either one or the other, provided that it is expressly made clear that the contract shall be in existence at all material times pending the fulfilment of the condition. (See clause (a) in Schedule A Part I.)

## 3. "CONDITIONAL ON THE NOMINATED LENDER"

The contract "is conditional on the nominated lender or any other lender acceptable to the purchaser approving on or before the latest date for approval. . . . The purchaser's application for a loan".

It is possible that approval for a loan may be given, thus making the contract unconditional, but subsequently withdrawn through no act of default on the purchaser's part. To deal with this situation, it is provided in suggested clause (g) of Schedule A Part I that the purchaser may terminate the contract by notice in writing to the vendor, supported by written evidence that approval has been withdrawn, in which case the vendor will repay to the purchaser all monies he has received under the agreement.

## 4. "BEST ENDEAVOURS TO OBTAIN THE LOAN"

The words "the purchaser shall use his best endeavours to take all steps necessary to obtain the loan" make it clear that the purchaser is under an express obligation to take all reasonable steps on his part to obtain a loan from "the nominated lender or any other lender acceptable to the purchaser". This obligation requires the purchaser to make an application to the nominated lender for approval of finance and to accept the offer of finance once approval is given. What is not clear is whether the purchaser is under an obligation to seek finance from sources other than the nominated lender. This may well depend upon whether the nominated lender is particularized as a specific institution within a general class of lender, or simply as a general class of lender, or indeed not particularized at all. It is clear, that where there is no specific class of lender particularized in the agreement, it is not sufficient for the purchaser to unsuccessfully attempt to obtain a loan from one institution only and then look no

further. In *Zeime v Gregory*[54] the phrase "lending institutions" was held to have the widest possible meaning and could not be read *ejusdem generis* to mean those lending institutions akin to life assurance societies. The Full Court of the Supreme Court of Victoria accepted the trial judges' view that he was "far from satisfied that had the defendant made reasonable efforts he would not have been able to obtain a loan on more favourable terms than those offered by the Lensworth Company and which he may have been prepared to accept." It appears that where a general class of lender such as a bank is mentioned, and where the bank is not specifically identified, there may well be an obligation on the purchaser to seek approval of finance from more than one bank. Phillips notes that "when the class of lender (e.g. a bank) is mentioned in the clause the prudent purchaser should obtain written evidence of a refusal of a loan from a number of institutions among that class of lender. If the finance clause does not mention the class of lender the purchaser is in a more difficult position and the wisest course would be to approach a variety of possible lending institutions and, in particular, those that will be more likely to make funds available".[55] But where a specific lending institution is identified such as "the X & Y Permanent Building Society" there seems little scope for the argument that the clause should be construed to place an obligatioin on the purchaser to look further afield than that one specific institution. However, it seems equally clear that unsuccessful approaches made to institutions other than the specific institution will not suffice to satisfy the purchasers obligation.[56] It appears that the words "or any other lender acceptable to the purchaser" gives the purchaser an option exercisable at his own discretion to waive the benefit of the clause. If this is correct, then it follows that the words in parenthesis in clause (3) of the conditions "(unless the purchaser has previously given notice in writing to the vendor or to the vendor's agent stating that he waives the benefit of this condition)" do not in themselves give the purchaser the right to waive the benefit of the condition, that right having been already conferred. Rather they deal with the way in which that right is to be exercised.

Phillips notes that providing the finance clause is sufficiently certain there is authority that the purchaser may waive the benefit of the

54 See supra note 25.
55 Supra note 5 at 125.
56 Rechichi & Anor v Collett & Anor., Supreme Court W.A. 22 Dec. 1975 No. 5353 of 1975.

clause because it has been inserted for his benefit.[57] He notes that in *Grime v Bartholomew*[58] Holland J. "was emphatic that where there is no enforceable agreement the purchaser is not able to waive the benefit of the clause". He notes further that the decision in *Bradford v Zahra*[95] seems to be inconsistent on this point and argues that "Kneipp J's decision does not appeal to logic". This view seems correct on the issue of whether the finance clause has to be inserted for the purchasers exclusive benefit before he can rely on it.

In *McDonald v. Castrianni* No. 10903 of 1976 (an unreported decision of the Supreme Court of Western Australia) Brinsden J. considered the rights of a vendor who had purported to avoid a contract for the sale of land by notice in writing after the purchaser had—

(i) failed to gain approval for a loan within the agreed time,
(ii) failed to pay the deposit,
(iii) failed to settle on the due settlement date.

He found that the purchaser failed to make out a case for specific performance of the agreement because he had at no time been ready able and willing to perform the agreement according to its terms. That finding was sufficient to dispose of the action.

When considering whether the Vendor was entitled by reason of the purchaser's acts of default to avoid the contract, Brinsden J. took the view that the vendor could only avoid the contract pursuant to the special condition if he could show that the condition was for his benefit and that by reason of the purchaser's default the stipulation upon which the contract may have become voidable had come about. He came to the conclusion " on the whole I think there is a lot to be said for the view that the vendor ought to be entitled to avoid the contract after the specified date in the event of the purchaser having failed to take reasonable steps by that date to obtain the loan. But on the weight of authorities I feel constrained to conclude that this particular clause does not confer any benefits upon the vendor defendant".

Phillips takes a different view of the position of the vendor under the clause.[59a]

> The initial point is whether the vendor has any right at all to avoid the contract if approval for a loan has not been obtained within the requisite time period. A view that was at one time expressed was that the vendor does not have such a right because since the clause is inserted for the exclusive benefit of the pur-

57 Supra note 5 at 125 and note 92.
58 See supra note 4.
59 See supra note 8
59a Supra note 5 at 129.

chaser he is the only party who has the right to avoid the contract as a result of the non fulfilment of the condition. This principle has been applied to sales of land made subject to the obtaining of planning approval, and at first instance in the New Zealand case of *Rania v. Scott* Barrowclough J. adopted this view in relation to finance clauses, although he was subsequently over-ruled on appeal. This view should be considered both wrong and unfortunate. The result of a failure to give the vendor a right to avoid the contract in these circumstances would be that if a vendor is faced with a purchaser who is unable to find finance within the stipulated time he cannot re-sell the property elsewhere but must wait until the date of settlement has passed before finding another buyer. The suggestion that the vendor has no right to avoid also depends on the theory that the finance clause is inserted for the exclusive benefit of the purchaser and it has already been pointed out that it is doubtful if this is so in circumstances in which finance has to be acquired at a date earlier than completion.

I have recommended in my suggested clause (d) in Schedule A Part I that the purchaser be given the express right to waive the benefit of the special condition upon notice in writing to the vendor. This will obviate the need for the confusing and unhelpful words "or any other lender acceptable to the purchaser", and will make it clear that the purchaser does have a right to waive the benefit of the special condition, whether or not it was inserted for his exclusive benefit.

In *Tait v Bonnice*[60] it was said that the expression "obtaining a loan" means "obtaining a loan in the sense of procuring monies and not in the sense of obtaining approval for the loan". Phillips quite properly points out that if "obtain" is read in this sense, it may mean that the condition to obtain finance could not be satisfied until the date of completion.[61] However this problem does not arise where the contract "is conditional on the Nominated Lender. . . . approving . . . the purchaser's application for a loan" and not on the purchaser's "obtaining a loan". The purchaser's obligation to "use his best endeavours to take all steps necessary to obtain the loan" is recognition of the fact that if he fails to use his best endeavours, he is in default and can be sued for damages. It appears that he may in this regard, commit the following breaches:

(i) he may fail to apply for a loan per se, or
(ii) having applied and having had his application approved (thus causing the contract to become unconditional) he may fail to take up the loan.

60 [1975] V.R. 104.
61 Supra note 5 at 126.

In both cases the breaches would be anticipatory to the primary obligation to pay over the balance of purchase monies on settlement, but in addition, would be actual breaches of fundamental obligations of the contract. But how is the vendor made aware of such breaches? The major problem with Clause 3 of the conditions contained in the Offer and Acceptance as it is presently constructed, is that it contains no provisions relating to notification by the purchaser to the vendor of the approval of finance. As a result the vendor could be unconditionally bound without knowing it or the purchaser could be in breach in any of the ways outlined above and yet the vendor could be left completely in the dark up until settlement day.

The situation is nothing short of outrageous. Therefore clauses (c) and (e) are included in Schedule A Part I to remedy the mischief. Clause (c) places an obligation on the purchaser to notify the vendor in writing if finance is approved by the nominated Lender within 48 hours from the time of notice of approval. Clause (e) requires the purchaser to notify the vendor in writing within 48 hours of the expiry of the latest date for approval or, if none is specified, within 48 hours from the expiry of 21 clear days from the date of contract that he has failed to obtain approval for a loan and requiring him to furnish the vendor with evidence in writing of that fact.

## 5. DEFAULT NOTICE

It is essential that the vendor be aware as quickly as possible of the default of the purchaser, because before he can take any action with respect to that default he has to serve "default notice" in accordance with clause 16 of the General Conditions. "Time shall be the the essence of the contract in all respects but neither party shall be entitled to enforce any rights or remedies hereunder or at common law arising out of the default of the other in performing or observing any of the terms and conditions of the contract (other than the right of the vendor to sue for any monies already due) until he has given to the other party a written notice specifying the default and stating his intention to enforce his rights and remedies unless the default is made good within the period stipulated in the notice and the other fails within that period to remedy the default. Any notice given under this paragraph shall not prejudice the right of either party to give any further notice under this paragraph. The period stipulated in the notice shall be not less than 14 days from the date of service of the notice or if the contract is a terms contract, not less than the period

of notice prescribed in section 6 of the Sale of Land Act 1970".[62] It has been seen that the question of whether or not the contract is "at an end" automatically where finance is not approved can arise only where neither party has been in default.[63] If the purchaser has failed to use his best endeavours to obtain approval of a loan, the vendor has an option to insist upon specific performance of the contract, or to elect to treat the breach as entitling him to put an end to the agreement. "If it is a condition that is broken i.e. an essential promise, the innocent party, when he becomes aware of the breach, had ordinarily the right of his option either to treat himself as discharged from the contract and to recover damages for loss of the contract, or else to keep the contract on foot and to cover damages for the particular breach".[64]

The position is precisely the same in the case of an anticipatory breach of the primary obligation to pay the balance of the purchase monies on settlement. "The doctrine of anticipatory breach is, of course, applicable as soon as A has communicated to B his refusal to carry out the contract. Under the doctrine B is put to his election. He may, if he chooses, treat the contract as brought to an end in consequence of A's default, and recover damages from A for the loss of the benefit of the contract. Alternatively, he may treat the contract as continuing on foot, in which case it will remain in force for the benefit of both parties, just as it would if the refusal had never been declared. If A persists in his refusal, B may at any time while the refusal continues, elect to treat the contract as at an end and sue for damages; but unless and until he does so the contract remains on foot, and A may withdraw his refusal and require B to peroform the contract on his part subject only to giving B reasonable notice of his change of intention".[65]

It is necessary for the vendor to make a positive election and having made his election he must notify the purchaser. "If an essential breach is committed where nothing has yet been done to perform the contract on either side, the innocent party if he chooses, may by notice to the defaulting party exercise his right of treating himself as discharged

62 *The Law Society of Western Australia General Conditions for the Sale of Land* (1974 Revision), Clause 16.

63 Supra p. 14.

64 See note 66 infra. per Jordan C.J. at 641. See also dicta of Dixon J. in McDonald v Dennys Lascelles Ltd., (1933) 48 C.L.R. 457 at 475. See also note 71 infra.

65 Peter Turnbull & Co. Pty. Ltd. v Mundus Trading Co. (A/Asia) Pty. Ltd., (1954) 90 C.L.R. 235 per Kitto J. at 250.

from the obligations of the contract and may also sue for damages for loss of the contract. A communicated election to avoid the contract, if made by a party having a right to avoid it, is at once operative and final and irrevocable".[66] The need for a communicated election to avoid the contract was referred to inferentially by Stephen J. in *Attorney-General v Australian Iron & Steel Ltd.*,[67] where he said "there was a breach of the condition. The defendant had then a right to treat the contract as at an end, or they could, if they choose, treat it as still subsisting. But, if they intended to treat the contract as at an end, it was their duty to so exercise their right and not to lead the plaintiff to believe that he was still bound by the contract."[68] But before the vendor can exercise any rights or remedies either at common law or under the contract itself, he must serve a default notice on the purchaser in accordance with clause 16 specifying the default and stating his intention to enforce his rights and remedies at the expiry of the period of notice therein provided.

It appears appropriate therefore that where section 16 notice is served on a defaulting purchaser, the vendor should include within the notice a statement of the specific rights or remedies he intends to exercise and if he intends to bring the contract to an end, he should state that the contract will terminate immediately on the expiration of the period of notice without prejudice to any other rights he may have either at common law or under the contract itself. Where the purchaser is in default, he does not have a right or indeed a power to bring the agreement to an end. Any rights or powers that he may have are conditional upon his not being in default as has been seen.[69] It matters not that the purchaser expressly "repudiates" the agreement, clause 16 of the General Conditions still has to be complied with because such a "repudiation" is no more than an act enabling the vendor to elect to either bring the contract to an end or to sue for specific performance. It follows that where a purchaser is in default he cannot ever unilaterally repudiate the contract.

In *Suttor v Gundowda Pty. Ltd.*[70] the contract for the sale of land provided that in the event of the consent of the treasurer not being obtained within two months from the date of the contract, or within

66 Tramways Advertising Pty. Ltd. v Luna Park (N.S.W.) Ltd., (1938) 38 S.R. (N.S.W.) 632 per Jordan C.J. at 643.
67 (1936) 36 S.R. (N.S.W.) 172.
68 Id. at 184.
69 Supra.
70 (1950) 81 C.L.R. 418.

such further period as might be mutually agreed upon by the parties, the contract should be deemed to be cancelled and neither party should be under any liability to the other for any sum or damages, costs or otherwise. The High Court of Australia (Latham C.J., Williams and Fullager J.J.) held that:

> Where the event in question is one which cannot occur without default on the part of one party to the contract, the position is clear. The provision is then construed as making the contract not void but voidable: only the party who is not in default can avoid it and he may please himself whether he does so or not. In the present case the happening of the event . . . was, I think, brought about without any default on the part of either party. Such case is perhaps not quite so clear as the simpler case where the event cannot occur without default on one side or the other. But we are of opinion that the *New Zealand Shipping Case* [1919] A.C. 1 requires the same construction to be given to the contract in both classes of case. The provision in question is to be construed as making the contract not void but voidable. The question of who may avoid it depends on what happens. If one party has by his default brought about the happening of the event, the other party alone has the option of avoiding the contract. If the event has happened without default on their side, then either party may avoid the contract. But neither need do so, and, if one party having a right to avoid it does not clearly exercise that right, the other party may enforce the contract against him".[71]

It appears from this that even where neither party is at fault and notwithstanding that the wording of clause 3 of the conditions in the offer and acceptance is that "this contract shall be at an end", it may still be necessary for one of the parties to notify the other that he is avoiding the contract before it can be said with certainty that the contract is at an end.[72] This is so irrespective of whether the condition is one which is subsequent or precedent and notwithstanding that the New Zealand Court of Appeal in *Scott v Rania*[73] were of the view that in such a situation time was of the essence and at the expiry of the time limit the contract no longer existed. In addition to this difficulty, it is uncertain whether the vendor has any right at all to avoid the contract, where neither party is at fault.[74] Therefore a recommended clause is set out making it as clear as possible that in the event of the purchaser not obtaining finance for any reason not attri-

71 Id. at 440.
72 Supra note 5 at 131.
73 See supra note 8.
74 Supra note 5 at 130.

butable to his own default the contract shall automatically be at an end without the need for either the purchaser or the vendor to notify the other that they are avoiding the contract. In such a case provision is made for the return to the purchaser of all monies paid under the contract without deduction. (See clause (g) of Schdule A Part I.)

## CONCLUSION

In his article, Phillips recommends two groups of suggested clauses.[75] The first places the onus on the purchaser to notify the vendor that he has obtained finance or else the contract is automatically terminated when the time limit for obtaining finance expires. The second has the effect of making the contract unconditional if the purchaser does not give notice that he has been refused finance. Both these groups of clauses are unsuitable as models for use in Western Australia where the Offer and Acceptance is quite different from its Queensland counterpart. They are in any event unsatisfactory in the following respects:—

(i) In constructing the opening words of both groups of clauses to read "the parties agree that the contract is subject to the condition subsequent" Phillips expresses a condition subsequent in a form more akin to a condition precedent. It is confusing and unhelpful to characterise the special condition as a condition subsequent in circumstances in which in reality it can be nothing but a condition precedent. Providing that the contract is in existence at all material times pending fulfulment of the condition and that the onus of proof is expressly on the purchaser to furnish written evidence of a failure on his part to obtain finance, it is not necessary to allege the fiction of the condition subsequent.

(ii) Clause 1 in group 1 makes the contract subject to the condition subsequent that the purchaser obtains approval of the loan, whilst clause 3 in the same group makes the contract subject to the purchaser notifying the vendor that he has obtained approval for a loan in accordance with the terms of clause 1, failing which, the contract will determine. These two clauses read together only expressly contemplate the situation where neither party is in breach. But where the purchaser is in default it has been seen that he will not be able to take advantage of his own wrong and unilaterally determine the agreement. It can be argued therefore that it is unnecessary to expressly provide for the situation of a defaulting purchaser it being implicit in such a

75 Supra note 5 at 133 f.f. See also Schedule B to this article, infra.

case that clause 3 would not operate for the benefit of the purchaser. The matter should be dealt with expressly to put it beyond doubt.

(iii) Nothwithstanding that the purchaser is under an obligation to notify the vendor in writing supported by written evidence of his approval of finance, nowhere in group I is there to be found an obligation on the purchaser to notify the vendor in writing supported by written evidence of his falure to obtain approval for a loan. Phillips has omitted this important requirement because within his first group of clauses the contract is automatically terminated unless the purchaser notifies the vendor that he has obtained finance. However, this does not help a vendor who is left in the situation of not knowing whether the purchaser's failure to obtain finance was owing to his own default or not. However, Phillips' second group of clauses make the contract unconditional if the purchaser does not give notice that he has been refused finance. Therefore in respect of this group there is a requirement that the purchaser provide notice in writing supported by written evidence that he has been unable to obtain a loan. (Clause 3 Group 2.)

(iv) In his first group of suggested clauses Phillips fails to give the purchaser the express right to avoid the contract. He notes "there is no need to give the purchaser an express right to avoid the contract because the contract is automatically terminated in any case on the expiry of the relevant time limit".[76] Assuming neither party to be in breach, the question of whether the contract is automatically terminated will depend upon whether the words "the contract shall determine on that date" (Clause 3 group 1) are effective of themselves to terminate the agreement without the need for notice. Phillips provides expressly in the same clause that the vendor need not notify the purchaser that he is avoiding the contract it appears appropriate that the same express provision should be included for the benefit of the purchaser. Phillips' two groups of suggested clauses are set out in Schedule B to this article, and are reproduced with his kind permission. My recommended clauses are set out in Schedule A Part I.

## SCHEDULE A PART I

Recommended clauses to replace the existing Clause 3 of the conditions in the Offer and Acceptance.

(a) The parties agree that if Item 1 of the particulars is completed in any respect then this contract is conditional on the nominated

[76] Supra note 5 p. 134.

lender approving on or before the latest date of approval therein specified, or if none is specified on the expiry of 21 clear days from the date of the contract, the purchaser's application for a loan in accordance with Item I, the loan to be repayable upon the Nominated Lender's current terms and conditions, provided always that the contract shall be in existence at all material times pending the fulfilment of this condition.

(b) It is a condition that the purchaser shall use his best endeavours to take all steps necessary to obtain the loan.

(c) It is a condition that if the Nominated Lender approves the purchaser's application for a loan in accordance with Item I, the purchaser will notify the vendor in writing to that effect within 48 hours from the receipt of the notice of approval from the Nominated Lender.

(d) The purchaser shall have the right to waive the benefit of the condition set out in clause (a) herein at any time on or before the latest date for approval specified in Item I or if none is specified at any time before the expiry of 21 clear days from the date of the contract by notice in writing to the vendor and thereupon the contract shall become unconditional.

(e) If the contract does not become unconditional within Clauses (a) or (d) herein, it is a condition that the purchaser must notify the vendor in writing within 48 hours from the expiry of the latest date for approval specified in Item I or if none is specified within 48 hours from the expiry of 21 clear days from the date of contract, that he has been unable to obtain approval for a loan in accordance with the said Item I it is a further condition that his written notice must be supported by evidence in writing from the nominated lender.

(f) In the event of the purchaser not obtaining finance for any reason not attributable to his own default the contract shall be automatically at an end without the need for either the purchaser or the vendor to notify the other that he is avoiding the contract. In such a case the vendor agrees to repay to the purchaser all monies paid hereunder without deduction.

(g) If the purchaser has notified the vendor in accordance with clause (c) of this contract that he has obtained approval for a loan, but through no fault of his own, approval for the loan is subsequently withdrawn either before or after the latest date for approval specified in Item 1 if none is specified either before or after the expiry of 21 clear days from the date of contract, the

contract shall determine when the vendor receives notice in writing from the purchaser and supported by evidence in writing from the purchaser and supported by evidence in writing from the nominated lender that approval for the loan has been withdrawn. In such a case the vendor agrees to repay to the purchaser all monies paid hereunder without deduction.

SCHEDUDE A PART II

(a) To be endorsed on the front of the Offer and Acceptance in a conspicuous form.

NOTICE TO PURCHASERS

IF YOU WISH TO MAKE THIS AGREEMENT SUBJECT TO THE APPROVAL OF FINANCE, YOU MUST COMPLETE ITEM I IN SOME RESPECT. IT IS STRONGLY RECOMMENDED THAT ALL THE SUB-PARTICULARS OF ITEM I ARE COMPLETED TO ENSURE THAT ALL THE TERMS OF THIS AGREEMENT ARE CERTAIN.

SCHEDULE B

*Clauses suggested by John Phillips*

GROUP 1

(1) The parties agree that the contract is subject to the condition subsequent that the purchaser obtains approval of a loan before [state date before which it is required that finance be obtained] of [state amount] from [state class of lender or lenders], the loan to be secured by a first registered mortgage over the land to be sold [or alteratively state here any other form of security taken, or the fact that it is to be unsecured]. The purchaser agree to undertake to use his best endeavours to obtain such a loan.

(2) The purchaser shall have the right to waive the benefit of clause 1 of this contract at any time before [state date before which it is required that finance be obtained] by notice in writing to the vendor, and on the receipt of such notice by the vendor the contract shall become unconditional. The contract shall also become unconditional on the purchaser giving the vendor notice in writing (suported by written evidence) before [state date

before which it is required that fianace be obtained] that he has obtained approval of a loan in accordance with the terms of clause 1.

(3) Unless the purchaser notifies the vendor in writing (supported by written evidence) before [state date before which it is required that finance be obtained] that he has obtained aproval for a loan in accordance with the terms of clause 1, or notifies him in writing that he has waived the benefit of clause 1 the contract shall determine on that date, and the vendor may re-sell or otherwise deal with the property without informing the purchaser that he is avoiding the contract. In such a case the vendor agrees to re-pay to the purchaser a sum equal to the amounts paid by the purchaser under this contract by way of deposit, instalment or otherwise.

(4) If the purchaser has notified the vendor in accordance with clause 2 of this contract that he has obtained approval for a loan but, through no fault of the purchaser, approval for the loan is subsequently withdrawn either before or after [state date before which it is required that finance be obtained] the contract shall determine when the vendor receives notice in writing from the purchaser (supported by written evidence) that the approval for the loan has been withdrawn. In such a case the vendor agrees to repay to the purchaser a sum equal to the amounts paid by the purchaser under this contract by way of deposit, instalment or otherwise.

Except that this clause does not release the purchaser from the obligation to use his best endeavours to obtain another loan by [state date before which it is required that finance be obtained] if approval for a loan is withdrawn before [state date before which it is required that finance be obtained].

## GROUP 2

Clause (1).

The parties agree that the contract is subject to the condition subsequent that the purchaser obtains approval of a loan before [state date before which it is required that finance be obtained] of [state amount] from [state class of lender or lenders], the loan to be secured by a first registered mortgage over the land to be sold [or alternatively state here any other form of security taken, or the fact it is to be unsecured]. The purchaser agrees to undertake to use his best endeavours to obtain such a loan.

(2) Where the purchaser before [state date before which it is required that finance be obtained] notifies the vendor in writing (supported by written evidence) that he has been unable to obtain a loan in accordance with the terms of clause 1, the contract shall determine on the receipt of such notice by the vendor, and the vendor shall repay to the purchaser a sum equal to the amounts paid by the purchaser under this contract by way of deposit, instalment or otherwise.

(3) Unless the purchaser notifies the vendor in writing (suported by written evidence) before [state date before which it is required that finance be obtained] that he has been unable to obtain a loan in accordance with the terms of clause 1, the contract shall become unconditional on that date.