MUCH ADO ABOUT NOTHING: *STEELE V SEREPISOS* AND A NOTICE REQUIREMENT FOR CONTINGENT CONDITIONS

Sarah Leslie*

In the 2006 case of Steele v Serepisos, *the Supreme Court had an opportunity to clarify the law on contingent conditions. The issue was whether a party seeking to cancel a contract for its failure to fulfil a contingent condition first had to give notice to the other party. The purpose of the notice would be to give the other party an opportunity to fulfil the condition. A majority held, correctly in the author's view, that such a notice was not required. However, the majority went to some lengths to distinguish Cooke J's judgment in the 1978 case of* Hunt v Wilson. *This paper revisits* Hunt v Wilson *and argues that Cooke J's judgment was wrong. It further argues that the majority's failure to recognise this, coupled with general judicial confusion with respect to contingent conditions, made a simple issue much more difficult than it need have been.*

I INTRODUCTION

A seemingly simple question faced the Supreme Court in 2006: in what circumstances will failure of a contingent condition, where the condition has no date fixed for fulfilment, allow a party to cancel the contract? In the case of *Steele v Serepisos*,[1] the Court's treatment of *Hunt v Wilson*[2] made the issue much more difficult than it should have been. In *Hunt v Wilson*, Cooke J had required a notice before a party could cancel for the other party's failure to fulfil the condition. A majority of the Supreme Court distinguished *Hunt v Wilson* and ruled that if a party has taken reasonable steps to fulfil the condition but has been unsuccessful, it can simply treat the contract as at an end. The minority applied *Hunt v Wilson* and held that that party could not cancel unless and until it had given a notice to the other party, allowing the other party an opportunity to fulfil the

* Submitted as part of the LLB(Hons) programme at Victoria University of Wellington.

1 *Steele v Serepisos* [2007] 1 NZLR 1 (SC).

2 *Hunt v Wilson* [1978] 2 NZLR 261 (CA).

condition. This essay argues that Cooke J's judgment was wrong and that it would have been much simpler for the majority to recognise this instead of taking great pains to distinguish *Hunt v Wilson*. This would have made it clear that a party seeking to cancel a contract for failure of condition need not give a notice before doing so.

The essay first examines the grounds on which the majority distinguished *Hunt v Wilson* and contrasts this with the minority's finding that a *Hunt v Wilson* notice requirement applied to the facts. Second, it comments briefly on different types of contingent condition, a problematic area of the law which has led to confusion in applying precedent. Third, it reviews the key parts of Cooke J's reasoning and argues that his Honour's use of authority was based on a fundamental misconception. Fourth, it contrasts Cooke J's approach with the different, more principled approach taken by the High Court of Australia where a majority held that no notice was required if a party wished to avoid the contract because the other party had not fulfilled the condition. Finally, the essay considers the way in which *Hunt v Wilson* has been subsequently applied in New Zealand and argues that this has caused more problems than it has solved. The essay concludes that Cooke J's judgment in *Hunt v Wilson* was wrong and that there should be no notice requirement when a contingent condition is at issue. *Steele v Serepisos* provided an opportunity to remove any doubt and clarify the law in this area, an opportunity of which the Supreme Court did not take full advantage.

II STEELE V SEREPISOS

A Facts

The parties entered into a contract for sale of land in 1996. The vendors, Mr Steele and Ms Roberts, agreed to subdivide the land into two lots. Mr Serepisos would purchase Lot 2, toward which he paid a deposit. The vendors retained Lot 1 on which their house was built. Section 225 of the Resource Management Act 1991 implied a condition into the contract, which made the contract subject to territorial authority consent for the subdivision. Section 225 has been interpreted to oblige the vendor to take reasonable steps to obtain the territorial authority's consent.[3]

Lot 2 did not have separate drains. The parties correctly anticipated that the territorial authority would require them to connect drains to Lot 2 in order to subdivide the property. The cheapest and most convenient way of doing this was via an easement across a neighbouring property. The easement required the neighbours' consent. An alternative was to connect the drains across Lot 1, but this would cost substantially more and involve "considerable environmental and amenity disadvantages"[4] to Lot 1. The neighbours did not consent to the easement and a long period of time

3 *W R Clough & Sons Ltd v Martyn* [1978] 1 NZLR 313 (CA).

4 *Steele v Serepisos*, above n 1, para 20 Tipping J.

elapsed while the purchaser sought and obtained a land use consent for his future development of Lot 2.[5]

The purchaser sought to perform the contract in 2003. Lot 2 had trebled in value. The vendors returned the deposit and said the contract was at an end for failure of the section 225 condition. The purchaser sued.

B High Court and Court of Appeal Decisions

1 High Court

In the High Court, the purchaser sought specific performance, or alternatively damages.[6] Miller J found that the vendors were in breach as they had not fulfilled their obligations with respect to the section 225 condition.[7]

2 Court of Appeal

The vendors appealed the High Court's finding. In particular, they argued that they had taken all reasonable steps in attempting to fulfil the condition, which was the extent of their obligation. Requiring the drains to be connected across Lot 1 was not a reasonable step, so they had discharged their obligation with respect to the condition. This meant the contract came to an end for failure of condition.

The Court of Appeal rejected the vendors' argument. Although requiring the drains to be connected across Lot 1 was unreasonable,[8] it was not open to the vendors to treat the contract as at an end for failure of condition. The Court found that *Hunt v Wilson* required the vendors to first give a notice to the purchaser, allowing him a reasonable opportunity to fulfil the condition himself.[9] It was possible that the purchaser might make "a substantial payment"[10] to procure the neighbours' consent to the easement, and the vendors were obliged to give him an opportunity to do so. The vendors could rely on failure of condition to bring the contract to an end only after the purchaser had had an opportunity to fulfil the condition.

---

5 The territorial authority linked the subdivision consent with Mr Serepisos' land use consent. This meant that the subdivision and sale could not proceed until Mr Serepisos had obtained the land use consent.

6 *Serepisos v Steele* (13 August 2004) HC WN CIV 2003-485-1335, paras 31-33 Miller J.

7 Ibid, para 63.

8 *Steele v Serepisos* (16 August 2005) CA 203/04, para 43 William Young J for the Court.

9 Ibid, paras 47, 50 William Young J for the Court.

10 Ibid, para 50 William Young J for the Court.

III STEELE V SEREPISO*: THE SUPREME COURT DECISION*

The vendors appealed the Court of Appeal's finding that they were required to give a notice to the purchaser before being entitled to treat the contract as at an end. The purchaser cross-appealed, arguing that the Court of Appeal was wrong to hold that connecting the drains across Lot 1 was not a reasonable step.

A The Cross-Appeal: Did the Vendors Take Reasonable Steps?

A majority of the Supreme Court dismissed the cross-appeal and held that connecting the drains across Lot 1 was not a reasonable step the vendors were required to make.[11] This article does not address this matter further.

B The Appeal: Was a Notice Required?

1 Arguments

The vendors made two arguments in support of their appeal. First, a notice requirement would impose an additional obligation on the vendors, over and above their duty to take reasonable steps.[12] Second, *Hunt v Wilson* was not authoritative on the point. It was restricted to cases where one party was in default of its obligations with respect to fulfilling the condition. In those cases the non-defaulting party had to give a notice, fixing a time (which had to be reasonable) within which the defaulting party had to fulfil the condition. The non-defaulting party could then rely on the default to cancel the contract. Counsel argued that in this case a notice requirement could not apply as the recipient, the purchaser, was not in default as he had no obligations with respect to fulfilling the condition. *Hunt v Wilson* could, therefore, have no application.[13] Counsel also argued that *Hunt v Wilson* was restricted to cases of delay. Again, the present situation was different: the vendors had attempted to obtain the neighbours' consent and had done everything that could be reasonably expected of them, so delay and issues of time were irrelevant.

The purchaser argued that a *Hunt v Wilson* notice requirement was "not restricted to notice to the non-performing party."[14] The purchaser could have "become involved to prevent the transaction from falling though" so there would be utility in a notice requirement in this case.[15]

---

11 *Steele v Serepisos*, above n 1, para 15 Blanchard J; para 32 Tipping J; para 138 Anderson J.

12 Ibid, 4.

13 Ibid.

14 Ibid, 5.

15 Ibid.

2 Hunt v Wilson

Hunt v Wilson concerned an agreement for sale of land where the price was to be fixed by valuation, which never eventuated. The vendor purported to cancel the contract. The purchaser sued seeking specific performance. Two judges in the Court of Appeal held that no contract existed for lack of certainty. Cooke J found the contract was conditional on the price being fixed by valuation. He held that the vendor could not cancel until he had given the purchaser a notice requiring fulfilment of the condition within a fixed, but reasonable time. If the condition remained unfulfilled at the expiration of the fixed time, the vendor could then treat the contract as at an end.

The notice issue divided the Supreme Court.

3 Majority findings

Elias CJ, Blanchard, Tipping and Anderson JJ held that *Hunt v Wilson* did not apply. The vendors were not required to give a notice before treating the contract as at an end.

Elias CJ and Blanchard J accepted the vendors' argument.[16] Blanchard J also accepted that a notice would be required if the recipient had an obligation with respect to fulfilling the condition, but the recipient in this case, Mr Serepisos, did not have any such obligation.[17]

Tipping J delivered a lengthy judgment. In his Honour's opinion, there were two interpretations of *Hunt v Wilson*. One was the wide interpretation which the Court of Appeal had favoured. Under this approach:[18]

> [any] party who seeks to cancel a contract on the basis of non-satisfaction of a condition within a reasonable time must first give notice akin to a notice making time of the essence. Such notice must give the other party a reasonable opportunity to attempt to satisfy the condition.

However, Tipping J favoured the narrower interpretation of *Hunt v Wilson* that he had earlier adopted in *Mt Pleasant Estates v Withell*.[19] In *Mt Pleasant Estates*, his Honour stated that:[20]

> a party faced with delay on the other side cannot normally hold the other party in repudiation or claim that a stipulation has been broken unless and until an appropriate notice has been given making time of the essence and requiring performance by a stated date.

---

16 Ibid, para 12 Elias CJ; ibid, para 16 Blanchard J.

17 Ibid, para 16 Blanchard J.

18 *Steele v Serepisos*, above n 8, para 47 William Young J for the Court.

19 *Mt Pleasant Estates Co Ltd v Withell* [1996] 3 NZLR 324 (HC).

20 Ibid, 330 Tipping J.

In *Hunt v Wilson*, Cooke J applied this approach to contingent conditions because, in Tipping J's terms, "it would be inequitable to have the axe falling without warning" on a party endeavouring to fulfil the condition.[21] The facts in the present case were "materially different"[22] as *Hunt v Wilson* "was not a case in which a party claimed to be free from further contractual obligations on account of having failed to satisfy a condition, despite having taken all reasonable steps to do so."[23] Tipping J made it clear that the purpose of a notice would be different in each case. In *Hunt v Wilson*, Mr Wilson was in default and Cooke J held that Mr Hunt could not cancel the contract without first giving Mr Wilson a notice. By contrast, in *Steele v Serepisos* the purchaser had no obligations with respect to fulfilling the condition and could not be in default. The purpose of the *Hunt v Wilson* notice was to warn a defaulting party that failure to fulfil the condition within a certain date would entitle the other party to cancel the contract, whereas in *Steele v Serepisos* the purpose would be to allow the recipient an opportunity to fulfil the condition although there was no default on either side. Tipping J did not think that the *Hunt v Wilson* notice requirement applied to the facts, and if it did, *Hunt v Wilson* should not be followed.[24] His Honour concluded that Cooke J's reasoning did not support a notice requirement in any situation other than where the recipient of the notice was in default.[25]

His Honour also distinguished *Hunt v Wilson* on the ground that "[t]he key circumstance in *Hunt v Wilson* was delay."[26] What his Honour meant by "delay" is unclear. He emphasised Cooke J's concern that "the party prejudiced would be without an effective remedy if unable to treat the contract as at an end following serious delay."[27] Cooke J had cited *Hargreaves Transport Ltd v Lynch* in his judgment.[28] In *Hargreaves*, a contract for the sale of a farm was conditional on the purchaser obtaining permission for its future development of the land in question. The contract "prescribed no date for permission or completion".[29] Permission was refused on questionable grounds. The English Court of Appeal held that the purchaser had discharged his obligations with respect to fulfilling the condition, and was not required to appeal the questionable decision.[30] The

---

21 Ibid; cited in *Steele v Serepisos*, above n 1, para 40 Tipping J.

22 Ibid, para 55 Tipping J.

23 Ibid, para 44 Tipping J.

24 Ibid, para 55 Tipping J.

25 Ibid, para 47-50 Tipping J.

26 Ibid, para 51 Tipping J.

27 Ibid.

28 *Hargreaves Transport Ltd v Lynch* [1969] 1 All ER 455 (CA); cited in *Steele v Serepisos*, above n 1, para 52 Tipping J.

29 *Steele v Serepisos*, ibid.

30 *Hargreaves Transport Ltd v Lynch*, above n 28, 458 Lord Denning MR.

purchaser was entitled to cancel and "was not bound to put up with [the] excessive delay" which would have resulted from pursuing an appeal.[31] Cooke J said he would follow this approach in *Hunt v Wilson*.[32] As Tipping J pointed out, this was "difficult to reconcile with [Cooke J's] ultimate conclusion that a notice was required."[33] The notice requirement Cooke J imposed on the vendor in *Hunt v Wilson* essentially meant that Mr Hunt was bound to put up with excessive delay as he had had to issue a notice requiring fulfilment of the condition within a fixed time and wait until that time expired. It is not clear whether Tipping J referred to delay in the sense of time passing without the fault of either party, which is what happened in *Hargreaves*, or in the sense that one party was in default for simply dragging its heels, which is what happened in *Hunt v Wilson*. In any case, his Honour pointed out that "the vendors here were not claiming any right to avoid or cancel the contract on account of continuing delay, either generally or as a result of default by the purchaser."[34]

Tipping J then referred to the equitable foundations of a notice requirement. Equity did not allow an innocent party to cancel for breach of a time stipulation unless time was of the essence.[35] If time was not of the essence, it could be made so by giving a notice which fixed a date for completion. The purpose of the notice was "to secure performance by the recipient of some contractual obligation, in default of which the recipient would be at risk of being found in repudiation, entitling the giver of notice to cancel the contract",[36] which was different to the facts as the purchaser was not obliged to do anything.

The vendors were, therefore, entitled to treat the contract as at an end for failure of condition, having taken all reasonable steps in attempting to satisfy the condition. It was "conventional law that the vendors were entitled to rely on the non-fulfilment of the condition as a defence to an action on the contract."[37]

Anderson J concurred briefly, stating that *Hunt v Wilson* requirement was restricted to cases where the recipient was in default.[38] In this case "a notice could serve no purpose."[39] He also made the point that the other judges in *Hunt v Wilson* decided the case on a different basis to Cooke J.[40]

---

31 *Steele v Serepisos*, above n 1, para 52 Tipping J.

32 Ibid.

33 Ibid, para 53 Tipping J.

34 Ibid, para 54 Tipping J.

35 Ibid, para 59 Tipping J.

36 Ibid, para 62 Tipping J.

37 Ibid, para 68 Tipping J.

38 Ibid, para 140 Anderson J.

4 Minority findings

McGrath J dissented. He disagreed with the grounds on which Tipping J distinguished Cooke J's judgment in *Hunt v Wilson*, a decision which he described as "very influential."[41] The notice requirement was "not the subject of any qualification",[42] that is, it was not restricted to cases of delay. Further, the present situation was "not a case in which a notice would serve no useful purpose".[43] Notice would serve three purposes. First, it would give the recipient the opportunity to fulfil the condition.[44] Second, it would give the recipient "an opportunity to scrutinise the adequacy" of the other party's steps taken in attempting to fulfil the condition.[45] Third, it would "avoid the notified party being taken by surprise by a peremptory pronouncement that the contract is at an end."[46] His Honour acknowledged that the traditional view was that these purposes were an insufficient foundation for a notice requirement in law,[47] but said that *Hunt v Wilson* provided a basis for "a different view".[48] What amounted to a reasonable time was "notoriously difficult to predict"[49] and that it would make for "clarity and justice"[50] to require a notice where no time was fixed for fulfilment of a condition.

The judgments in the Supreme Court thus revealed a deep division over whether *Hunt v Wilson* did in fact require the vendors to give a notice, thereby allowing the purchaser an opportunity to fulfil the condition himself. In particular, Tipping and McGrath JJ delivered long and sometimes difficult judgments which disagreed as to the purpose of a notice and what role delay, in any sense of the word, should play.

---

39 Ibid, para 142 Anderson J.

40 Ibid, para 140 Anderson J.

41 Ibid, para 119 McGrath J dissenting.

42 Ibid, para 121 McGrath J dissenting.

43 Ibid, para 122 McGrath J dissenting.

44 Ibid, para 114 McGrath J dissenting.

45 Ibid.

46 Ibid.

47 *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537, 569 Brennan J (Stephen J concurring); cited in *Steele v Serepisos*, above n 1, para 115 McGrath J dissenting.

48 Ibid, para 116 McGrath J dissenting

49 *Perri v Coolangatta Investments Pty Ltd*, above n 47, 555 Mason J dissenting; cited in *Steele v Serepisos*, above n 1, para 112 McGrath J dissenting.

50 Ibid, para 127 McGrath J dissenting.

IV HUNT V WILSON

It is necessary to re-examine *Hunt v Wilson* and ask whether it merited the deference paid to it by the Supreme Court. In what ways has it been "very influential"?[51]

A Classification of Conditions

McGrath J cited Burrows, Finn and Todd in support of his contention that Cooke J's judgment was influential. The passage cited refers to the way in which Cooke J classified conditions rather than his notice requirement.[52] However, classification of conditions has been the subject of much judicial confusion, with the result that judges have had difficulty in applying authority, and the operation of, and obligations arising under, the different types of condition have been unclear. In light of these difficulties, Cooke J made some helpful comments on the distinction between a condition which "prevent[s] the formation of any contract at all" and one which governs "an [existing] conditional contract … from which neither party is at liberty to withdraw at will. Indeed there are often … binding obligations in the meantime".[53] This was not an issue in *Steele v Serepisos*, but many of the authorities Cooke J relied on in *Hunt v Wilson* can only be understood when considered in light of the way the judges in those cases classified the relevant conditions. An understanding of the differences between, and operation of, the types of condition is, therefore, essential.

It should first be noted that this paper deals only with contingent conditions. If "the obligations of both parties are contingent on the happening of a specified event … [the happening of this event] may be described as a contingent condition."[54] If however one party's obligation to perform depends on the other party having first performed its obligation, it is a promissory condition,[55] and is better described as a term of the contract.[56]

1 Types of condition

There are three types of contingent condition. First, there are those which prevent a contract from coming into existence until the event occurs. An example of this is where the parties have

---

51 Ibid, para 119 McGrath J dissenting.

52 John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (2 ed, LexisNexis, Wellington, 2004), para 8.2.

53 *Hunt v Wilson*, above n 2, 267 Cooke J; Cooke J also cast doubt on the utility of using labels such as precedent and subsequent. His comments in this regard have been frequently cited and discussed.

54 H G Beale (ed) *Chitty on Contracts* (28 ed, Sweet & Maxwell, London, 1999) para 2-135 [*Chitty on Contracts*].

55 Ibid.

56 Jeannie Paterson, Andrew Robertson and Peter Heffey *Principles of Contract Law* (2 ed, Lawbook Co, Sydney, 2002) 347.

negotiated a bargain and expressed it to be "subject to contract".[57] Under this type of condition, no obligations or duties on either party arise, which makes sense as there is no contractual relationship at this stage. This type of condition is called a condition precedent in the sense that the existence of a contact is dependent on the condition being fulfilled.

Second, there may be a contract in existence but "there is, before the occurrence of the condition, no duty on either party to render the principal performance by him".[58] Until the occurrence or non-occurrence of the event, there is a binding contract from which neither party can withdraw at will, and one or both parties may have a duty to take reasonable steps to bring about the event, "without undertaking that [their] efforts will succeed".[59] For example, "subject to finance" clauses give the purchasers an opportunity to arrange finance while protecting them from an action on the contract if they are not able to do so, provided they have taken reasonable steps to obtain the finance. Until the condition is fulfilled or waived, neither party is obliged to perform. However, the parties remain bound in the sense that they are prohibited from acting inconsistently with the agreement. For example, a "subject to finance" condition will not allow the vendor to sell the property in question to a third party. This type of condition can also be called a condition precedent in that the obligation to perform is dependent on its fulfilment. If the condition is not fulfilled within the time stated the contract is voidable at either party's option.[60]

Third, conditions subsequent are beyond the scope of this paper, but broadly speaking the "parties' obligations to perform are immediately binding but will come to an end should the event specified in the condition occur."[61]

2 Scott v Rania

The 1966 case of *Scott v Rania*, although it no longer represents the law in some respects, illustrates the difficulties in this area. A contract for sale of land was subject to the purchaser obtaining finance within 14 days. He did not obtain finance and the issue was whether the vendor was able to terminate the contract for failure of condition. The case turned on the classification of the condition. A majority of the Court of Appeal held that a subject to finance clause was a condition precedent to the existence of a contract,[62] therefore, the vendor was not bound to sell the

---

57 Burrows, Finn and Todd, above n 52, para 8.2.2.

58 *Chitty on Contracts*, above n 54, para 2-142.

59 Ibid.

60 *New Zealand Shipping Co Ltd v Societé des Ateliers et Chantiers de France* [1919] AC 1, 13 (PC) Lord Shaw; cited in *Scott v Rania* [1966] NZLR 527, 532-533 (CA) North P.

61 Paterson, Robertson and Heffey, above n 56, para 20.20.

62 *Scott v Rania*, above n 60, 526 McCarthy J.

property to the purchaser.[63] This approach has been described as "misleading" as both parties had taken on contractual obligations at that stage; [64] the purchaser to take reasonable steps to obtain finance, and the vendor to sell if the purchaser obtained finance. Hardie Boys J dissented in a judgment which has "received all too little attention".[65] He held, correctly in the author's view, that the condition was one precedent to performance, not formation.[66] He further found for the purchaser on the ground that the condition made the contract voidable at the purchaser's option only.[67] However, there was authority from the Privy Council in *Aberfoyle Plantations v Cheng* that failure of a condition precedent made the contract voidable at either party's option.[68] Hardie Boys J distinguished *Aberfoyle* on the ground that *Aberfoyle* applied only to conditions precedent to formation.[69] The Privy Council had made some misleading statements as to whether the condition was one precedent to formation or performance, but its reasoning and findings are, as this paper will shortly show, consistent with the condition being one precedent to performance. In the author's view, the condition in *Aberfoyle* is indistiguishable from that in *Scott* and Hardie Boys J was incorrect to distinguish it.

In sum, judicial confusion, particularly where judges have made statements like "the very existence of [a contract] is dependent on the performance of a condition",[70] has been used to avoid following binding authority on the ground that the dicta in question applied only to conditions precedent to formation and not conditions precedent to performance. A closer analysis of the dicta in many of these cases reveals that although the judges may have misdescribed the conditions, their analysis is consistent with the condition being one precedent to performance.

B The Requirement for a Notice

Cooke J's judgment has also been influential with regard to notice requirements with respect to contingent conditions. This part of the essay examines the basis on which Cooke J established this notice requirement and questions the validity of his reasoning.

---

63 Ibid, 533 North P, 536 McCarthy J.

64 D W McLauchlan *The Parol Evidence Rule* (Professional Publications, Wellington, 1976) 121.

65 D W McMorland "A New Approach to Precedent and Subsequent Conditions" (1980) 4 Otago L Rev 469, 471.

66 *Scott v Rania*, above n 60, 539 Hardie Boys J dissenting.

67 Ibid, 541 Hardie Boys J dissenting.

68 *Aberfoyle Plantations Ltd v Cheng* [1960] AC 115 (PC).

69 *Scott v Rania*, above n 60, 539 Hardie Boys J dissenting.

70 *Aberfoyle Plantations Ltd v Cheng*, above n 68, 126 Lord Jenkins.

1 Facts

Mr Hunt and Mr Wilson operated a farm in partnership. They entered into an agreement in which Mr Wilson would buy out Mr Hunt. The price at 16 May 1969 was to be fixed by valuation machinery whereby each party would appoint a valuer, the valuers would refer their valuations to one another, and in the event they could not agree they would appoint an umpire whose decision would be final. Several years' delay ensued. Mr Hunt wrote to Mr Wilson informing him that he would forthwith treat the contract as at an end. Mr Wilson sought a court order fixing the price under the Arbitration Act 1908. In the High Court, Mahon J found the contract was subject to two unfulfilled conditions precedent concerning fixing of the price and the mortgagee's consent to the sale, and that he had no jurisdiction to fix the price under the Arbitration Act. The contract was therefore, at an end. Mr Wilson appealed.

2 Price-fixing as a term of the contract

In the Court of Appeal, Richardson J returned to first principles. His Honour disagreed with Mahon J's conclusion that the fixing of the price was a condition precedent to the existence of a contract. Several provisions had "immediate and continuing effect following the execution of the agreement,[71] and the "conclusion was inescapable" that a contract existed between the parties.[72] Further, he held that the price fixing provision was not a contingent condition in any sense: it was an unconditional term of the contract. In his Honour's opinion the fact that "the price [was] to be fixed by valuation … [did] not make it a conditional contract."[73] It was "not an agreement to sell if the parties [could] agree on the price".[74] Thus, the deposit was immediately payable, the purchaser was responsible for all outgoings, the vendor was obliged to deal with the stock as the purchaser directed, and the vendor was to hold all insurance policies on trust for the purchaser.[75]

Richardson J thus regarded the issue as "not so much a question of invalidity of the contract due to non-performance of a condition, but rather that the contract is not sufficiently certain to be enforced by specific performance."[76] Price is an essential element of certainty as one of the "five Ps".[77] If no price is specified the agreement generally fails for lack of certainty.[78] Richardson J held

---

71 *Hunt v Wilson*, above n 2, 279 Richardson J.

72 Ibid.

73 Ibid, 280 Richardson J.

74 Ibid.

75 Ibid, 279 Richardson J.

76 Ibid, 280 Richardson J.

77 *T A Dellaca Ltd v PDL Industries Ltd* [1992] 3 NZLR 88, 97 (HC) Tipping J.

78 Burrows, Finn and Todd, above n 52, para 3.7.7.

that the provision of machinery for fixing the price prima facie provided sufficient certainty as the valuation clause allowed the Court to fix the price under the Arbitration Act.[79] However, several years had passed and it would be unfair to the vendor for the Court to use its discretionary jurisdiction under the Act to fix the price as at 16 May 1969.[80] It would also be very difficult to ascertain the value of the land, buildings, plant and stock at that date after such a long time.[81] This meant the machinery had broken down and the contract was void for lack of certainty.[82]

Richmond P agreed. He was "not prepared to infer … that both parties must have intended that their bargain would be off if the price fixing machinery did not yield a definite result within a reasonable time after the making of the contract",[83] so the price fixing was not a condition of the contract.[84] He also agreed that the Court should not use its jurisdiction under the Arbitration Act, meaning the machinery had "irretrievably broken down" and the contract "came to an end by operation of law".[85]

3 Cooke J: Price-fixing as a contingent condition

Cooke J decided the case on a substantially different basis from Richmond P and Richardson J. Several elements in his Honour's judgment are difficult to sustain. These fall into two areas.

First, although his Honour observed correctly that there were no conditions precedent to the existence of the contract,[86] he found the bargain to be conditional on the price being fixed by valuation, in the sense that price-fixing was a condition precedent to performance.[87] However, the price-fixing provision did not express the bargain to be conditional on price-fixing.[88] It simply stated that the price was to be fixed by valuation. By contrast, the mortgagee consent provision was expressly a condition.[89] In the author's view, this implies that the parties understood the nature and effect of a condition, and had chosen not to make price-fixing a contingent condition. Cooke J took

---

79 *Attorney-General v Barker Bros Ltd* [1976] 2 NZLR 495, 498-499 (CA) Richmond P; *Hunt v Wilson*, above n 2, 282 Richardson J.

80 Ibid, 285 Richardson J.

81 Ibid.

82 Ibid, 286 Richardson J.

83 Ibid, 288 Richmond P.

84 Ibid.

85 Ibid, 287 Richmond P.

86 Ibid, 267 Cooke J.

87 Ibid, 268 Cooke J.

88 Ibid.

89 Ibid.

a contrary view and said that "there should be no magic in the accidents of terminology."[90] His Honour found that "of its very nature" it was a condition "since the vendor's obligation to transfer arose only upon the ascertainment and payment of the price."[91] This statement is extremely problematic. Few contracts for sale of land oblige the vendor to transfer until the purchaser has paid. This makes payment a promissory condition,[92] which, as noted above, is better described as a term of the contract. Yet his Honour made it clear that he thought the price-fixing provision was a "contingenc[y]".[93] The corollary of this is that all contracts for sale of land are conditional, which is absurd. Likewise, simply because ascertainment of the price is logically prior to payment and transfer does not make it a contingent condition: as Richmond P and Richardson J found, there was a promise to fix the price, not a promise to take reasonable steps to fix the price. Cooke J himself described the contract as a "comprehensive settlement" of the parties' affairs.[94] In the author's view his Honour was wrong to find that fixing the price by valuation was a contingent condition.

The second difficulty is in Cooke J's reasoning in finding that Mr Hunt had to give Mr Wilson notice making time of the essence and calling on fulfilment of what Cooke J found to be a contingent condition before being able to treat the contract as at an end.

Cooke J began with the proposition that "where a conditional contract of sale fixes no date for completion of the sale … the condition must be fulfilled within a reasonable time"[95] (if there is no date specified for fulfilment of the condition). His Honour thus phrased the issue:

> if the contract fixes no time either for satisfaction of a condition or for completion, and each simply has to occur within a reasonable time, can one party claim the contract is at an end for failure of the condition without serving notice making time of the essence and allowing an appropriate time [for fulfilment of the condition]?

His Honour said the authorities were "fewer than might have been expected."[96] The most important authority was the Privy Council decision in *Aberfoyle*.

(a) The authority: *Aberfoyle Plantations v Cheng*

---

90 Ibid.

91 Ibid.

92 See Paterson, Robertson and Heffey, above n 56, 347.

93 *Hunt v Wilson*, above n 2, 268 Cooke J.

94 Ibid, 269 Cooke J.

95 Ibid, 268 Cooke J.

96 Ibid, 270 Cooke J.

The parties entered into a contract for the sale of a rubber estate.[97] The vendor held title to most of the block, but needed to renew the leases to the remainder of the block in order to be in a position to transfer the entire block. The contract was conditional on the vendor renewing the leases. It also provided that the purchaser should pay two deposits, both of which were to be returned if the condition were not fulfilled. "Completion of the purchase" was fixed at 30 April 1956, at which time the purchaser would take possession, and transfer would happen "as soon as possible thereafter". The vendor had not renewed the leases by this date. The purchaser wrote to the vendor stating that he, the purchaser, was entitled to cancel the contract, but was prepared to extend the completion date to 31 May 1956, and that time was of the essence for renewal of the leases. The condition remained unfulfilled at 31 May. The purchaser refused to pay the balance of the purchase price and sued for the return of his deposits. The vendor argued that 30 April was merely the date on which the balance was payable, and that the words "as soon as possible thereafter" gave the vendor a reasonable time to renew the leases. The purchaser could not make time of the essence because the reasonable time allowed had not yet expired, and even if he could make time of the essence, requiring completion by 31 May was too short a time to be reasonable.[98] The purchaser was, therefore, in breach for refusing to pay the balance, entitling the vendor to keep the deposits.

The Privy Council accepted the purchaser's argument. Completion of the contract meant completion of both parties' obligations, not just the purchaser's.[99] The Committee rejected the vendor's argument and held that the words "as soon as possible thereafter" were merely in case the vendor could not execute the transfer on 31 May; the vendor had to be in a position to transfer on 31 May. It would be unreasonable for the purchaser to pay the balance and for the vendor to relinquish possession while it was uncertain whether the leases would ever be renewed.[100] Having reached this conclusion, Lord Jenkins said it was unnecessary to deal with the full extent of the vendor's argument. However, if the condition did not have to be fulfilled by the completion date, and a reasonable time was instead allowed, he would "be disposed to agree" with the vendor's submissions.[101] It is not clear whether his Lordship agreed that time could not be made of the essence by the purchaser's letter and that the time given (until 31 May) was unreasonably short, or whether he only agreed that the time given was unreasonably short.

The Court set out three principles, the first of which governed the contract in *Aberfoyle*:[102]

---

97 *Aberfoyle Plantations Ltd v Cheng*, above n 68.

98 *Aberfoyle Plantations Ltd v Cheng*, above n 68, 128 Lord Jenkins for the Court.

99 Ibid, 130 Lord Jenkins for the Court.

100 Ibid.

101 Ibid, 128 Lord Jenkins for the Court.

102 Ibid, 124-125 Lord Jenkins for the Court.

> (i) Where a conditional contract of sale fixes a date for the completion of the sale, then the condition must be fulfilled by that date; (ii) where a conditional contract of sale fixes no date for completion of the sale, then the condition must be fulfilled within a reasonable time; (iii) where a conditional contract fixes (whether specifically or by reference to the date fixed for completion) the date by which the condition is to be fulfilled, then the date so fixed must be strictly adhered to, and the time allowed is not to be extended by reference to equitable principles.

Lord Jenkins made several statements which, as noted in the discussion of *Scott v Rania* above, "provoked [the question] whether he was referring to a condition precedent to the formation of a contract or a condition precedent to the duty to perform obligations imposed by the contract."[103] Some statements indicated that the condition was one precedent to the existence of a contract. For example, he adverted to the possibility that the purchaser would settle "with no assurance that a binding contract would ever emerge."[104] On the other hand, the contract itself provided that it would "become null and void" if the condition were not fulfilled.[105] This suggests that there was in fact a contract in existence before failure of the condition.

In any case, the judgment makes no sense unless Lord Jenkins was referring to a condition precedent to performance, not formation. If there were not an existing contractual relationship, how could the purchaser be required to pay deposits? In *Property & Bloodstock v Emerton*, Danckwerts LJ doubted whether Lord Jenkins was correct in describing the condition as one precedent to formation.[106] In the Australian case of *Perri v Coolangatta Investments*, Gibbs CJ said that the condition in *Aberfoyle* "was one on which the performance of the relevant obligations under the contract depended rather than a condition precedent to the formation of a binding contract".[107] Both cases applied the *Aberfoyle* principles to conditions precedent to performance. This was a different approach to that of Hardie Boys J in *Scott v Rania*, who, as noted above, distinguished *Aberfoyle* as being restricted to conditions precedent to formation.

(b) Cooke J's application of *Aberfoyle*

In *Hunt v Wilson*, Cooke J applied *Aberfoyle* to what he found was a condition precedent to performance. His Honour said that "[a]lthough their Lordships did not go as far as positively deciding the point, their observations certainly tend towards the view that, if no time is fixed for completion and a condition is to be satisfied within a reasonable time, the equitable requirements as

---

103 *Perri v Coolangatta Investments Pty Ltd*, above n 47, 550 Mason J dissenting.

104 *Aberfoyle Plantations Ltd v Cheng*, above n 68, 130 Lord Jenkins for the Court.

105 Ibid, 128 Lord Jenkins for the Court.

106 *Property & Bloodstock Ltd v Emerton* (1968) 1 Ch 94, 116 (CA) Danckwerts LJ.

107 *Perri v Coolangatta Investments Pty Ltd*, above n 47, 543 Gibbs CJ.

to notice apply."[108] This is difficult to support. In the second principle set out by Lord Jenkins, where no time is fixed for completion or fulfilment of the condition, a reasonable time is implied. There is no reference to any possible extension beyond a reasonable time, nor any notice requirement. Conversely, the third principle holds that where conditions have a fixed date for fulfilment, this date "is not allowed to be extended by reference to equitable principles." There are two ways to interpret this. One is Cooke J's interpretation: that by ruling out extension and notice requirements for fixed date conditions while remaining silent as to conditions with no fixed date, the Privy Council intended notice requirements to apply to the latter case. The other interpretation is that their Lordships simply thought it was obvious that no notice was necessary in such cases. This seems to be the more tenable interpretation when taking into account that:[109]

> Equity has, I think, never applied its liberal views as to time to such a condition. If a date is mentioned, the condition must be exactly complied with. If a date is not mentioned, the condition must be fulfilled within a reasonable time.

In addition, Cooke J relied heavily on Lord Jenkins' obiter agreement with the vendor's argument that if a reasonable time was allowed for fulfilment of the condition, 31 May was an unreasonably short time. Cooke J interpreted these comments as suggesting that a notice was required before the purchaser could cancel for non-fulfilment of condition. Lord Jenkins decided that the case fell under the first principle outlined above, that the condition had to be fulfilled by the completion date. He, therefore, had to ascertain the completion date in order to ascertain the date by which the condition had to be fulfilled, so his comments pertained to completion of the contract, not fulfilment of the condition. Further, Lord Jenkins did not suggest that a notice was required in any situation; the passage cited deals only with what a reasonable time is. The issues he addressed were whether a reasonable time had expired when the purchaser sent his letter and whether, if a reasonable time had expired, it was reasonable for the purchaser to require completion by 31 May.

Aberfoyle provides no authority for Cooke J's notice requirement. If anything, Lord Jenkins' discussion of equity and conditions tends toward ruling out a notice requirement. Cooke J's judgment was thus based on a fundamental misconception.

(c) Equitable requirements as to time

Cooke J made it clear that he was adopting the equitable approach to time stipulations for completion of the contract itself:[110]

---

108 *Hunt v Wilson*, above n 2, 271 Cooke J.

109 *In re Sandwell Park Colliery Co* [1929] 1 Ch 277, 283 (Ch) Maugham J; cited in *Aberfoyle Plantations Ltd v Cheng*, above n 68, 126 Lord Jenkins for the Court.

110 Ibid, 273 Cooke J.

> If a stipulation as to time in a contract for sale of land had not been strictly complied with, equity would not allow this to be used as a ground for resisting specific performance unless time was originally of the essence or had been made so.

If time were not originally of the essence, it could be made so by giving a notice. This applied to both fixed-date stipulations and those with no fixed date, where a reasonable time was implied.[111] In the former case, time could only be made of the essence once the time stipulation had been breached or "as soon as the delay is evident."[112] In the latter case, "there [would] only be a breach of an implied time stipulation where there [was] an unreasonable delay in performance … and it [was] only after this that the non-defaulting party could issue a notice making time of the essence."[113] The notice had to fix a time for performance which was reasonable and make clear that failure to comply with the fixed time would allow the giver of notice to terminate the contract.[114]

Cooke J applied this approach to the fulfilment of contingent conditions where there was no fixed date for completion. His Honour said it would make for:[115]

> clarity and justice to adopt the equitable approach … so … that where no time is specified for fulfilment of a condition, a reasonable time is allowed and in the event of a delay a notice is required to bring matters to a head.

This reasoning is problematic. Why should conditions requiring fulfilment by a certain date be treated differently to those requiring fulfilment within a reasonable time while provisions relating to completion of the contract itself are treated in the same way, regardless of whether or not a date is fixed for completion?

(d) The purpose of a notice

Cooke J stated that it was important the price was fixed within a reasonable time, "otherwise the party prejudiced would be without any truly effective remedy" if it "could not treat the contract at an end after serious delay".[116] As Tipping J pointed out in *Steele v Serepisos*, this is "difficult to reconcile with [Cooke J's] ultimate conclusion that a notice was required".[117] Cooke J was also concerned with the nature of contingent conditions in that their fulfilment was often beyond the power of the contracting parties: "serious delay might occur without the fault of either" and third

---

111 Paterson, Robertson and Heffey, above n 56, 381.

112 Ibid, 379.

113 Ibid, 382.

114 Ibid, 380.

115 *Hunt v Wilson*, above n 2, 273 Cooke J.

116 Ibid, 269 Cooke J.

117 *Steele v Serepisos*, above n 1, para 53 Tipping J.

party decisions are often involved.[118] This also makes his Honour's conclusion difficult to sustain. Will giving a notice make a difference in situations where the fulfilment of the condition is beyond the recipient's control? In *Perri v Coolangatta Investments*, Mason J, who supported a notice requirement, thought a notice "would serve little or no purpose" in such a case.[119]

A careful examination of Cooke J's judgment reveals that its reasoning is based on two fundamental misconceptions: that the contract actually was conditional, and that *Aberfoyle* supported a notice requirement.

V SINCE 1978: THE HUNT V WILSON *EFFECT*

A In Australia: Perri v Coolangatta Investments

Four years after *Hunt v Wilson*, the High Court of Australia considered the same issue as Cooke J, but was not persuaded by his reasoning. In *Perri v Coolangatta Investments*, the parties contracted in April 1978 for the sale of a property. The contract was conditional on the purchasers first selling their existing property. No time was fixed for sale of the existing property or completion of the contract. The purchasers made little progress in selling their property.[120] The vendor issued two notices to complete on 13 June and 17 July 1978. The second notice required completion by 8 August. On August 10, the property remained unsold and the vendor purported to terminate the contract. The purchasers sold their property in March 1979 and sought specific performance of the contract on the ground that the vendors were not able to terminate the contract without first giving a notice fixing a time by which the condition had to be fulfilled.

A majority found for the vendor. Gibbs CJ, Stephen and Brennan JJ found that no notice was required and that a reasonable time for fulfilment of the condition had expired by August. The vendor's cancellation was valid. Wilson and Mason JJ found that a notice was required before the vendor could terminate the contract for failure of condition. Wilson J said that the second notice to complete was valid for this purpose. The vendor was entitled to cancel for failure of condition on August 10. Mason J did not think that a valid notice had been given as a reasonable time had not expired by the time the vendor gave the second notice to complete.[121] He found for the purchasers.

Each judge discussed the distinction between conditions precedent to formation and to performance and, having regard to the contractual relationship that arose between the parties before the condition was fulfilled, placed the condition in the latter category.[122] In the author's view this

---

118 *Hunt v Wilson*, above n 2, 269 Cooke J.

119 *Perri v Coolangatta Investments Pty Ltd*, above n 47, 555 Mason J dissenting.

120 The trial Judge found that the purchasers had not taken reasonable steps to sell their existing property as they had set the price too high.

121 *Perri v Coolangatta Investments Ltd*, above n 47, 556 Mason J dissenting.

122 Ibid, 542-543 Gibbs CJ; 552 Mason J dissenting; 558 Wilson J; 565 Brennan J (Stephen J concurring).

was correct. The case then turned on whether *Aberfoyle* was authoritative given that the condition in *Perri* was precedent to performance, not formation.

Gibbs CJ said that the condition in *Aberfoyle* "was one on which the performance of the relevant obligations under the contract depended rather than a condition precedent to the formation of a binding contract"[123] notwithstanding Lord Jenkins' misleading statements. *Aberfoyle* "was correct to hold that the time fixed … for [fulfilment] of the condition was not to be extended by reference to equitable principles, and the same conclusion should be reached when the condition is to be [fulfilled] within a reasonable time."[124] The extent of the purchasers' obligation was to take reasonable steps to sell their property; a notice was required "only when the [recipient] is under [an absolute] contractual obligation to act."[125]

Brennan J, with whom Stephen J agreed, stated that "the seeds of difficulty lie … in the confusion of the promissory and contingent effects" of the condition.[126] His Honour said that in arguing that a notice was required, counsel for the purchasers was confused "between the consequence of non-fulfilment of a contingent condition and the consequence of breach of a promissory term."[127] A notice could "have no application where the party to whom it is given is under no obligation to perform."[128]

Mason J said *Aberfoyle* should be "closely circumscribed" to its facts on the ground that it applied only to conditions precedent to contract formation.[129] He stated that the reason behind the equitable notice requirement is "that it is undesirable that the rights of the parties should rest definitively and conclusively on the expiration of a reasonable time, a time notoriously difficult to predict."[130] He held that a notice was required before the vendor was entitled to cancel the contract,[131] and that the notices to complete given in this case were given before a reasonable time had elapsed.[132] His Honour held that the vendor had not validly cancelled the contract and found for the purchasers.

---

123 Ibid, 543 Gibbs CJ.

124 Ibid, 546 Gibbs CJ.

125 Ibid.

126 Ibid, 566 Brennan J (Stephen J concurring).

127 Ibid, 569 Brennan J (Stephen J concurring).

128 Ibid.

129 Ibid, 551 Mason J dissenting.

130 Ibid, 555 Mason J dissenting.

131 Ibid, 556 Mason J dissenting.

132 Ibid.

Wilson J agreed with Gibbs CJ, Stephen and Brennan JJ that *Aberfoyle* governed the condition in *Perri*. However, *Aberfoyle* did not rule out a notice requirement where the condition had to be fulfilled within a reasonable time.[133] His Honour preferred Cooke J's view of *Aberfoyle* but did not agree with Cooke J to the extent that *Aberfoyle* required a notice in this case.[134] Once a reasonable time had elapsed the vendor had to "force the issue by serving a notice" before being able to cancel for failure of condition.[135] The vendor's second notice was effective for this purpose.[136]

Mason J carefully distinguished *Aberfoyle* and held that a notice was required. The obvious inference is that if it were applicable, *Aberfoyle* would rule out a notice requirement, which is what Gibbs CJ held. Stephen and Brennan JJ thought that *Aberfoyle* was relevant and that it was contrary to principle to require a notice. Wilson J, who required a notice, did not rely on *Aberfoyle*; he merely thought that *Aberfoyle* did not rule out such a requirement. It will be recalled that Cooke J relied on *Aberfoyle* as the "most important" authority. In light of the decision in *Perri,* this reliance is particularly difficult to sustain.

B In New Zealand: Hunt v Wilson *applied*

Hunt v Wilson is frequently cited. The majority of citations have been to Cooke J's judgment on the classification of conditions. The 1996 case of *Mt Pleasant Estates v Withell* was the first reported case to consider the notice requirement.[137] In that case, Mr Withell, a builder, entered into a contract with a developer, Mt Pleasant, to purchase a lot on which he would build two houses to onsell. Settlement was to take place a year later. The contract was conditional on Mr Withell's solicitor giving his approval within 10 days. Subsequently, it was discovered that the lot was subject to a restrictive covenant which allowed only one house to be built on it. Mr Withell's solicitor gave his approval subject to Mt Pleasant, securing the release of the covenant. Mt Pleasant experienced some difficulties and wrote to Mr Withell on 13 May. Mr Withell said he did not wish to proceed with the purchase. Mt Pleasant wrote again on 30 May saying it was taking "certain steps". On 15 June, Mr Withell wrote back cancelling the contract. Mt Pleasant sued for breach.

Tipping J held that Mr Withell was not able to cancel the contract for failure of the condition without first giving a notice fixing a time within which Mt Pleasant had to secure release of the covenant.[138] His Honour followed Cooke J's judgment in *Hunt v Wilson* which the Court of Appeal

---

133 Ibid, 559 Wilson J.

134 Ibid.

135 Ibid, 560 Wilson J.

136 Ibid, 563 Wilson J.

137 *Mt Pleasant Estates Co Ltd v Withell*, above n 19.

138 Ibid, 332-333 Tipping J.

had approved, albeit in an obiter statement, in *Stirling Pastoral Co v Downley Properties*.[139] The purpose of a notice was that "it would be inequitable to have the axe falling without warning" on a party endeavouring to fulfil the condition.[140] He held that where no date was fixed for fulfilment of a condition, a reasonable time was implied, after which:[141]

> [c]ertainty and fairness to both parties will be promoted if the law requires the party contemplating cancellation for delay to give a notice expressly warning the party said to be in default that in the absence of performance within the time stated by the notice, which itself must be a reasonable time, the party serving the notice will regard itself as entitled to cancel.

There are some difficulties with *Mt Pleasant Estates*. First, Tipping J made no finding as to what a reasonable time would have been in this case. Settlement was not to take place until the following year, so it is possible that Mr Withell was in breach for attempting to terminate the contract before allowing Mt Pleasant a reasonable time to fulfil the condition.

Second, Cooke J in *Hunt v Wilson*, Mason and Wilson JJ in *Perri*, Tipping J in *Mt Pleasant Estates* and McGrath J in *Steele v Serepisos* thought a notice requirement would be a fairer and more certain way to govern the cancellation of contracts for failure of condition. However, this thinking in the author's view overlooks Brennan J's statement in *Perri* that "[w]hat is a reasonable time is a question of fact and depends upon the circumstances. Its limit is determined by reference to what is fair to both parties."[142] It is suggested that a proper determination of what is a reasonable time will obviate a substantial part of any unfairness caused by "the axe falling without warning". When determining what is a reasonable time, judges may take into account a wide range of factors, including the fact that the parties could have attached a time limit to the condition, but chose not to.

Further, a notice requirement does not obviate the problems complained of with respect to a reasonable time rule. It also requires the giver of notice to choose what a reasonable time is and then choose a further reasonable time within which fulfilment is required. The other party might not agree with this assessment, and this means that a notice requirement may also be subject to the same retrospective judicial determination which Cooke J found so "unattractive" in *Hunt v Wilson*.[143]

---

139 *Stirling Pastoral Co Ltd v Downley Properties Ltd* (6 July 1992) CA 313/90 and 67/91, 27 McKay J for the Court.

140 *Mt Pleasant Estates Co Ltd v Withell*, above n 19, 330 Tipping J.

141 Ibid.

142 *Perri v Coolangatta Investments Pty Ltd*, above n 47, 568 Brennan J (Stephen J concurring).

143 *Hunt v Wilson*, above n 2, 270 Cooke J.

Third, this decision did not produce the "certain and fair" result promised by a notice requirement. Tipping J said the decision "may be viewed as a hard case for Mr Withell".[144]

A small number of subsequent cases have followed *Mt Pleasant Estates*.[145]

VI CONCLUSION

How, then, should contingent conditions precedent to performance operate when there is no fixed time for fulfilment or completion? From the authorities it is clear that a reasonable time is implied for fulfilment unless the parties have evinced an intention to the contrary. If the condition remains unfulfilled after a reasonable time despite reasonable steps having been taken, then the contract is simply voidable at either party's option.

The majority in *Steele v Serepisos* was undoubtedly correct to not require a notice in this case. Such a notice requirement would have introduced a further requirement above and beyond the vendors' duty to take reasonable steps. There was no principled reason for requiring a notice. However, the notice issue was made much more difficult than it should have been. Undue deference was paid to Cooke J's judgment; the judges, with the possible exception of Anderson J, approved *Hunt v Wilson* insofar as that if one party had an obligation to take reasonable steps to fulfil the condition, the other party had to give a notice before being able to cancel the contract. In the author's view this approval made distinguishing *Hunt v Wilson* a hard task.

The majority judges made much of the point that the notice would have a different purpose in *Steele v Serepisos*. This is true, but it misses the point made in *Perri* that the purpose of a notice requiring completion is different to that of a notice calling for fulfilment of a condition. Failure to comply with a completion notice would amount to repudiation and entitle the giver to damages, while failure to comply with a notice to fulfil the condition would only entitle the giver to damages if the recipient had not taken reasonable steps. Tipping J outlined the purpose of an equitable notice and said it did not apply to the facts, but he stopped short of pointing out that this purpose did not apply to *Hunt v Wilson* either. He should have simply said that the proposed notice in both *Hunt v Wilson* and *Steele v Serepisos* was sufficiently different in purpose to the original equitable notice that no notice should be required in either case.

Tipping J also discussed delay. This was, as noted above, a difficult point because it was unclear whether delay included default. In the author's opinion, it was difficult for his Honour to distinguish *Hunt v Wilson* as being restricted to cases of delay while pointing out the inconsistency between Cooke J's preoccupation with delay and his ruling that a notice was required. It would have been

---

144 *Mt Pleasant Estates Co Ltd v Withell*, above n 19, 333 Tipping J.

145 See for example *Harringtons Farm Ltd v City Park Travel Lodge (2001) Ltd* [2003] BCL 611 (HC); *Rapley v McGarry* (18 August 2004) HC DUN CIV 2004-412-00089; *Abis Properties Ltd v Orion NZ Ltd* (2004) 5 NZCPR 881 (HC).

much more straightforward to reexamine Cooke J's judgment and ask whether a notice should have been required in *Hunt v Wilson*.

There are five compelling reasons to hold that Cooke J was wrong. First, Cooke J incorrectly classified the contract in *Hunt v Wilson* as being one that was conditional on the price being fixed, so his judgment was wrong on the facts. Second, his Honour misinterpreted the authority of *Aberfoyle*. Third, it is inconsistent to require a notice with respect to conditions without a fixed date for fulfilment, but not for those with a fixed date. Fourth, the notice requirement does not obviate the problems of a straight reasonable time rule in that it still involves one party determining what a reasonable time is. Finally, a notice serves a different purpose when a condition is at stake. The Supreme Court should have simply held that Cooke J's judgment in *Hunt v Wilson* was wrong and could not form the basis for any notice requirement. In this case, *Hunt v Wilson* was directly responsible for the fact that such a simple issue as failure of a condition went all the way to the Supreme Court. *Steele v Serepisos* was rightly decided but its preservation of *Hunt v Wilson* may make for similar problems in the future.