interest to serve in that he was the priest who officiated at the ceremony and would not be likely to admit to any impropriety. This factor must be borne in mind but it does not mean that his evidence must perforce be discarded. A balanced assessment of his evidence must still be made.

But his contradictions on time placed a great strain on his credibility. The respondent and her daughter fixed the time of the ceremony at 7.30 – 7.40 p.m. This was about the time when Dr. Clarke thought he saw some improvement in the patient's condition.

Father Deane in his evidence also fixed the time at 7.40 p.m. When he was cross-examined he admitted having given a written statement in March, 1973 to the effect that the wedding took place at 8.30 p.m. Moreover in his evidence he stated that he got the call from the ship at about 6 o'clock and later admitted that in his written statement of March, 1973, he stated that he received the call at about 7 o'clock. The contradictions did no good to his evidence and I was completely unimpressed by his explanation of the visual recollection of the clock showing twenty to eight. Maybe it was his misfortune that his belated visual recollection of the clock happened to match so well the time being put forward by the respondent and her daughter as the time at which the ceremony took place. But it is a matter which I cannot ignore especially when Mr. Rocheford when first asked about the time at which he spoke to Father Deane that evening, estimated it at about 8 p.m.

Sister Franklyn gave her evidence well and I accept it. I accept that the ceremony took place at about 9 o'clock. I accept the evidence of Dr. Haynes and Dr. Clarke, both men of high professional standing with no personal interest in the matter. Dr. Haynes gave the opinion that, on the basis of all the facts available to him and of his clinical observations, the patient would not have been in a position to appreciate that he was going through a ceremony or getting married or agreeing to get married. Dr. Clarke thought that when he saw the patient a few minutes before nine he was not in a condition to understand what was taking place. He went on to say that if the patient went through a marriage ceremony just after he left him he would not have understood what was taking place.

I accept these opinions and I find that at the time of the purported marriage Mr. Kinneally was not in a fit condition to be asked to consent to marriage and was incapable of understanding the significance of what was being done at his bedside or of a meaningful participation in the ceremony. In my view though Father Deane went through the normal ritual of the marriage ceremony he was following the form rather than the substance – an empty and meaningless formula since one of the participants was present essentially in body only. Sister Franklyn's versions of the ceremony came in my view nearest to what must have transpired. She spoke of the patient being in an unconscious condition; of his never having spoken or repeated anything; of his never having nodded or shaken his head; of his not having done or said anything to indicate that he knew what was happening. She spoke of the part of the ceremony in which he was asked if he took the respondent for his wife; of the priest asking him in a progressively louder voice whether he could hear him; and of an eventual muttering or groaning sound "ohhh."

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Counsel for the respondent cited *Hill v. Hill* [1959] 1 All E.R. 281. That case shows, *inter alia*, that though the different parts of the marriage ceremony should be strictly observed, they are not all absolutely essential to the validity of the marriage. However in this case there is no doubt that Father Deane did in fact follow the form in so far as he could in the circumstances. The point is that Mr. Kinneally's condition precluded an appreciation by him of, and a participation by him in, what was taking place. So that the ceremony was a mere empty shell devoid of substance and meaning.

In my view the petitioners have discharged the onus which rested on them and accordingly I make an order declaring the marriage of December 6, 1972, to be null and void and for the record thereof to be expunged from the Register of Marriages in Barbados.

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PILLERSDORF *v.* DENNY

[SUPREME COURT – HIGH COURT – CIVIL SUIT NO. 555 OF 1973
(Williams, J.), February 17, 1975]

Contract – Sale of land – Condition precedent – Condition that sale was subject to the obtaining of planning permission – Reasonable time – Whether condition could be waived by the purchaser.

Facts: The plaintiff sought specific performance of a contract dated July 29, 1969, under which W.D. agreed to sell him 6 acres 5 perches of land at Thorpes in St. James. W.D. died in October, 1971 and the defendant, his widow, was the administratrix of his estate. The plaintiff's business included the development of real estate and towards the middle of 1969 he became interested in the purchase of the land. It had not been passed for residential development and in fact W.D. had previously made an unsuccessful application to develop the land for residential purposes. The refusal had been on two grounds – that the application was premature and that water was not available. Water mains were later laid alongside the road and the plaintiff thought that he had a good chance of securing planning permission. Accordingly, by a written agreement dated July 29, 1969, he agreed to buy the land for $76,136.40. Included in the agreement was the stipulation regarding consent. Clause 2 of the contract stated the purchase price and the amount of the deposit ($7,613.64) and stipulated that "the balance of the said purchase money or sum of sixty-eight thousand five hundred and twenty-two dollars and seventy-six cents will be paid and the matter completed within fifteen days of the purchaser obtaining from the Town and Country Planning Officer permission to develop the said land as a building estate and on which date vacant possession will be given to the purchaser". Clause 3

provided that the stamp duty on the conveyance would be borne in equal shares by the vendor and the purchaser, and that the ownership taxes for 1969–70 would be apportioned between vendor and purchaser as at the date of actual completion. Clause 5 provided as follows:

"This agreement is conditional on the Purchaser obtaining permission from the Town and Country Planning Officer for the development of the said parcel of land hereby agreed to be sold and purchased for residential purposes in accordance with such application as shall be submitted by the Purchaser for that purpose. In the event of such permission of the Town and Country Planning Officer being refused, then the vendor will refund to the Purchaser the deposit this day paid without any interest or costs and this Agreement shall be at an end and of no force and effect."

The plaintiff applied to the Town and Country Planning Office on September 16, 1969, but to no avail. Because of obstacles in the way, the permission to develop was not granted until January 6, 1972. W.D. had in the meantime become impatient, and wrote on September 21, 1970 complaining of the delay and referring to an understanding at the time of the agreement that the plaintiff would obtain permission within three months. W.D. then informed the plaintiff that if the matter was not closed on or before September 30, 1970, he intended to return the deposit and cancel the sale. The plaintiff, in his reply of September 29, 1970, pointed out to W.D. that his letter of September 21 had arrived only that day, thus giving him only one day's notice to complete. He expressed regret over the delay and stated that he had recently been told that a decision was imminent. He also expressed the view that W.D. was not entitled to cancel the agreement. In his reply of October 6 W.D. expressed sympathy for the plaintiff's point of view and gave the plaintiff fifteen more days to complete the matter. The plaintiff's reply of October 15 noted that the plaintiff expected a decision "any day now". He ended by stating that it would be entirely contrary to their agreement to set a new time limit or to forfeit the deposit. On October 20 the plaintiff told W.D. that he was willing to complete immediately and was willing to forget the permission. W.D. refused and said that the land was no longer for sale. The letter of November 6, 1970 from the plaintiff's solicitors to W.D. confirmed the plaintiff's willingness to complete the purchase, but W.D's solicitors, on November 24, 1970 confirmed W.D.'s position. Further correspondence passed between W.D's and the plaintiff's solicitors and by letter of February 25, 1971 proposals were put forward by the plaintiff's solicitors with a view to settlement of the matter. There was no response to the proposals and on May 18, 1972, W.D. having died in the meantime, the plaintiff applied to the High Court for a grant of letters of administration to W.D's estate limited to his right, title and interest in the land at Thorpes, St. James. It did not appear that the application ever came on for hearing and in due course the defendant obtained a grant of letters of administration to her deceased husband's estate. On December 4, 1973, the plaintiff's solicitors returned a cheque purporting to be a refund of the deposit paid by the plaintiff and on December 10, 1973, the writ seeking specific performance was issued. The agreement contained no provision as to the time in which the permission of the Town and Country Planning Officer was to be obtained. The plaintiff gave evidence about the negotiations.

He said that W.D. stated that there would be no difficulty in getting planning permission and tried to convince him (the plaintiff) that it would not take long. He said that he realised that it would take a long time and that was the reason why he agreed to pay the price of 36 cents per square foot asked by W.D. rather than 30 cents which he thought was the current value of the land. However, in a letter to the Minister of Home Affairs of November 3, 1970, the plaintiff stated that he had agreed in July 1969 to purchase the land at 30 cents per square foot. Counsel for the plaintiff submitted that no time having been expressed, time was not of the essence and, the plaintiff having done all he could to get the matter expedited, he could not be blamed for the ensuing delay. Counsel for the defendant submitted that the document being silent on the matter, a reasonable time was allowed to the plaintiff to obtain the permission.

Held: (i) the submission of counsel for the defendant was founded on good authority, for it was a general proposition in relation to the time for the fulfilment of conditions of conditional contracts for the sale of land that where the contract fixes no date for the completion of the sale, the condition must be fulfilled within a reasonable time. The document in dispute was a conditional contract – a contract conditional on the plaintiff's obtaining permission for residential development of the land. If he obtained permission the contract stood; if it was refused, the contract was at an end;

(ii) the reasonableness of the time was to be determined as at the date of the contract and what was reasonable was to be judged by an objective test applicable to both parties. The question was what was a reasonable time, looking at the matter objectively as at the time of the contract and taking into account the position of W. D. as well as of the plaintiff. Taking all the circumstances into consideration, the parties did not contemplate that the plaintiff would be allowed a prolonged period to get the permission and any period running beyond a year was unreasonable. W. D. was therefore, not acting unreasonably when he set a limit to the time he was prepared to continue waiting;

(iii) completion of sale and grant of relevant possession were matters in which the vendor would have had an interest and if the time at which these were to take place was made to depend on the obtaining of planning permission, it could not be said that the stipulation regarding planning consent was one for the purchaser alone which he could unilaterally waive;

(iv) the obligations under the contract of July, 1969, on both sides, depended on a future uncertain event, the happening of which depended entirely on the will of the third party. That was a true condition precedent – an external condition upon which the existence of the obligations depended. Until that event occurred there was no right of performance on either side. The purchaser having no such right, could not waive what he did not have, since waiver presupposed the existence of a right to be relinquished. It followed that the plaintiff's claim would be dismissed.

Cases referred to:

(1) *Aberfoyle Plantations Ltd. v. Cheng* [1959] 3 All E.R. 910.
(2) *Longlands Farm*, Re [1968] 3 All E.R. 552.
(3) *Smith v. Butler* [1900] 1 Q.B. 694.

(4) *Heron Garage Properties Ltd. v. Moss and Another* [1974] 1 All E.R. 421.
(5) *Bennet v. Fowler* (1840) 2 Beav. 302; 48 E.R. 1199.
(6) *Hawksley v. Outram* [1892] 3 Ch. 359.
(7) *Lloyd v. Nowell* [1895] 2 Ch. 744.
(8) *Turney and Turney v. Zhilka* 18 D.L.R. (2d) 447.
(9) *Dacon Construction Ltd. v. Karkoulis et al* 44 D.L.R. (2d) 403.

Statute referred to:

Land Charges Act, 1925 (U.K.)

Mr. W. H. A. Hanschell, Q.C. with *Messrs. Yearwood & Boyce* for the plaintiff.
Mr. H. B. St. John, Q.C. with *Messrs. Brown & Chapman* for the defendant.

WILLIAMS, J: In this matter the plaintiff, Mr. Pillersdorf, seeks specific performance of a contract of July 29, 1969, under which Mr. William Denny agreed to sell him 6 acres 5 perches of land at Thorpes in St. James. Mr. Denny died in October, 1971 and the defendant, his widow, is the qualified administratrix of his estate.

The plaintiff's business includes the development of real estate and towards the middle of 1969 he became interested in the purchase of this land. It had not been passed for residential development and in fact Mr. Denny had previously made an unsuccessful application to develop the land for residential purposes. The refusal had been on two grounds, that it was premature and that water was not available. Water mains had later been laid alongside and the plaintiff clearly thought that he had a good chance of securing the permission of the planning authority. Accordingly by a written agreement dated July 29, 1969, he agreed to buy the land for $76,136.40. Included in the agreement was a stipulation regarding consent. The following clauses are relevant:—

"2. The purchase price is the sum of seventy-six thousand one hundred and thirty-six dollars and forty cents of which the Purchaser has this day paid the sum of seven thousand six hundred and thirteen dollars and sixty-four cents as a deposit and in part payment of the said purchase money (the receipt whereof the Vendor doth hereby admit and acknowledge). The balance of the said purchase money or sum of sixty-eight thousand five hundred and twenty-two dollars and seventy-six cents will be paid and the matter completed within fifteen days of the purchaser obtaining from the Town and Country Planning Officer permission to develop the said land as a building estate and on which date vacant possession will be given to the purchaser.

3. The Stamp duty on the Conveyance from the Vendor to the Purchaser will be borne by the Vendor and the Purchaser in equal shares. The ownership taxes for the year 1969/70 will be apportioned between the Vendor and the Purchaser as at the date of actual completion.

5. This Agreement is conditional on the Purchaser obtaining permission from the Town and Country Planning Officer for the development of the said parcel of land hereby agreed to be sold and purchased for residential purposes in accordance with such application as shall be submitted by the Purchaser for that purpose. In the event of such permission of the Town and Country Planning Officer being refused, then the Vendor will refund to the Purchaser the deposit this day paid without any interest or costs and this Agreement shall be at an end and of no force and effect."

The plaintiff lost little time in making his application and it was received in the Town and Country Development Planning Office on September 16, 1969. And I accept his evidence that he did all that he could to get it processed. But to no avail. The previous refusal of permission placed obstacles in the way. According to Mr. Gill, Chartered Town Planner who was employed in the office from 1959 until the middle of 1971, the Chief Town Planner would not undertake to change a decision without consulting the Minister and in fact in August 1970 the plaintiff was informed by letter that the Minister had directed the Chief Town Planner to refer the application to him. The permission for subdivision of the land for residential purposes was eventually granted on January 6, 1972.

Mr. Denny in the meantime had been getting more and more impatient. On September 21, 1970, he wrote to the plaintiff complaining that a year had passed since the agreement and referred to an understanding at the time the agreement was made, that the plaintiff would obtain permission within 3 months. Mr. Denny in his letter went on to inform the plaintiff that if the matter was not closed on or before September 30, 1970, he intended to return the deposit and cancel the sale.

The plaintiff in his reply of September 29, 1970, pointed out to Mr. Denny that his letter of September 21 had arrived only on that day and that it only gave him one day's notice before the deadline of September 30 fixed by Mr. Denny. He expressed regret that the Town Planner had taken such a long time over the application and stated that though he may have told Mr. Denny that the Town Planning Office took about three months to make a decision, provision was made in the agreement for the eventuality that a longer period of time might be required. He told Mr. Denny that he had expended a considerable amount of money and effort hoping to obtain the Town Planner's permission and had recently been told that a decision was imminent. He closed his letter by expressing the opinion that he did not think that Mr. Denny was legally entitled to cancel the agreement at that stage and refused to accept the deadline given.

Mr. Denny replied on October 6 expressing some sympathy for the plaintiff's point of view but at the same time putting forward his side of the picture – he could not be expected to sit idly by for one or more years losing revenue. He gave the plaintiff fifteen more days to complete the matter.

The plaintiff's reply of October 15 noted that Mr. Denny's letter of October 6 was received on October 9. He told Mr. Denny that the matter was in its final stage and he expected a decision "any day now." He cautioned Mr. Denny that it was in his interest to exercise some more patience and asked for a little more time. He ended by stating that it would be entirely contrary to their agreement to set a new time limit or to forfeit the deposit.

I accept the plaintiff's evidence that on October 20 he told Mr. Denny that he was willing to complete immediately and was willing to forget the permission. I accept his evidence that Mr. Denny refused and said that the land was no longer for sale. The letter of November 6, 1970, from the plaintiff's solicitors to Mr.

Denny, confirmed this willingness on the part of the plaintiff to complete the purchase though no permission for residential development had been received.

On November 24, 1970, Mr. Denny's solicitors replied to this letter in the following terms:—

"We refer you to the previous correspondence which has passed between the parties, and especially to the letter dated October 27th, 1970, from Mr. Denny to Mr. Pillersdorf. Our client insists (and he has been legally advised) that the contract for sale dated July 29th, 1969, has been properly cancelled by him, and he remains ready and willing to refund the deposit paid by Mr. Pillersdorf. In fact, we are instructed that Mr. Denny has already handed Mr. Pillersdorf a cheque for the said deposit, but that Mr. Pillersdorf saw fit to destroy this cheque.

Unless we received immediate notification from you that you are willing to accept our cheque for the refund of the deposit, we propose to obtain a Manager's cheque and forward the same to you."

The incident to which this letter referred took place at Mr. Pillersdorf's house. There was a quarrel and the plaintiff tore up a cheque for the amount of the deposit which Mr. Denny handed to him.

There was no response to this letter and on February 15, 1971, Mr. Denny's solicitors addressed a further letter to the plaintiff's solicitors.

They referred to their letter of November 24, 1970, and stated that they proposed to attend at their offices on February 26, 1971, in order to refund the deposit. An alternative appointment was suggested if the time and place notified was not convenient. The letter went on as follows:—

"We notice that you have recorded the contract for sale which our client contends is not binding on him. You will appreciate that this fact may cause Mr. Denny some difficulty in any future negotiations for the sale of the land and we would appreciate it if you would formally cancel this contract so that Mr. Denny may be in a position to satisfy any future purchasers, mortgages etc.

Your Mr. Allen informed us orally a few days after the date of our said earlier letter, that Mr. Pillersdorf is insisting that the contract for sale was still in force and binding upon Mr. Denny. We are not sure whether that discussion was intended to be without prejudice, and so we will appreciate your written clarification.

We must inform you that if we do not receive your co-operation on the points raised in this letter, we shall have to advise Mr. Denny to apply to the Court for any necessary declarations and relief."

This letter produced the following reply from the plaintiff's solicitors, dated February 25, 1971:—

"We desire to inform you that our client is and has at all times treated the contract between your client, Mr. Denny, and himself for the sale and purchase of 6 acres 5 perches of land at Thorpes, St. James, as binding upon them both and in full force and effect.

Our client has obtained surveyor's plans at considerable expense and effort, made the application to the Town and Country Planning Office with all possible despatch and throughout all that time has done all in his power to obtain the required permission. Our client was advised and is convinced that the agreement remains in full force and its validity is not likely to be upset in a court of law."

Proposals were then put forward with a view to a settlement of the matter.

There was no response to these proposals and on May 18, 1972, Mr. Denny having died in the meantime, the plaintiff made an application to the High Court for a grant of letters of administration to his estate limited to his right, title and interest in the land at Thorpes, St. James. It does not appear that this application ever came on for hearing and in due course the defendant obtained a grant of letters of administration to her deceased husband's estate.

On December 4, 1973, the plaintiff's solicitors wrote the following letter to the defendant's solicitors:—

"We acknowledge receipt of your letter of today's date, with a cheque in the sum of $7,613.64 which purports to be a refund of the deposit paid by our client, Mr. S. W. Pillersdorf, when the said agreement for sale and purchase of the said land was entered into with your client, and which the administratrix of the estate of W. M. Denny now considers as having been rescinded.

Our client does not treat the said agreement as being at any time rescinded, and we are in the process of instituting proceedings in the Supreme Court against the Administratrix for specific performance of the said Agreement. Accordingly, we return herewith your cheque today forwarded to us."

The writ was issued on December 10, 1973.

The Agreement does not contain any provision as to the time in which the permission of the Town and Country Planning officer was to be obtained. The document is silent about that. And the question arises what time did the plaintiff have for obtaining the permission. Counsel for the plaintiff approached it from the point of view that no time having been expressed, time was not of the essence and, the plaintiff having done all that he could to have the matter expedited, he could not be blamed for the delay which ensued. Counsel for the defendant adopted a fundamentally different approach that the document being silent on the matter, a reasonable time was allowed to the plaintiff to obtain the permission. He relied on *Aberfoyle Plantations, Ltd. v. Cheng* [1959] 3 All E.R. 910 and *Longlands Farm, Re* [1968] 3 All E.R. 552. In my view the submission of counsel for the defendant is founded on good authority. The principles are set out by the Privy Council in the former case. I quote from the headnote:—

"Subject to the provisions of particular contracts, the following general propositions concerning the time for the fulfilment of conditions of conditional contracts for the sale of land are warranted by authority:

(i) where the contract fixes a date for the completion of the sale, then the condition must be fulfilled by that date;

(ii) where the contract fixes no date for the completion of the sale, then the condition must be fulfilled within a reasonable time; and

(iii) where the 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."

The above is a virtual reproduction of the words of Lord Jenkins at p. 914 who went on to quote the words of Romer, L.J., in *Smith v. Butler* [1900] 1 Q.B. 694:–

"To my mind it is reasonably clear that the vendor has until the time fixed for completion, or, if no time for completion is fixed, then a reasonable time, in which to procure the assent of the mortgagee to the acceptance of the purchaser as mortgagor."

Cross, J., in *Re Longlands Farm*, above cited, applied the principles stated in *Aberfoyle Plantations Ltd. v. Cheng*. There the plaintiff, who owned fifty-seven acres of agricultural land, and the defendants, a property development company, on April 2, 1964, executed a document in which it was stated that the defendants were agreeable to the purchase of the fifty-seven acres for a price of £114,000 subject to the defendants obtaining planning permission to their entire satisfaction for the development of the land and to questions of title being to their approval. The purchase was to be completed within eight weeks of those conditions being satisfied. The plaintiff was stated to have agreed and accepted those terms and he acknowledged receipt of £5 in consideration of his holding the property for the defendants.

The plaintiff signed his name and dated it. The defendants registered the document as a contract under the *Land Charges Act*, 1925 s.10, Clause C (IV). In March, 1967, the plaintiff called on the defendants within 28 days either to apply for planning permission or to agree to the cancellation of the contract and to vacate the registration at the Land Charges Register. Application for planning permission was made in April, 1967 and refused in July, 1967. The plaintiff took out a summons seeking an order that the registration of the contract be vacated. Cross, J., held that the document of April 2, 1964, was a conditional contract which would become absolute if the defendants obtained planning permission to their satisfaction and approved the title. He went on to hold that since the document of April 2, 1964, was silent as to the time in which the condition relating to planning permission was to be satisfied, it must be taken that the defendants were given a reasonable time in which to obtain planning permission to their satisfaction and in the circumstances the period which had elapsed was more than reasonable. The plaintiff was therefore entitled to treat the contract as at an end and to have the registration vacated.

Cross, J., had this to say on the manner of determining what is reasonable – [1968] 3 All E. R. at p. 556:–

"Two other points seem to be clear, first that the reasonableness of the time must be determined as at the date of the contract and that what is reasonable must be judged by an objective test applicable to both parties, and does not simply mean what is reasonable from the point of view of the defendants."

Turning to the case before me I have no doubt that the document of July 29, was a conditional contract – a contract conditional on the plaintiff's obtaining permission for residential development of the land. If he obtained permission the contract stood; if it was refused, the contract was at an end. No time was expressed as the period in which the condition was to be performed. In these

circumstances the second proposition in *Aberfoyle Plantations, Ltd. v. Cheng* is applicable. The question is what is a reasonable time, looking at the matter objectively as at the time of the contract and taking into account the position of Mr. Denny as well as of the plaintiff.

Looking at the Agreement I note that in Clause 3 provision is made for the apportionment of ownership taxes for the year 1969/1970 according to the date of actual completion. That provision would seem to contemplate actual completion sometime within the financial year 1969–70. In Clause 5 I note that in the event of permission being refused the deposit was to be refunded to the purchaser without interest. It should also be noted that with the constant fall in the value of money any prolonged delay in obtaining permission would reduce the value of the vendor's bargain.

The plaintiff gave evidence about the negotiations. According to him Mr. Denny stated that there would be no difficulty in getting permission to develop the land for residential purposes and tried to convince him (the plaintiff) that it would not take long. The plaintiff for his part said that he realised that it would take a long time and this was the reason why he agreed to pay the price of 36 cents per square foot asked by Mr. Denny as against 30 cents which he thought was the current value of the land. His letter of November 3, 1970, to the Minister of Home Affairs does not support him on this point. In that letter he told the Minister that he had agreed in July, 1969 to purchase the land at 30 cents per square foot.

The correspondence between the parties subsequent to the date of the agreement appears to throw some light on their attitudes at the time of the agreement. On September 21, 1970, Mr. Denny in a letter to the plaintiff referred to an understanding when they made the agreement, that the plaintiff would obtain permission within three months. The plaintiff's reply was that it was indeed regrettable that the Town Planner took such a long time to reply to his application. He went on to say that he might have told Mr. Denny that the Town Planning Office takes about three months to make a decision but that in the agreement they had made provision for the eventuality that a longer period of time might be required. The terms of the agreement do not support the plaintiff on this point.

The plaintiff's letter to the Minister of Home Affairs appears too to be relevant as showing the state of the plaintiff's mind at the time of the agreement. In it he referred to an assurance by Mr. Denny and his agent, Mr. Scott, that the reasons for the refusal of a former application relating to the land no longer obtained because an adequate supply of water had recently been installed, transportation had been improved and the continued development of the West Coast, Cave Hill and other neighbouring areas rendered the land suitable for subdivision into small housing lots for persons likely to provide services needed in the area.

The plaintiff went on to say that it was then more than a year since he had applied to the Town and Country Planning Office for permission to develop the land and apart from the surveyors' fees and a substantial deposit paid on the signing of the agreement, he was forced to keep the balance of the purchase money in constant readiness.

I have to consider all the circumstances and make an objective determination giving equal weight to the positions of both parties. The agreement itself does not indicate that there would be any prolonged delay. According to the plaintiff's testimony Mr. Denny did not think it would take long to obtain the necessary permission. And though the plaintiff himself would have the court believe that he expected that the matter would take a long time, his letter to Mr. Denny of September 29, 1970, and his letter to the Minister of Home Affairs suggest that it was taking longer than he expected. It is possible that though his experience as a developer made him acquainted with long delays in seeking planning permission the assurance and the circumstances which he referred to in his letter to the Minister of Home Affairs, may have caused him to think that this was a case in which permission could be got with little delay. Mr. Denny was a building contractor and there is no evidence that he had any wide dealings with the Planning Office. In any case Mr. Gill who had worked there for many years stated that the time taken to approve an application for planning permission depended on the circumstances. He could not give an average.

The conclusion I reach is that the parties did not contemplate that the plaintiff would be allowed a prolonged period to get the permission and I find that any period running beyond a year was unreasonable in the circumstances. I cannot say that Mr. Denny was acting unreasonably when he set a limit to the time he was prepared to continue waiting.

Planning permission was not in fact got until January, 1972 – a period of two years five months after the agreement and in these circumstances the only matter which I need examine further is whether the condition regarding planning consent could be waived by the plaintiff. I find as a fact that at about the time when Mr. Denny was seeking finality to the matter the plaintiff offered to complete without awaiting planning permission and that this offer was not accepted by Mr. Denny.

It appears that the latest case in which this question has been raised is *Heron Garage Properties Ltd. v. Moss and Another* [1974] 1 All E.R. 421. I have found it most helpful. In that case the defendants were owners of property which was the site of a petrol station and garage. The plaintiffs were interested in acquiring the southern part of the site for development and use in connection with their garage business. The intention of the defendants was to use the northern part of the site for the sale of motor vehicles and the plaintiffs knew this. On August 16, 1972, they entered into an agreement for the sale by the defendants to the plaintiffs of the southern part of the site. Clause 7 thereof provided that the agreement was expressly conditional upon the plaintiffs obtaining detailed town planning consent for the redevelopment of the property as a petrol filling and service station together with a car-wash in accordance with plans and drawings to be submitted to the local Town Planning Authority by the plaintiffs.

Clause 7 further provided that if planning consent had not been granted within six months of the first meeting of the local planning authority to take place after the date of the agreement, or if it had been granted on conditions not acceptable to the plaintiffs, either party could give notice in writing to determine the agreement. Clause 8 provided that completion was to take place

on the expiration of one calendar month from the grant of the unconditional planning consent or the approval by the plaintiffs of conditional planning consent, but not in any event before January 1, 1973. The plaintiff lodged an application for planning consent with the local authority in time for its first meeting after the date of the agreement, but the consent was not then or thereafter forthcoming. On February 27, 1973, the plaintiffs' solicitors wrote a letter to the defendants purporting to waive what was described as the benefit of Clause 7 of the contract, asserting that the contract was therefore unconditional and calling on the defendants to complete one month from the receipt of the letter. On March 6, the six-month period envisaged by Clause 7 expired and on March 13, the defendants' solicitors gave the plaintiffs' solicitors notice in writing under Clause 7 determining the agreement. The plaintiffs brought an action for specific performance of the agreement and Brightman, J., held that they were not entitled to specific performance. Counsel for the plaintiffs submitted that the condition expressed in Clause 7 was imposed solely for the benefit of the plaintiffs who could therefore waive it. He based his submission on the proposition that a party to a contract is at liberty to waive performance of a stipulation if such stipulation is exclusively for his benefit, and is entitled to require the contract to be completed in the absence of such performance.

He relied on *Bennett v. Fowler* (1840) 2 Beav. 302; 48 E.R. 1199 *Hawksley v. Outram* [1892] 3 Ch. 359. Brightman, J., after referring to and explaining these cases went on as follows:–

> "The facts in the case before me are very different from those in the Hawksley case. The town planning consent is expressed in Clause 7 of the sale agreement as a condition fundamental to the enforceability of the sale agreement as a whole. It is not expressed as a condition which is precedent only to liability of Heron as purchaser. Clause 7 is not a clause which is expressed only to confer rights on Heron. It is expressed to confer a right also on the vendors.
>
> Without seeking to define the precise limits within which a contracting party seeking specific performance may waive a stipulation on the ground that it is intended only for his benefit, it seems to me that in general the proposition only applies where the stipulation is in terms for the exclusive benefit of the plaintiff because it is a favour or right vested by the contract in him alone as in the Hawksley case, or where the stipulation is by inevitable implication for the benefit of him alone as in *Bennett v. Fowler*. The question which Kekewich, J., asked himself in *Lloyd v. Nowell* [1895] 2 Ch. 744 in a somewhat similar type of case, was whether the stipulation was necessarily for the sole benefit of the party claiming to waive it, and I refer to his observations: "If it is not obvious on the face of the contract that the stipulation is for the exclusive benefit of the party seeking to eliminate it, then in my opinion it cannot be struck out unilaterally. I do not think that the court should conduct an enquiry outside the terms of the contract to ascertain where in all the circumstances the benefit lies if the parties have not concluded the matter on the face of the agreement they have signed."

Brightman, J., later in his judgment went on to say:–

"There is an added difficulty in the way of Heron's case. The decision in *Hawksley v. Outram* suggests that a stipulation cannot be waived if it is inextricably mixed up with other parts of the transaction from which it cannot be severed. Clause 8 is dependent on the date when Heron received planning consent without conditions or when Heron is deemed to have approved conditions attached to the planning consent. Nothing is said about the date of completion if Heron waives the condition for planning consent. So it would seem that Heron's unilateral elimination of Clause 7 of the sale agreement will also eliminate Clause 8 and leave the date for completion in the air. Counsel for Heron sought to supply that gap by reference to condition 15 (1) of the Law Society's General Conditions of Sale which were incorporated in the sale agreement, but I think that that clause cannot apply."

I return to the case before me. Under Clause 2 of the Agreement the balance of the purchase money was to be paid and the matter completed within fifteen days of the purchaser obtaining permission to develop the land as a building estate on which date (presumably the date of completion) vacant possession was to be given to the purchaser. It seems to me that completion of sale and grant of vacant possession are matters in which the vendor must have an interest and if the time at which these are to take place is made to depend on the obtaining of planning permission, it cannot in my opinion be said that the stipulation regarding planning permission is one for the purchaser alone which he can therefore waive.

But apart from that it is clear from the agreement that clauses 2 and 5 are intimately bound together. Clause 5 cannot be eliminated without vitally affecting the rest of the agreement. The time for completion and the date for delivery of vacant possession are fixed in relation to the date when the plaintiff obtains planning permission. As Brightman, J., said in the context of *Heron Garage Properties, Ltd. v. Moss and Another*, nothing is said about the date for completion if the plaintiff waives the condition for planning consent. And nothing is said about the date for the grant of vacant possession if the condition is so waived. The elimination of clause 5 would leave these dates in the air.

In my judgment the stipulation regarding planning consent was not a condition which the plaintiff could unilaterally waive. Accordingly I dismiss the claim.

Before concluding I will refer to two Canadian cases which support the view I have taken on the submission that the plaintiff could unilaterally waive the condition regarding planning permission. In *Turney and Turney v. Zhilka* 18 D.L.R. 447 a contract for the sale of land was made subject to a proviso that "the property can be annexed to the Village of Streetsville and a plan is approved by the Village Council for subdivision" and the date for completion was fixed at "60 days after plans are approved."

There was no undertaking by either party to fulfill this condition and no reservation on either side of the power of waiver. The Supreme Court of Canada held that the condition was an external one, a true condition precedent upon which the existence of the obligation depended and until it occurred neither party had a right to performance. It was not a case where a party could waive or forego a promised advantage or dispense with any part of the promised performance of the other party which was solely for the benefit of the first and

was severable from the rest of the contract. Judson, J., who delivered the judgment of the court said at p. 450:-

"But here there is no right to be waived. The obligations under the contract, on both sides, depend upon a future uncertain event, the happening of which depends entirely on the will of a third party – the village council. This is a true condition precedent – an external condition upon which the existence of the obligation depends. Until the event occurs there is no right of performance on either side. The parties have not promised that it will occur. In the absence of such a promise there can be no breach of contract until the event does occur. The purchaser now seeks to make the vendor liable on his promise to convey in spite of the non-performance of the condition and this to suit his own convenience only. This is not a case of renunciation or relinquishment of a right but rather an attempt by one party, without the consent of the other, to write a new contract. Waiver has often been referred to as a troublesome and uncertain term in the law but it does at least presuppose the existence of a right to be relinquished."

In *Dacon Constructions Ltd. v. Karkoulis et al 44 D.L.R. (2d) 403* a contract for the sale of land contained a provision that it was subject to the purchaser being able to obtain a zone variance. The sale was to be completed on or before December 31, 1963, and time was stated to be of the essence of the agreement. The plaintiff sought specific performance of the contract and submitted *inter alia*, that the condition with respect to re-zoning was not a condition precedent and could be waived by the plaintiff unilaterally. Evan, J., in the Ontario High Court rejected this argument resting his decision essentially on the judgment of the Canadian Supreme Court in *Turney and Turney v. Zhilka* cited above.

Returning to the present case, and adopting the language of these cases, the obligations under the contract of July, 1969, on both sides, depended upon a future uncertain event, the happening of which depended entirely on the will of a third party – the Town Planning Office. That was a true condition precedent – an external condition upon which the existence of the obligations depended. Until that event occurred there was no right of performance in either side. And the purchaser having no such right could not waive what he did not have. Waiver presupposes the existence of a right to be relinquished.

GRIFFITH *v.* PHOENIX BUILDING SERVICES (B'DOS) LTD.

[SUPREME COURT – HIGH COURT – CIVIL SUIT NO. 746 OF 1974
(Douglas, C. J.), April 14, 1975]

Labour Law – Master and servant – Summary dismissal – Supervisor of building company taking on private contracting work – Using employer's vehicle and workmen for private work – Whether summary dismissal justified.