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Barnett v. Harrison – Unilateral Waiver of Contractual Conditions Precedent

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*Barnett v. Harrison*¹ concerned the correctness of a trilogy of judgments² of the Supreme Court of Canada which have stood for the basic proposition of contract law that a condition precedent expressed in a contract may not be waived unilaterally, notwithstanding that the condition was inserted and intended for the sole benefit of the party seeking to waive it unless the contract expressly provides such a power to waive.

In the initial and leading case, *Turney v. Zhilka*,³ a contract for the purchase and sale of land was made conditional upon the property being “annexed to the village of Streetsville and a plan is approved by the Village Council for subdivision.”⁴ Spence J., then sitting in the High Court of Ontario, found this condition was one introduced “for the sole benefit of the purchaser and that he could waive it”.⁵ However, on appeal to the Supreme Court of Canada, Judson J. speaking for the Court in response to this argument, held:

I have *doubts* whether this inference may be drawn from the evidence adduced in this case but, *in any event*, the defence falls to be decided on *broader grounds*. The obligations under the contract, on both sides, depend on 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 . . . upon which the existence of the obligation depends. Until the event occurs, there is no right to performance on either side[emphasis added].⁶

Judson J.’s “doubts” that the condition was solely for the benefit of the purchaser derived from the fact that the vendor intended to retain

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1. (1975), 5 N.R. 131; 57 D.L.R. (3d) 225 (S.C.C.), *aff g* [1973] 2 O.R. 176 (C.A.), *aff g* [1971] 3 O.R. 821 (H.C.).

2. *Turney v. Zhilka*, [1959] S.C.R. 578; 18 D.L.R. (2d) 447; *F. T. Developments v. Sherman*, [1969] S.C.R. 203; *O’Reilly v. Marketers Diversified Inc.*, [1969] S.C.R. 741; 6 D.L.R. (3d) 631.

3. [1959] S.C.R. 578; 18 D.L.R. (2d) 447.

4. *Id.* at 582; 18 D.L.R. (2d) at 449.

5. *Id.* at 583-84; 18 D.L.R. (2d) at 450.

6. *Id.* at 583; 18 D.L.R. (2d) at 450.

adjoining land.⁷ Consequently, whether or not the land was annexed and subdivided would continue to concern him after closing. The “broader grounds” upon which Judson J. allowed the appeal may, therefore, have been *dicta*. But no such “doubts” existed in the subsequent cases of *F. T. Developments v. Sherman*⁸ and *O’Reilly v. Marketers Diversified Inc.*⁹ in that the vendor adduced no evidence of any continuing concern in the satisfaction of the condition such as adjoining land to be retained, *etc.* In both cases, the Court adopted and applied the *Turney* principle that no unilateral right to waive such external conditions would be implied in favour of the party for whose sole benefit they were inserted and intended.

The cases draw a distinction between (1) true *external* conditions which neither party has promised to perform but depend, at least partly, on the will of a third party, and (2) conditions which one party has promised to satisfy himself — performance of the latter type of condition by the promisor may be waived by the promisee-beneficiary who may thus accept less than he bargained for but the contract remains otherwise the same. Satisfaction of the first type may not unilaterally be waived by either party, for the implication by the court of such a power of waiver would be tantamount to re-writing the contract.¹⁰

Lower courts applied¹¹ the basic *Turney* rule and it remained intact and unqualified until the recent decision of *Beauchamp v. Beauchamp*¹² in which the Supreme Court affirmed (without hearing counsel for the respondent, and without reasons) the decision of the Ontario Court of Appeal¹³ permitting a purchaser in an agreement for the purchase and sale of land to waive the following conditions:

This sale is conditional for a period of 15 days . . . upon the Purchaser . . . being able to obtain a first mortgage in the amount

7. *Id.* at 580; 18 D.L.R. (2d) at 448.

8. [1969] S.C.R. 203.

9. [1969] S.C.R. 741; 6 D.L.R. (3d) 631.

10. *Turney v. Zhilka*, [1959] S.C.R. 578 at 583; 18 D.L.R. (2d) 447 at 450; *O’Reilly v. Marketers Diversified Inc.*, [1969] S.C.R. 741 at 743; 6 D.L.R. (3d) 631 at 633.

11. *Jackson v. Executors of Farwell Estate*, [1961] O.R. 322 (C.A.); *Dacon Construction Ltd. v. Karkoulis*, [1964] 2 O.R. 139 (H.C.); *Genern Investments Ltd. v. Back*, [1969] 1 O.R. 694 (H.C.); *Dennis v. Evans*, [1972] 1 O.R. 585 (H.C.); *LeStrange v. Juda*, [1973] 1 O.R. 588 (H.C.); *Aldercrest Developments Ltd. v. Hunter*, [1970] 2 O.R. 562 (C.A.).

12. (1974), 40 D.L.R. (3d) 160 (S.C.C.).

13. [1973] 2 O.R. 43 (C.A.).

of \$10,000.00 . . . otherwise, this offer shall be null and void. This offer is also conditional for a period of 15 days . . . upon the Purchaser . . . being able to secure a second mortgage in the amount of \$2,500.00 . . . otherwise, this offer shall be null and void. . . .¹⁴

The purchaser arranged a first mortgage of \$12,000.00 and called on the vendor to close. Gale C.J.O. found the conditions to be solely for the protection of the purchaser and permitted him to waive them. Cases supporting the *Turney* rule were distinguished on the basis that “. . . the condition herein is not such as is dealt with in those cases.”¹⁵ This is not a distinction compelling in its logic nor is there any reasonable distinction in principle, and yet the result is obviously just.

Most recently, Bouck J. of the British Columbia Supreme Court held in *Matrix Construction Ltd. v. Chan*¹⁶ that a “condition inserted for the sole benefit of one party . . . may be waived by the person for whose benefit it was inserted.”¹⁷ Bouck J. understood as the basis for the *Turney*, *F. T. Developments*, and *O’Reilly* decisions, either a benefit to the vendor or an improper waiver and, therefore, concluded that Canadian law permitted waiver of conditions solely benefitting one party in accordance with other Commonwealth jurisprudence.¹⁸

In *Barnett v. Harrison*, an agreement for the purchase and sale of land was subject to municipal and provincial approvals of the purchaser’s development plans by a specified date. The plans were not specified in the agreement and the purchaser retained a power to amend his plans to satisfy the governmental authorities.¹⁹ The vendor retained no adjoining land nor was there evidence of any other specific concern the vendor might have for the zoning, *etc.* of the land after closing — in fact, at one point, it was admitted that there was no such concern but that the vendors simply wanted to avoid the contract and take advantage of a better offer.²⁰ When the

14. *Id.* at 44.

15. *Id.* at 45.

16. (1975), 51 D.L.R. 284 (B.C.S.C.).

17. *Id.* at 291.

18. In support of the proposition that a condition precedent may be waived by a party for whose sole benefit it was intended and inserted, Bouck J. cited two cases: *Raysun Pty. Ltd. v. Taylor* (1971), 64 Qd. R. 172 (S.C.) and *Gange v. Sullivan* (1966), 116 C.L.R. 418 (H.C. Aust.).

19. See reasons of Dickson J., (1975) 5 N.R. 131 at 135; 57 D.L.R. (3d) 225 at 241.

20. See reasons of Laskin C.J.C., *id.* at 145-46; 57 D.L.R. (3d) at 229.

date specified for the satisfaction of the condition approached, it became apparent that the approvals would not be had, due to the lethargy of the municipality and not to the fault of the purchaser. The purchaser sought to waive the condition, take the property *as is*, and pay cash on closing. The vendors refused and took the position that the agreement became null and void for failure of a condition precedent.²¹ In a decision written by Dickson J., a majority of the full Supreme Court upheld the correctness of the *Turney* rule and dismissed the purchaser's suit for specific performance. Laskin C. J. C. wrote a dissenting opinion in which Spence J. concurred.²²

In his decision, Dickson J. listed five reasons why the *Turney* rule should remain undisturbed:

(1) “. . . the distinction . . . between (i) the manifest right of A to waive default by B in the performance of a severable condition intended for the benefit of A, and (ii) the attempt by A to waive his own default or the default of C, upon whom depends the performance which gives rise to the obligation, *i.e.* the true condition precedent, seems to me, with respect, to be valid”.²³

But is not that the question, rather than the answer? Why is the distinction valid? If a condition is for the sole benefit of the party seeking to waive it, what difference does it make to the other party how the condition may be satisfied or even whether it is satisfied at all or waived?

(2) Where the contract provides a right to waive some conditions but not others, the court would be re-writing the contract to imply a right to waive one of those others.²⁴

This point does not deal with the correctness of the *Turney* rule but rather with the interpretation of the particular contract in the case under review. It is a point, however, which bears on most usual conditional real estate sales agreements, as the usual form of real estate contract expresses a unilateral right to waive title defects.

(3) In the event the condition is not satisfied, implying a unilateral right to waive would give to the purchaser an option (for which he has paid nothing) and could tie up the vendor's lands. Until the final day the vendor may not know whether the purchaser will waive

21. *Id.* at 146; 57 D.L.R. (3d) at 229.

22. Chief Justice Laskin's judgment, while recognizing the basis upon which *Turney v. Zhilka* proceeded, did not find that it precluded a contrary conclusion. *Id.* at 158; 57 D.L.R. (3d) at 240.

23. *Id.* at 140; 57 D.L.R. (3d) at 246.

24. *Id.*

compliance. Dickson J. says this “option” would thus be an injustice to the vendor, whereas no injustice would accrue to the purchaser if the transaction failed for an unsatisfied condition precedent.²⁵

This argument fails to consider that the uncertainty which the vendor faces until the final day exists entirely apart from the question of waiver. The vendor has agreed that his lands will be tied up awaiting the uncertainty of the condition being satisfied by an uncertain event beyond the control of either party. This uncertainty derives from the nature of a conditional obligation whether or not a right to waive is implied. It is no injustice to either party.

In a simple agreement for sale, a vendor’s only concern is for timely payment of the purchase price — his effort is to minimize any possibility that the transaction will not close. A zoning condition, *etc.* creates such a possibility and therefore a vendor will exact a higher price for such conditions. Implying a right in the purchaser to waive the condition only increases the likelihood of timely payment of the purchase price as the vendor desired when the agreement was made. There can be no injustice to the vendor if the transaction closes at the time and price agreed. It makes no difference to him, after closing, whether or not the property has a particular zoning as long as he has been paid the full purchase price on time — the “option” can cause no injustice to a vendor. On the other hand, the purchaser in *Barnett v. Harrison* had gone to the expense and effort over a twenty month period of hiring architects and planners and submitting fifteen different proposals to the municipality. This expense is borne by the purchaser but now enures to the benefit of the vendors (who have paid nothing) as the purchaser’s efforts must have softened the path to development somewhat. This result is an injustice to the purchaser.

(4) A straight application of the *Turney* principle avoids consideration of “(i) whether the condition is for the benefit of the purchaser alone or for the joint benefit and (ii) whether the conditions are severable from the balance of the agreement.”²⁶

25. *Id.* at 141; 57 D.L.R. (3d) at 247. Dickson J. is not dealing here with questions of bad faith as, for instance, where the purchaser makes no effort to have the condition satisfied in order to give himself the “option” which he may then take up or not depending on the then value of the land. Where such questions of bad faith arise, clearly there would be no right to waive, but this is not the situation to which Dickson J. is addressing himself.

26. *Id.* at 141; 57 D.L.R. (3d) at 247.

The *Turney* rule certainly avoids the issue “for whose benefit is the condition” but no issue should be avoided if it is relevant. Conspicuously absent from the majority reasons is any discussion of the *significance* or meaning of a condition being “solely for the benefit” of one of the parties. The proper question is whether there is something in the nature of such a condition that ought to imply a right to waive.

The nature of such a condition is that after the contract is performed, the non-benefiting party will have gained everything he bargained for whether or not the condition has been satisfied by performance. If a condition meets this test, the non-benefiting party cannot reasonably be heard to object to its waiver because he stands to get what he bargained for. This test is not a difficult one to apply but it does require some sympathetic understanding of the bargain struck. It ought *not* to be circumvented by the terse logic of Judson J.’s rule in *Turney*. Such reasoning, though “logical” in a strictly legal sense, proceeds without consideration or understanding of the bargain struck, and cannot be reconciled with *Beauchamp v. Beauchamp*.

Respecting *Beauchamp*, Dickson J. considered:

The patent purpose of the condition was to afford the purchasers an opportunity of raising the moneys with which to complete the purchase; in this they were successful and so advised the vendors timeously. It was of no importance whatever that the funds required by the purchasers came from a first mortgage for \$12,000 rather than a first mortgage for \$10,000 and a second mortgage for \$2,500. That case should, I think, be regarded as one in which the condition precedent was satisfied and not one in which it was waived.²⁷

With greatest respect, the conditions in *Beauchamp* were not satisfied. Each condition called for a particular mortgage and could not be satisfied strictly by another. True, it was of no importance *to the vendor* because, after closing, he would have what he bargained for whether or not the conditions had been satisfied strictly or at all, but this reasoning only applies when one considers that the basic purpose of the conditions was to enable the purchaser to obtain the closing funds and not some purpose involving any continuing concern to the vendor. This is exactly the reasoning that determines whether a condition is for the sole benefit of one of the parties. Dickson J. says the conditions were satisfied rather than waived but

27. *Id.* at 142; 57 D.L.R. (3d) at 248.

can there be any doubt that the purchaser could have considered the agreement ended unless he obtained exactly the mortgages specified in the conditions? The conditions were satisfied only in the sense that (1) the purchaser was satisfied and (2) it was of no continuing concern to the vendor whether or not the conditions were satisfied because either way he stood to get the purchase price on time — this amounts to a waiver. The test that Dickson J. applies to *Beauchamp* is the same test he avoids in *Barnett* and says ought to be avoided generally.

(5) Finally, in “the interests of certainty and predictability”, the law should not be changed without compelling reasons; furthermore, if the parties “agree that the rule shall not apply, that can be readily written into the agreement”.²⁸

The “certainty and predictability” argument does not deal with the correctness of the *Turney* rule and is properly more applicable to regulatory laws whose only real importance lies in their being generally obeyed (*e.g.* driving on the right hand side of the road) than it is to a basic principle of contract law. The issue under review deals specifically with the situation where the parties have neglected to address themselves to the question of waiver. Therefore, it is no answer that a right to waive could have been expressly included in the contract. It would be foolish to assume that parties entering contracts post-*Barnett* will consider the question of waiver more frequently than they did post-*Turney* etc. It is a fact of life that the huge majority of contracts are not drawn with reference to every court decision that might apply (nor should they be expected to) but rather are drawn in reliance on the parties’ basic sense of justice which assumes that a condition inserted solely for the benefit of one of the parties does not afford the other party a means of escape from the contract to take advantage of a better offer. It ought not to be expected that parties will always address themselves to the question of waiver notwithstanding total consistency in court decisions.

In expounding the law of contract, the court truly fulfills the common law function of expounding what the law is rather than introducing and creating law — contracts have been and will continue to be a common medium of social exchange independently of court decisions. To determine what the law of contract is, there must be an appreciation of the purpose and nature of the contract *to the parties* to see where justice lies *as between them*. This was the

28. *Id.* at 141; 57 D.L.R. (3d) at 247.

approach Dickson J. took in his discussion of *Beauchamp*. However, the *Turney* rule proceeds on an entirely different footing: as a matter of logic and by definition, until a condition precedent is satisfied, the very contract does not exist and there can be no question of implying terms into a contract that does not yet exist and no point in inquiring into the nature and purpose of the condition or whether it benefits one party solely. It is the writer's opinion that the *Turney* approach is wrong in its direction, logic and result, and that Dickson J.'s defence of that approach in *Barnett v. Harrison* is completely hollow.

Unless the *Beauchamp* distinction (whatever that is) is expanded and developed in the lower courts, the *Turney* rule will probably not be considered again for some time by the Supreme Court. Until then, Canada may be the only²⁹ jurisdiction having such a rule and the compelling dissent of Laskin C.J.C. will serve only for academic discussion.

29. See (1932), 76 A.L.R. 2d 1204; *Godfrey v. Crawford* (1964), 126 N.W. 2d 495; *Funke v. Paiste* (1947), 52 A.2d 655; *Major v. Price* (1954), 84 S.E. 2d 445; *Pease v. Brown* (1960), 8 Cal. Rptr. 917; *Hall v. Snipes* (1959), 330 S.W. 2d 381; *Maynard v. Goode* (1926), 37 C.L.R. 529; *Donaldson v. Tracy*, [1951] N.Z.L.R. 684 (S.C.); *Scott v. Rania*, [1966] N.Z.L.R. 527 (C.A.); *Mnyandu v. Mnyandu* (1964), 1 S.A.L.R. 418; *Van Jaarsveld v. Coetzee* (1973), 3 S.A.L.R. 241; see also cases cited *supra*, note 18.