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Volume I - General Principles

Part 7 - Performance and Discharge

Chapter 24 - Discharge by Breach

Section 1. - In General ¹

Discharge by breach

24-001

One party to a contract may, by reason of the other's breach, be entitled to treat himself as discharged from his liability further to perform his own unperformed obligations under the contract and from his obligation to accept performance by the other party if made or tendered. ² The expression "discharge by breach" is commonly employed to describe the situation where he is entitled to, and does, exercise that right. Nevertheless, the expression is not wholly accurate, at least without further explanation. In the first place, not every breach of contract has this effect. Discharge from liability is not necessarily coincident with a right to sue for damages. The rule is usually stated as follows: "[a]ny breach of contract gives rise to a cause of action; not every breach gives a discharge from liability". Thus the main question discussed in this chapter is whether a party who admittedly has a claim for damages is also relieved from further performance by the other party's breach. ³ Secondly, although sometimes the innocent party is referred to as "rescinding" the contract and the contract as being "terminated" by the breach, it is clear that the contract is not rescinded *ab initio* ⁴ nor is it extinguished by the breach. ⁵ The innocent party, or, in some cases, both parties, are excused from further performance of their primary obligations under the contract; but there is then substituted for the primary obligations of the party in default a secondary obligation to pay monetary compensation for his non-performance. ⁶ Thirdly, the innocent party is not ordinarily ⁷ bound to treat himself as discharged: if the contract is still executory, he may elect instead to treat it as continuing. ⁸ He may also waive his right of discharge, accept the defective performance of the other party, and content himself with damages, which are his remedy in any event. ⁹

A middle ground


24-002

⚠ An innocent party, faced by a repudiatory breach, is therefore given a choice: he can either treat the contract as continuing ("affirmation" of the contract) or he can bring it to an end ("acceptance of the repudiation"). He must "elect" or choose between these options. Further, it is sometimes said that there is no other option open to the innocent party; that is to say, there is no "middle way" or "third choice". ¹⁰ This is true in the sense that there is no

"... third choice, as a sort of *via media*, to affirm the contract and yet be absolved from tendering further performance unless and until [the breaching party] gives reasonable notice that he is once again able and willing to perform." ¹¹

But the proposition that there is no middle way can be over-stated. There is a sense in which there is a middle way open to the innocent party in that he is given a period of time in which to make up his mind whether he is going to affirm the contract or terminate. This point was well-expressed by Rix L.J. in *Stocznia Gdanska SA v Latvian Shipping Co (No.2)* ¹² when he stated:

“In my judgment, there is of course a middle ground between acceptance of repudiation and affirmation of the contract, and that is the period when the innocent party is making up his mind what to do. If he does nothing for too long, there may come a time when the law will treat him as having affirmed. If he maintains the contract in being for the moment, while reserving his right to treat it as repudiated if his contract partner persists in his repudiation, then he has not yet elected. As long as the contract remains alive, the innocent party runs the risk that a merely anticipatory repudiatory breach, a thing ‘writ in water’ until acceptance, can be overtaken by another event which prejudices the innocent party’s rights under the contract—such as frustration or even his own breach. He also runs the risk, if that is the right word, that the party in repudiation will resume performance of the contract and thus end any continuing right in the innocent party to elect to accept the former repudiation as terminating the contract.” ¹³

The length of the period given to the innocent party in order to make up his mind will very much depend upon the facts of the case. The period may not be a long one because a party who does nothing for too long may be held to have affirmed the contract. ¹⁴ The length of time will also depend upon the time at which the innocent party’s obligations fall due for performance. A contract remains in force until it has been terminated for breach so that a contracting party who has not elected to terminate the contract remains bound to perform his obligations unless the effect of the other party’s breach is to prevent performance of the innocent party’s obligation becoming due. ¹⁵ 

Affirmation

24-003

Where the innocent party, being entitled to choose whether to treat the contract as continuing or to accept the repudiation and treat himself as discharged, elects to treat the contract as continuing, he is usually said to have “affirmed” the contract. ¹⁶ He will not be held to have elected to affirm the contract unless, first, he has knowledge of the facts giving rise to the breach, ¹⁷ and, secondly, he has knowledge of his legal right to choose between the alternatives open to him. ¹⁸ When deciding whether the innocent party has affirmed the contract, a court is not conducting a “mechanical exercise” but is exercising a judgment. ¹⁹ The acceptance of the repudiation must be “real”, that is to say, there must be a “conscious intention to bring the contract to an end, or the doing of something that is inconsistent with its continuation”. ²⁰ Affirmation may be express or implied. It will be implied if, with knowledge of the breach and of his right to choose, he does some unequivocal ²¹ act from which it may be inferred that he intends to go on with the contract regardless of the breach or from which it may be inferred that he will not exercise his right to treat the contract as repudiated. ²² Affirmation must be total: the innocent party cannot approbate and reprobate by affirming part of the contract and disaffirming the rest, for that would be to make a new contract. ²³ Equally a party cannot affirm the contract for a limited period of time and then abrogate it on the expiry of that period of time. ²⁴ Mere inactivity after breach does not of itself amount to affirmation, ²⁵ nor (it seems) does the commencement of an action claiming damages for breach. ²⁶ The mere fact that the innocent party has called on the party in breach to change his mind, accept his obligations and perform the contract will not generally, of itself, amount to an affirmation:

“... the law does not require an injured party to snatch at a repudiation and he does not automatically lose his right to treat the contract as discharged merely by calling on the other to reconsider his position and recognize his obligation.” ²⁷

But if the innocent party unreservedly ²⁸ continues to press for performance or accepts performance by the other party after becoming aware of the breach and of his right to elect, he will be held to have affirmed the contract. Reliance upon a term of the contract (such as a term giving a party the right to claim a refund) will not be held to amount to an affirmation, at least in the case where the party who is alleged to have affirmed the contract has made it clear that it was treating the contract as discharged.

Affirmation irrevocable

24-004

⚠ Once the innocent party has elected to affirm the contract, and this has been communicated to the other party, then the choice becomes irrevocable. ³⁰ ⚠ There is no need to establish reliance or detriment by the party in default. ³¹ Thus the innocent party, having affirmed, cannot subsequently change his mind and rely on the breach to justify treating himself as discharged. ³² Nevertheless, in the case of a breach which is persisted in by the other party, the fact that the innocent party has continued to press for performance will not normally preclude him at a later stage from treating himself as discharged. ³³ ⚠ In such a case the innocent party is not terminating on account of the original repudiation and going back on his election to affirm but rather is “treating the contract as being at an end on account of the continuing repudiation reflected in the other party’s behaviour after the affirmation”. ³⁴ Nor, in the case of an ongoing contract, will affirmation in respect of one breach preclude the innocent party from treating himself as discharged by reason of further subsequent breaches. ³⁵

Loss of right to terminate

24-005

There are, however, circumstances where the innocent party may be deprived of his right to treat the contract as repudiated notwithstanding that he has no knowledge of the breach or of the right to choose which the law gives to him. For example, there will be circumstances where, even in the absence of an actual election, the innocent party will be regarded as having made its election, and decided not to terminate, when a reasonable time has passed and it has not sought to bring the contract to an end. ³⁶ A statutory example is provided by s.11(4) of the Sale of Goods Act 1979 whereby a buyer may, in certain circumstances, be deprived of his right to reject the goods and to treat the contract as repudiated by his acceptance of the goods, regardless of his lack of knowledge of the breach. ³⁷

“Inchoate doctrine” of consistency

24-006

The example given in the last paragraph was relied on and extended by the Court of Appeal in *Panchaud Frères SA v Etablissements General Grain Co*, ³⁸ a case which concerned a CIF contract for the sale of goods. Buyers of maize to be shipped in June/July 1965 accepted without objection shipping documents which included a bill of lading showing shipment on July 31 and also a certificate of quality which stated that the maize had been loaded in August. On arrival of the vessel the buyers rejected the maize on a ground subsequently found to be inadequate. Some three years later, at the hearing of an arbitration appeal, they became aware of late shipment, and then sought to justify their rejection on this ground. It was held that they were not entitled to do so. The case is best considered to have been decided on the relatively straightforward ground that a buyer under a CIF contract who accepts the documents will lose his right to reject the goods on the ground of their late shipment if he fails to notice the late shipment date when he takes up the documents. ³⁹ Lord Denning M.R., however, stated ⁴⁰ that the buyers were estopped by their conduct from setting up late shipment as a ground for rejection, in that they had led the sellers to believe that they were not relying on that ground and it would be unjust or unfair to allow them to do so when they had had full opportunity of finding out from the contract documents what the real date of shipment was, but did not trouble to do so. Winn L.J. agreed ⁴¹ that, having accepted the documents, the buyers could not properly thereafter turn round and say that the goods tendered were not contract goods. While doubting that there was anything which could be strictly described as an estoppel or quasi-estoppel, he considered that:

“... there may be an inchoate doctrine stemming from the manifest convenience of consistency in pragmatic affairs, negating any liberty to blow hot and cold in commercial conduct.”⁴²

The difficulty with the estoppel analysis is that there does not appear to have been any reliance by the sellers on any representation which was made by the buyers when they took up the documents. The “inchoate doctrine” referred to by Winn L.J. has received “no support”⁴³ in subsequent cases and has generally been invoked as an argument of “last resort”.⁴⁴ In so far as the case can be analysed as an example of estoppel by conduct, it is now clear that there is no “separate doctrine”⁴⁵ which can be derived from *Panchaud Frères* alone and the conventional requirements of estoppel by conduct must be satisfied on the facts of any future case.⁴⁶

Waiver and estoppel

24-007

Affirmation is sometimes regarded as a species of waiver, the innocent party “waiving” his right to treat the contract as repudiated.⁴⁷ But the word “waiver” is used in the law in a variety of different senses and so bears “different meanings”.⁴⁸ Two types of waiver are relevant here. The first type may be called “waiver by election” and waiver is here used to signify the “abandonment of a right which arises by virtue of a party making an election”.⁴⁹ Thus it arises when a person is entitled to alternative rights inconsistent with one another and that person acts in a manner which is consistent only with his having chosen to rely on one of them.⁵⁰ Affirmation is an example of such a waiver, since the innocent party elects or chooses to exercise his right to treat the contract as continuing and thereby abandons his inconsistent right to treat the contract as repudiated.⁵¹ It is important to appreciate that, in this context, the party who makes the election only abandons his right to treat the contract as repudiated; he does not abandon his right to claim damages for the loss suffered as a result of the breach.⁵² A second type of waiver may be called “waiver by estoppel” and it arises when the innocent party agrees with the party in default that he will not exercise his right to treat the contract as repudiated⁵³ or so conducts himself as to lead the party in default to believe that he will not exercise that right.⁵⁴ This type of waiver does not exist as a separate principle⁵⁵ but is in fact an application of the principle of equitable estoppel deriving from the classic statement of Lord Cairns in *Hughes v Metropolitan Ry Co.*⁵⁶

Similarities and differences

24-008

Both waiver by election and waiver by estoppel share some common elements. The principal similarity is that both would appear to require that the party seeking to rely on it (i.e. the party in default) must show a clear and unequivocal representation, by words or conduct, by the other party that he will not exercise his strict legal rights to treat the contract as repudiated.⁵⁷ But there are also important differences between the two types of waiver. In the case of waiver by election the party who has to make the choice must either know⁵⁸ or have obvious means of knowledge⁵⁹ of the facts giving rise to the right, and possibly of the existence of the right.⁶⁰ But in the case of waiver by estoppel neither knowledge of the circumstances nor of the right is required on the part of the person estopped; the other party is entitled to rely on the apparent election conveyed by the representation.⁶¹ Waiver by election is final and so has permanent effect,⁶² whereas the effect of an estoppel may be suspensory only.⁶³ This difference may not be so marked in the context of waiver of breach because here the waiver may have permanent effect because, in some circumstances, it would be inequitable to allow the innocent party to retract his waiver. For example, in the case where a buyer assures a seller that the goods are in conformity with the contractual specifications, and the seller, in reliance upon these assurances, does not make a fresh conforming tender when he could have done, the buyer will be held to have waived any breach relating to the conformity of the goods and so the waiver will have permanent effect.⁶⁴ Finally, waiver by estoppel requires that the party to whom the representation is made rely on that representation so as to make it inequitable for the representor to go back upon his representation.⁶⁵ There is, however, no such requirement in the case of waiver by

election; once the election has been made it is final whether or not the party has acted in reliance upon the election having been made. ⁶⁶ Waiver by estoppel is thus the “more flexible” ⁶⁷ of the two doctrines.

Other waivers

24-009

Affirmation must be distinguished from a waiver by one party of a term of the contract inserted for his benefit, ⁶⁸ or a “total” waiver by the innocent party of the breach itself by which he forgoes, not merely his right to treat himself as discharged by the breach, but also any claim for damages for the breach. ⁶⁹

Effect of affirmation

24-010

❗ Where the innocent party, being entitled to treat himself as discharged by the other’s breach, nevertheless elects to affirm the continued existence of the contract, he does not thereby necessarily relinquish his claim for damages for any loss sustained as a result of the breach. ⁷⁰ Further, he may insist on holding the other party to the bargain and continue to tender due performance on his part. ⁷¹ In *White and Carter (Councils) Ltd v McGregor*, ⁷² the appellants, advertising contractors, agreed with the respondent, a garage proprietor, to display advertisements for his garage for three years. On the same day, the respondent repudiated the agreement and requested cancellation, but the appellants refused to cancel and performed their obligations under the contract. They then sued for the full contract price. The House of Lords, by a majority of three to two, upheld the claim. The appellants had elected to treat the contract as continuing and it remained in full effect. The decision in this case has not passed without criticism, ⁷³ ❗ and one of the majority (Lord Reid) considered that the right to complete the contract and claim the price would not apply:

“... if it can be shown that a person has no legitimate interest, financial or otherwise, in performing the contract rather than claiming damages.” ⁷⁴ ❗

Further, if the innocent party is unable to complete the contract without the co-operation of the other party, his only remedy is to sue for damages and not for the contract sum. ⁷⁵ So an employee who is wrongfully dismissed can ordinarily only sue for damages ⁷⁶ and not for his wages or salary. ⁷⁷ But the fact that the remedies of the innocent party are restricted to damages does not mean that a discharge occurs at the moment of breach ⁷⁸; he may (in the case of an anticipatory repudiation) refuse to accept the repudiation and await the time fixed for performance, keeping the contract alive during the interval. In such a case, the innocent party is not required to mitigate his loss before the time for performance arrives. ⁷⁹ Finally, it would appear that the innocent party cannot continue to hold the contract open in a case where the contractual purpose of the adventure has been frustrated such that further performance of the contract is either impossible or would be something radically different from what had been agreed by the parties at the time of entry into the contract. ⁸⁰ ❗

Effect if repudiation not accepted

24-011

If the innocent party elects to treat the contract as continuing, then it remains in existence for the benefit of the wrongdoer as well as of himself. ⁸¹ The wrongdoer is entitled to complete the contract and to take advantage of any supervening circumstance which would excuse ⁸² him from or diminish ⁸³ his liability. The question, however, arises whether the wrongdoer may raise as a defence to liability

the fact that the innocent party has failed to perform or is unable to perform his own obligations in some fundamental respect at the time appointed for performance. The answer to this question turns on the difficult case of *Braithwaite v Foreign Hardwood Co Ltd*.⁸⁴ In that case, it was held that buyers of goods under a CIF⁸⁵ contract, who had wrongfully repudiated the contract, could not, in an action by the seller for damages for nonacceptance of a particular consignment of the goods, rely as a defence to liability upon the fact that part of the consignment covered by documents tendered to and refused by them did not answer to the quality specified by the contract. The case has been taken to establish the proposition that, if the innocent party elects to keep the contract alive notwithstanding a prior repudiation by the party in default, then so long as the repudiating party persists in his refusal to perform, he absolves the innocent party from his obligation to perform the contract in accordance with its terms.⁸⁶ Such a proposition may be defended on the ground that it would be an empty formality to require the innocent party to carry out his obligations under the contract in the face of a clear refusal by the other party to perform. But it is inconsistent with the principle that, if a repudiation is not accepted, the contract is kept alive for the benefit of *both* parties and the liabilities and obligations of the innocent party continue. In subsequent cases the facts of *Braithwaite* have been the subject of scrutiny,⁸⁷ and the opinion has been expressed that the documents covering the defective consignment were never tendered, but only offered to be tendered, and that at this stage the seller in fact accepted the buyers' repudiation and the contract was rescinded.⁸⁸ Alternatively, the House of Lords has stated⁸⁹ that the proposition sought to be derived from *Braithwaite* is wrong: there is no half-way house between affirmation (in which case the rights and obligations of both parties continue) and acceptance of the repudiation (in which case the rights and obligations of both parties which remain unperformed are discharged).⁹⁰

24-012

Nevertheless, it may be that there are certain circumstances in which the innocent party may be released from performance of one or more of his obligations under the contract, notwithstanding the fact that he has not accepted the wrongdoer's repudiation. The first arises where the repudiating party has, by words or conduct, represented to the innocent party that he will no longer require performance of a particular obligation under the contract, and the innocent party acts upon that representation. In such a case the repudiating party will be estopped from contending that the innocent party still remains bound by that obligation.⁹¹ Secondly, where the repudiating party, by means of a breach of contract or other default, prevents the innocent party from performing his obligations under the contract he cannot rely upon that non-performance to reduce or eliminate his liability.⁹² Finally, where the repudiating party stipulates for a mode of performance which is at variance with the terms of the contract and the innocent party attempts to comply with the new stipulation, the repudiating party cannot rely on a failure by the innocent party to perform his original obligations where that failure is attributable to his attempt to comply with the fresh stipulation.⁹³


Acceptance of repudiation

24-013


! Where there is an anticipatory breach, or the breach of an executory contract, and the innocent party wishes to treat himself as discharged, he must "accept the repudiation".⁹⁴ An act of acceptance of a repudiation requires no particular form.⁹⁵ It is usually done by communicating the decision to terminate to the party in default,⁹⁶ although it may be sufficient to lead evidence of an:

"Unequivocal overt act which is inconsistent with the subsistence of the contract ... without any concurrent manifestation of intent directed to the other party."⁹⁷

In an appropriate case an acceptance of a repudiation may take the form of reliance on a contractual term which entitles the innocent party to terminate the contract. Where the conduct of the party in breach is such as to entitle the innocent party to terminate the contract either pursuant to a term of the contract or under the general law, the innocent party is not required to elect between its two rights to terminate and so can be treated as having terminated the contract both under the appropriate term of the contract and in accordance with its rights at common law.⁹⁸ Unless and until the repudiation is



accepted the contract continues in existence for “an unaccepted repudiation is a thing writ in water”.⁹⁹ Acceptance of a repudiation must be clear and unequivocal¹⁰⁰  and mere inactivity or acquiescence will generally not be regarded as acceptance for this purpose.¹⁰¹ But there may be circumstances in which a continuing failure to perform will be sufficiently unequivocal to constitute acceptance of a repudiation. It all depends on “the particular contractual relationship and the particular circumstances of the case”.¹⁰² An example of a failure to perform which has been suggested as sufficient to constitute an acceptance is the following:

“Postulate the case where an employer at the end of the day tells a contractor that he, the employer, is repudiating the contract and that the contractor need not return the next day. The contractor does not return the next day or at all. It seems to me that the contractor’s failure to return may, in the absence of any other explanation, convey a decision to treat the contract as at an end.”¹⁰³

The requirement that the acceptance be communicated “clearly and unequivocally” is likely to mean that it is only where there has been a failure to carry out an act in relation to the party in breach that silence or inactivity will be sufficiently unequivocal for this purpose.¹⁰⁴  Where the silence or inactivity relates to the performance of a contract to which the party in breach is not privy then it is unlikely that silence will be sufficiently unequivocal.¹⁰⁵ Once a repudiation has been accepted, the acceptance cannot be withdrawn.¹⁰⁶ If the parties thereafter resume performance of the contract, their rights are governed by a new contract, even if the terms remain the same.¹⁰⁷

No reason or bad reason given

24-014

 The general rule is well established that, if a party refuses to perform a contract, giving a wrong or inadequate reason or no reason at all, he may yet justify his refusal if there were at the time facts in existence which would have provided a good reason, even if he did not know of them at the time of his refusal.¹⁰⁸ Thus when an employee brings an action against his employer, alleging that he has been wrongfully dismissed, the employer can rely on information acquired after the dismissal when seeking to justify the dismissal.¹⁰⁹ The general rule is the subject of a number of exceptions. First, a party cannot rely on a ground which he did not specify at the time of his refusal to perform “if the point which was not taken could have been put right”.¹¹⁰  Secondly, a party may be precluded by the operation of the doctrines of waiver or estoppel from relying on a ground which he did not specify at the time of his refusal to perform.¹¹¹ Thirdly, a party may be held to have accepted the goods so that he is no longer able to justify his refusal to perform.¹¹² However, there does not appear to be any separate principle which would preclude a party from setting up a different ground simply because it would be unfair or unjust to allow him to do so.¹¹³

Both parties in breach

24-015

Where both parties are alleged to have committed a breach of contract, and it is asserted that each breach (taken independently) gives rise to a right to terminate further performance of the contract, regard must be had to the order in which the breaches occurred. Where one party (A) breaches the contract and that breach is followed by a breach by the other party (B) then, assuming that both breaches are repudiatory, the breach by party A will give party B the right to terminate future performance of the contract. If B exercises that right and accepts the repudiation his subsequent failure to perform his obligations under the contract will not constitute a breach of contract.¹¹⁴ The position is rather more complex if B does not accept the breach and then himself commits a repudiatory breach of contract. In such a case can A accept the breach and terminate performance of the contract or does the fact that he has previously repudiated the contract prevent him from

exercising his option to terminate? It is suggested that, in such a case, the effect of B electing to affirm the contract is to leave the primary obligations of both parties unchanged.¹¹⁵ The contract therefore remains in existence for the benefit of A as well as for B so that A should be free to elect to terminate performance. Thus in *State Trading Corp of India v M. Golodetz Ltd*,¹¹⁶ Kerr L.J. stated that:

“If A is entitled to treat B as having wrongfully repudiated the contract between them and does so, then it does not avail B to point to A’s past breaches of contract, whatever their nature. A breach by A would only assist B if it was still continuing when A purported to treat B as having repudiated the contract *and* if the effect of A’s subsisting breach was such as to preclude A from claiming that B had committed a repudiatory breach. In other words, B would have to show that A, being in breach of an obligation in the nature of a condition precedent, was therefore not entitled to rely on B’s breach as a repudiation.”¹¹⁷

So unless the obligation of A to perform is a condition precedent to B’s obligation to perform, the fact that A is in breach of contract should not act as a barrier to A’s ability to terminate on the ground of B’s breach.¹¹⁸

24-016

⚠ Where both parties are simultaneously in breach of contract, there is authority for the proposition that neither party is entitled to terminate performance of the contract.¹¹⁹ Thus, it has been held that where both parties agree to submit a dispute to arbitration, and there then follows a substantial period of delay during which neither party seeks to proceed with the reference to arbitration, each party is thereby guilty of a continuing breach of contract with the result that:

“... neither [party] can rely on the other’s breach as giving him a right to treat the primary obligations of each to continue with the reference as brought to an end.”¹²⁰

While a party who has committed a repudiatory breach of contract is not entitled to enforce the contract against a party who is ready and willing to perform his obligations under the contract, it is suggested that it does not follow that the fact that a party has committed a repudiatory breach should preclude him from accepting a repudiatory breach committed by the other party. As has already been stated, until the repudiatory breach has been accepted, the primary obligations of both parties remain unaffected and therefore it is suggested that the proposition that, in such a case, either party is entitled to accept the breach is more consistent with the underlying principles of English law.¹²¹ ⚠


Circumstances of discharge

24-017



“The three sets of circumstances giving rise to a discharge of contract are tabulated by Anson as: (1) renunciation by a party of his liabilities under it; (2) impossibility created by his own act; and (3) total or partial failure of performance. In the case of the first two, the renunciation may occur or the impossibility be created either before or at the time for performance. In the case of the third it can occur only at the time or during the course of performance. Moreover, if the third be partial, the failure must occur in a matter which goes to the root of the contract. All these acts may be compendiously described as repudiation, though that expression is more particularly used of renunciation before the time for performance has arrived.”¹²²

1. See Lord Devlin [1967] Camb. L.J. 192; Reynolds (1963) 79 L.Q.R. 534; Treitel (1967) 30 M.L.R. 139; Shea (1979) 42 M.L.R. 623; Beatson (1981) 97 L.Q.R. 389; Rose (1981) 34 C.L.P. 235; Carter (2012) 128 L.Q.R. 283; Carter's Breach of Contract (2012); J.E. Stannard and D. Capper, *Termination for Breach of Contract* (2014).
2. This principle would appear to apply to leases: see *Hussain v Mehman* [1992] 2 E.G.L.R. 87; *Progressive House Pty Ltd v Tabali Pty Ltd* (1985) 157 C.L.R. 17; *Highway Properties Ltd v Kelly, Douglas & Co* (1971) 17 D.L.R. (3d) 710; *Grange v Quinn* [2013] EWCA Civ 24, [2013] 1 P. & C.R. 18 at [70]; cf. *Total Oil Great Britain Ltd v Thompson Garages (Biggin Hill) Ltd* [1972] 1 Q.B. 318. See further Pawlowski [1995] Conv. 379.
3. While the general law entitles a party to refuse to continue with performance in circumstances to be discussed in this chapter, the terms of the contract between the parties may give to one or both of the parties a right to terminate the contract in the event of a breach of contract by the other party. The right so conferred may be broader than that which would otherwise exist under the general law; in other words, the clause may entitle a party to terminate in the event of a breach which would not otherwise be regarded by the law as a repudiatory breach. The scope of the termination clause is in all cases a question of interpretation of the particular clause, on which see further para.22-048 n.206. In the case of a contract which falls within the scope of Ch.2 of Pt 1 of the Consumer Rights Act 2015, the rights and obligations of the parties to that contract are set out in the Act (on which see further Vol.II, paras 38-431 et seq.). The rights of the consumer include a short-term right to reject the goods (ss.20 and 22), a right of partial rejection (s.21), a right to repair or replacement (s.23), and a right to price reduction or a final right to reject (s.24). The Act applies to contracts made on or after October 1, 2015, see below, Vol.II, paras 38-471 et seq.
4. *Heyman v Darwins Ltd* [1942] A.C. 356, 373, 399; *Johnson v Agnew* [1980] A.C. 367, 373; *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827, 844; *Bank of Boston Connecticut v European Grain and Shipping Ltd* [1989] A.C. 1056, 1098–1099; *State Trading Corp of India Ltd v M. Golodetz Ltd* [1989] 2 Lloyd's Rep. 277, 286. See below, para.24-049.
5. *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827 (overruling *Harbutt's "Plasticine" Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 Q.B. 447). See above, para.15-025; below, para.24-049.
6. *R. V. Ward Ltd v Bignall* [1967] 1 Q.B. 534, 548; *Moschi v Lep Air Services Ltd* [1973] A.C. 331, 345, 350, 351; *Hyundai Ltd v Pournouras* [1978] 2 Lloyd's Rep. 502, 507; *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827, 848–851. See below, para.24-054.
7. At one time there was a question whether the wrongful dismissal of an employee from his or her contract of employment constituted an exception to the general rule but the Supreme Court has now resolved the question and concluded that contracts of employment do not constitute an exception: see *Geys v Société Générale, London Branch* [2012] UKSC 63, [2013] 1 A.C. 513, on which see further Vol.II, para.40-192, below.
8. *Avery v Bowden* (1855) 5 E. & B. 714; (1856) 6 E. & B. 953; *Frost v Knight* (1872) L.R. 7 Ex. 111, 112; *Johnstone v Milling* (1886) 16 Q.B.D. 460, 470; *Michael v Hart & Co* [1902] 1 K.B. 482, 492; *Tredegar Iron and Coal Co Ltd v Hawthorn Bros & Co* (1902) 18 T.L.R. 716; *Hain S.S. Co Ltd v Tate & Lyle Ltd* (1936) 41 Com. Cas. 350, 355, 363; *Heyman v Darwins Ltd* [1942] A.C. 356, 361; *Chandris v Isbrandtsen Moller Co Inc* [1951] 1 K.B. 240, 248; *Howard v Pickford Tool Co Inc* [1951] 1 K.B. 417, 421; *White & Carter (Councils) Ltd v McGregor* [1962] A.C. 413; *Cranleigh Precision Engineering Ltd v Bryant* [1965] 1 W.L.R. 1293; *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, 398, 418; *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 W.L.R. 361, 368, 375, 381; *Mayfair Photographic Supplies Ltd v Baxter Hoare & Co Ltd* [1972] 1 Lloyd's Rep. 410, 417; *Lakshmijit v Sherani* [1974] A.C. 605; *Thomas Marshall (Exports) Ltd v Guinle* [1979] Ch. 227; *Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory* [1979] A.C. 91; *Fercometal SARL v Mediterranean Shipping Co SA* [1989] A.C. 788; *Vitol SA v Norelf* [1996] A.C. 800; *Geys v*

Société Générale, London Branch [2012] UKSC 63, [2013] 1 A.C. 513. In the latter case while Lord Sumption (dissenting) recognised (at [113]) the general rule that the repudiation of a contract does not necessarily bring the contract to an end, he stated that the right to treat the contract as subsisting has “never been absolute” but is “subject to important exceptions and qualifications” (at [114]). In his judgment an innocent party cannot treat the contract as subsisting if “(i) performance on his part requires the co-operation of the repudiating party, and (ii) the contract is incapable of specific performance, with the result that co-operation cannot be compelled” (at [116]). The first of these qualifications is not controversial (see para. 24-010, especially n.75) but the second was rejected by the majority on the ground that one cannot infer from the absence of a particular remedy (namely specific performance) the absence of the right to treat the contract as subsisting (see at [89]).

9. *Bentsen v Taylor, Sons & Co* [1893] 2 Q.B. 274; *Wallis, Son and Wells v Pratt and Haynes* [1911] A.C. 394; *Hain S.S. Co Ltd v Tate & Lyle Ltd* (1936) 41 Com. Cas. 350; *Chandris v Isbrandtsen Moller Co Inc* [1951] 1 K.B. 240; *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361; Sale of Goods Act 1979 s.11(2). See also below, para.24-003 (affirmation).
10. *Bentsen v Taylor* [1893] 2 Q.B. 274, 279; *Fercometal SARL v Mediterranean Shipping Co SA* [1989] A.C. 788, 799–801; *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India* [1990] 1 Lloyd's Rep. 391, 398–399.
11. *Fercometal SARL v Mediterranean Shipping Co SA* [1989] A.C. 788, 801. English law does not permit a contracting party unilaterally to cure a repudiatory breach once it has been committed. The party in breach can attempt to persuade the innocent party to affirm the contract. But the choice whether to affirm or not is the choice of the innocent party. It cannot be taken away from him by the party in breach making an offer of amends: *Bournemouth University Higher Education Corp v Buckland* [2010] EWCA Civ 121, [2010] I.C.R. 908.
12. [2002] EWCA Civ 889, [2002] 2 Lloyd's Rep. 436; *Astea (UK) Ltd v Time Group Ltd* [2003] EWHC 725 (TCC), [2003] All E.R. (D) 212 (Apr).
13. [2002] EWCA Civ 889, [2002] 2 Lloyd's Rep. 436 at [87]; *Force India Formula One Team Ltd v Etihad Airways PJSC* [2010] EWCA Civ 1051, [2011] E.T.M.R. 10 at [113]–[116]; *White Rosebay Shipping SA v Hong Kong Chain Glory Shipping Ltd* [2013] EWHC 1355 (Comm), [2013] 2 All E.R. (Comm) 449 at [22].
14. cf. *W.E. Cox Toner (International) Ltd v Crook* [1981] I.R.L.R. 443, 446 (“he is not bound to elect within a reasonable time or any other time”). See also the line of cases in which it has been held that mere delay by itself does not constitute affirmation (n.25 below). The length of time given to the innocent party will depend in part upon the nature of the contract. Where time is of the essence of the contract or the contract has been entered into a volatile market, the time allowed is likely to be relatively short. But where there is no particular urgency, or the situation is a complex one, the innocent party may be given a longer period of time in which to make up its mind: *Force India Formula One Team Ltd v Etihad Airways PJSC* [2010] EWCA Civ 1051, [2011] E.T.M.R. 10 at [122].
15.  See Peel, *Treitel on The Law of Contract*, 14th edn (2015), paras 18–001–18–027 and also paras 24–037 and 24–038.
16. *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, 398; *Peyman v Lanjani* [1985] Ch. 457; *Tele2 International Card Co SA v Kub 2 Technology Ltd* [2009] EWCA Civ 9, [2009] All E.R. (D) 144 (Jan).
17. *Matthews v Smallwood* [1910] 1 Ch. 777, 786; *U.G.S. Finance Ltd v National Mortgage Bank of Greece* [1964] 1 Lloyd's Rep. 446, 450; *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, 426; *Panchaud Frères SA v Etablissements General Grain Co* [1970] 1 Lloyd's Rep. 53, 57; *Kammins Ballrooms & Co Ltd v Zenith Investments (Torquay) Ltd* [1971] A.C. 850; *Peyman v Lanjani* [1985] Ch. 457; *Yukong Line Ltd of Korea v Rendsberg Investments Corp of Liberia* [1996] 2 Lloyd's Rep. 604, 607.

18. *Kendall v Hamilton* (1879) 4 App. Cas. 504, 542; *Peyman v Lanjani* [1985] Ch. 457. cf. *Sea Calm Shipping Co SA v Chantiers Navals de L'Estérel* [1986] 2 Lloyd's Rep. 294; *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India* [1990] 1 Lloyd's Rep. 391, 398 where the issue was noted but not resolved; *Yukong Line Ltd of Korea v Rendsberg Investments Corp of Liberia* [1996] 2 Lloyd's Rep. 604, 607.
19. *White Rosebay Shipping SA v Hong Kong Chain Glory Shipping Ltd* [2013] EWHC 1355 (Comm), [2013] 2 All E.R. (Comm) 449 at [38].
20. *Geys v Société Générale, London Branch* [2012] UKSC 63, [2013] 1 A.C. 513 at [17].
21. *China National Foreign Trade Transportation Corp v Evlogia Shipping Co SA of Panama* [1979] 1 W.L.R. 1018; *Peyman v Lanjani* [1985] Ch. 457; *State Securities Plc v Initial Industry Ltd* [2004] EWHC 3482 (Ch.), [2004] All E.R. (D) 317 (Jan) (acceptance of rental payment held not to have amounted to an election to continue with the contract); *Garside v Black Horse Ltd* [2010] EWHC 190 (QB), [2010] All E.R. (D) 98 (Mar) at [28].
22. *Pust v Dowie* (1863) 5 B. & S. 33; *Bentsen v Taylor, Sons & Co* [1893] 2 Q.B. 274; *Matthews v Smallwood* [1910] 1 Ch. 777; *Hain S.S. Co Ltd v Tate & Lyle Ltd* (1936) 41 Com. Cas. 350, 355, 363; *Temple S.S. Co v Sovfracht* (1945) 79 L.L. Rep. 1, 11; *Chandris v Isbrandtsen Moller Inc* [1951] 1 K.B. 240; *Denmark Productions Ltd v Boscobel Productions Ltd* [1969] 1 Q.B. 699, 731; *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361; *Sea Calm Shipping Co SA v Chantiers Navals de L'Estérel* [1986] 2 Lloyd's Rep. 294; *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India* [1990] 1 Lloyd's Rep. 391, 398; *Laing Management Ltd v Aegon Insurance Co (UK) Ltd* (1998) 86 Build. L.R. 70, 108 (although the conclusion that the contract remained alive for the benefit of both parties does not sit easily with the fact that the plaintiffs had expressly relied upon an express power to terminate contained in the contract).
23. *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, 398. See also *Johnstone v Milling* (1886) 13 Q.B.D. 460; *Lanes Group Plc v Galliford Try Infrastructure Ltd* [2011] EWHC 1035 (TCC), [2011] B.L.R. 438 at [26].
24. *Norwest Holst Ltd v Harrison* [1985] I.C.R. 668, 683; *Walkinshaw v Diniz* [2001] 1 Lloyd's Rep. 632, 643. However, it is unlikely that there is an "inflexible rule that an acceptance of a repudiation can only be effective if it purports to bring about immediate termination in circumstances where the contract calls for no performance from either party in the interval before termination is expressed to take effect": *Shell Egypt West Manzala GmbH v Dana Gas Egypt Ltd* [2010] EWHC 465 (Comm), [2010] All E.R. (D) 156 (Mar) at [27].
25. *Perry v Davis* (1858) 3 C.B.(N.S.) 769; *Cranleigh Precision Engineering Ltd v Bryant* [1965] 1 W.L.R. 1293; *Nichimen Corp v Gatoil Overseas Inc* [1987] 2 Lloyd's Rep. 46. See also *Clough v L.N.W. Ry* (1871) 7 Ex. 26; *Allen v Robles* [1969] 1 W.L.R. 193; *Cantor Fitzgerald International v Bird* [2002] I.R.L.R. 867. But see *Denmark Productions Ltd v Boscobel Productions Ltd* [1969] 1 Q.B. 699; *Scandinavian Trader Tanker Co AB v Flota Petrolea Ecuatoriana* [1981] 2 Lloyd's Rep. 425, 430; affirmed [1983] 2 A.C. 694.
26. *General Billposting Co Ltd v Atkinson* [1909] A.C. 118; *Garnac Grain Co Ltd v H.M. Fauré & Fairclough Ltd* [1966] 1 Q.B. 650; affirmed [1968] A.C. 1130n. Equally, a decision not to pursue the remedy of specific performance does not commit the innocent party to accept a repudiatory or an anticipatory breach: *Bear Stearns Bank Plc v Forum Global Equity Ltd* [2007] EWHC 1576 (Comm) at [127].
27. *Yukong Line Ltd of Korea v Rendsberg Investments Corp of Liberia* [1996] 2 Lloyd's Rep. 604, 608. Moore-Bick J. added that, in his view, the courts should generally be "slow" to accept that the innocent party has committed itself irrevocably to going on with the contract and then leave it to "the doctrine of estoppel" (below, para.24-006) to remedy any potential injustice which may arise in the case where the party in breach has relied upon a representation by the innocent party which suggests that the contract has been affirmed. See also *Internet Trading Clubs Ltd v Freeserve (Investments) Ltd Plc* [2001] All E.R. (D) 185 (Jun); *Jet2.com Ltd v SC Compania Nationala de Transporturi Aeriene Romane Tarom SA* [2012] EWHC 622 (QB), [2012] All E.R.

- (D) 218 (Mar) at [67]; and *Ampurius Nu Homes Holdings Ltd v Telford Homes (Creekside) Ltd* [2012] EWHC 1820 (Ch), [2012] B.L.R. 387 at [123] and *Flanagan v Liontrust Investment Partners LLP* [2015] EWHC 2171 (Ch) at [216].
28. *Bremer Handelsgesellschaft mbH v Deutsche Conti Handelsgesellschaft mbH* [1983] 2 Lloyd's Rep. 45; *Cobec Brazilian Trading & Warehousing Corp v Alfred C. Toepfer* [1983] 2 Lloyd's Rep. 386 (waiver).
29. *Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2009] EWCA Civ 75, [2009] 1 Lloyd's Rep. 461 at [45].
30.  *Hain S.S. Co Ltd v Tate & Lyle Ltd* (1936) 41 Com. Cas. 350, 355; *Peyman v Lanjani* [1985] Ch. 457; *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India* [1990] 1 Lloyd's Rep. 391; *Yukong Line Ltd of Korea v Rendsberg Investments Corp of Liberia* [1996] 2 Lloyd's Rep. 604, 607; *Laing Management Ltd v Aegon Insurance Co (UK) Ltd* (1998) 86 Build. L.R. 70, 108. However, affirmation may not be irrevocable in the case of an anticipatory breach of contract. In the case of an anticipatory breach, it has been argued that the innocent party ought to be entitled to go back upon his affirmation unless there has been some change of position by the party in breach in reliance upon the affirmation which would be prejudiced by the change of mind by the innocent party (see Treitel (1998) 114 L.Q.R. 22 and Peel, *Treitel on The Law of Contract*, 14th edn (2015), para.17–091 et seq., a view which gains some support in principle from Thomas J. in *Stocznia Gdanska SA v Latvian Shipping Co* [2001] 1 Lloyd's Rep. 537, 566) and from Rix L.J. on appeal to the Court of Appeal, [2002] EWCA Civ 889, [2002] 2 Lloyd's Rep. 436 at [97]–[99].
31. *Edm. J.M. Mertens & Co PVBA v Veevoeder Import Export Vimex BV* [1979] 2 Lloyd's Rep. 372, 384; *Telfair Shipping Corp v Athos Shipping Co SA* [1981] 2 Lloyd's Rep. 74, 87–88; affirmed [1983] 1 Lloyd's Rep. 127; *Peter Cremer v Granaria BV* [1981] 2 Lloyd's Rep. 583, 589; *Peyman v Lanjani* [1985] Ch. 457, 493, 500; *Sea Calm Shipping Co SA v Chantiers Navals de l'Esterel SA* [1986] 2 Lloyd's Rep. 294, 298; *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India* [1990] 1 Lloyd's Rep. 391, 398; *Yukong Line Ltd of Korea v Rendsberg Investments Corp of Liberia* [1996] 2 Lloyd's Rep. 604, 607.
32. *Bentsen v Taylor Sons & Co* [1893] 2 Q.B. 274.
33.  *Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory* [1979] A.C. 91; *Johnson v Agnew* [1980] A.C. 367; *Stocznia Gdanska SA v Latvian Shipping Co* [2002] EWCA Civ 889, [2002] 2 Lloyd's Rep. 436 at [94]–[100]. In the context of an ongoing relationship such as a contract of employment it was held in *Vairea v Reed Business Information Ltd* UKEAT/0177/15/BA at [81] that an “entirely innocuous” act cannot “revive” a previous fundamental breach so that it is necessary, in order to be entitled to terminate the contract on the ground of the other party's breach, to establish that there has been a new breach entitling the innocent party to make a second election. Where there has been a series of breaches, followed by an affirmation of what would otherwise have been the “last straw” entitling the innocent party to terminate the contract, the scale does not remain loaded and ready to be tipped by adding another “straw”. Rather, the scale has been emptied by the affirmation and the new “straw” lands in an empty scale (*Vairea* at [84]).
34. *Safehaven Investments Inc v Springbok Ltd* (1996) 71 P. & C.R. 59, 68; *Stocznia Gdanska SA v Latvian Shipping Co* [2002] EWCA Civ 889, [2002] 2 Lloyd's Rep. 436 at [40] and [96]; *White Rosebay Shipping SA v Hong Kong Chain Glory Shipping Ltd* [2013] EWHC 1355 (Comm), [2013] 2 All E.R. (Comm) 449. In cases of this type a court must “carefully consider whether there were words or conduct after affirmation which demonstrate that the renunciation of the contract is continuing, so that a later acceptance of the continuing renunciation will be a legitimate termination of the contract” ([2013] EWHC 1355 (Comm) at [50]). In *Primera Maritime (Hellas) Ltd v Jiangsu Eastern Heavy Industry Co Ltd* [2013] EWHC 3066 (Comm), [2014] 1 All E.R. (Comm) 813 Flaux J. declined to draw a distinction between a repeated renunciation and a continuing renunciation, stating (at [25]) that “any distinction between repetition and continuation of a renunciation is more apparent than real”.

35. *Segal Securities Ltd v Thoseby* [1963] 1 Q.B. 887 (lease); *Yukong Line Ltd of Korea v Rendsberg Investments Corp of Liberia* [1996] 2 Lloyd's Rep. 604, 607; *Flanagan v Liontrust Investment Partners LLP* [2015] EWHC 2171 (Ch) at [217].
36. *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India* [1990] 1 Lloyd's Rep. 391, 398; *Kosmar Villa Holidays Inc v Trustees of Syndicate 1243* [2008] EWCA Civ 147, [2008] 1 C.L.C. 307 at [74].
37. *Wallis Son & Wells v Pratt and Haynes* [1910] 2 K.B. 1003, 1015 (decision reversed [1911] A.C. 394); *Peyman v Lanjani* [1985] Ch. 457. See Benjamin's Sale of Goods, 9th edn (2014), para.12–040. The Consumer Rights Act 2015 provides that s.11(4) will not apply to a contract to which Ch.2 of Pt 1 of the Consumer Rights Act applies. However, in the case of contracts falling within the scope of Ch.2 of Pt 1, a rather different remedial regime will be enacted (see ss.19–26 of the Act), including a short-term right to reject, the right to repair or replacement and the right to a price reduction or the final right to reject. The Act applies to contracts made on or after October 1, 2015, see below, Vol.II, paras 38–447 et seq.
38. [1970] 1 Lloyd's Rep. 53. See also *Woodhouse A.C. Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1971] 2 Q.B. 23; affirmed [1972] A.C. 741; *Alma Shipping Corp v Union of India* [1971] 2 Lloyd's Rep. 494; *Alfred C. Toepfer v Cremer* [1975] 2 Lloyd's Rep. 118; *Waren Import Gesellschaft Krohn & Co v Alfred C. Toepfer* [1975] 1 Lloyd's Rep. 322; *Surrey Shipping Co Ltd v Cie Continentale (France) SA* [1978] 1 Lloyd's Rep. 191; *Bunge GmbH v Alfred C. Toepfer* [1978] 1 Lloyd's Rep. 506; *Avimex SA v Dewulf & Cie* [1979] 2 Lloyd's Rep. 57; *Procter & Gamble Philippine Manufacturing Corp v Peter Cremer GmbH & Co* [1988] 3 All E.R. 843, 848–852; *Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce* [1997] 4 All E.R. 514. cf. *V. Berg & Son Ltd v Vanden Avenne-Izegem PVBA* [1977] 1 Lloyd's Rep. 499.
39. *B.P. Exploration Co (Libya) Ltd v Hunt* [1979] 1 W.L.R. 783, 810–811; *Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce* [1997] 4 All E.R. 514, 528, 530.
40. [1970] 1 Lloyd's Rep. 53, 57–58. The estoppel explanation was preferred by Hirst J. in *Procter & Gamble Philippine Manufacturing Corp v Peter Cremer GmbH & Co* [1988] 3 All E.R. 843, 852.
41. [1970] 1 Lloyd's Rep. 53, 60.
42. [1970] 1 Lloyd's Rep. 53, 59.
43. *Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce* [1997] 4 All E.R. 514, 529.
44. *B.P. Exploration Co (Libya) Ltd v Hunt* [1979] 1 W.L.R. 783, 811.
45. *Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce* [1997] 4 All E.R. 514, 530.
46. *Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce* [1997] 4 All E.R. 514.
47. See, e.g. Sale of Goods Act 1979 s.11(2).
48. *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India* [1990] 1 Lloyd's Rep. 391, 397; *Kosmar Villa Holidays Inc v Trustees of Syndicate 1243* [2008] EWCA Civ 147, [2008] 1 C.L.C. 307 at [36]–[38]. See also Wilken and Ghaly, *The Law of Waiver, Variation and Estoppel*, 3rd edn (2012), Ch.3 and above, paras 4–082, 22–040; below, para.24–009.
49. *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India* [1990] 1 Lloyd's Rep. 391, 398.

50. *Kammins Ballroom & Co Ltd v Zenith Investments (Torquay) Ltd* [1971] A.C. 850, 882–883; *China National Foreign Trade Transportation Corp v Evlogia Shipping Co SA of Panama* [1979] 1 W.L.R. 1018, 1024, 1034–1035; *Telfair Shipping Corp v Athos Shipping Co SA* [1981] 2 Lloyd's Rep. 74, 87; affirmed [1983] 1 Lloyd's Rep. 127; *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India* [1990] 1 Lloyd's Rep. 391, 398. Where the rights are not inconsistent but equivalent, no question of election arises: see *Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2009] EWCA Civ 75, [2009] 1 Lloyd's Rep. 461 at [44], where it was held that, where a contractual right to terminate corresponds to the right to terminate under the general law, no election is necessary.
51. *Peyman v Lanjani* [1985] Ch. 457; *Sea Calm Shipping Co SA v Chantiers Navals d'Esterel SA* [1986] 2 Lloyd's Rep. 294; *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India* [1990] 1 Lloyd's Rep. 391, 399; *Yukong Line Ltd of Korea v Rendsberg Investments Corp of Liberia* [1996] 2 Lloyd's Rep. 604, 607.
52. The latter type of waiver, sometimes called "total waiver", is discussed, above, para.22-047; below para.24-009.
53. See above, para.24-005.
54. See the cases cited in n.38, above.
55. *Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce* [1997] 4 All E.R. 514, 530, where the Court of Appeal rejected the argument that any separate doctrine could be derived from the decision of the Court of Appeal in *Panchaud Frères SA v Etablissements General Grain Co* [1970] 1 Lloyd's Rep. 53, above, para.24-006.
56. (1877) 2 App. Cas. 439, see above, para.4-086. There would also appear to be a common law species of waiver (sometimes referred to as "forbearance", see above, para.4-082) but the differences between the two appear to be very slight (see above, para.4-105). The equitable variety is most frequently relied upon in the courts.
57. *Woodhouse A.C. Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] A.C. 741, 758; *V. Berg & Son Ltd v Vanden Avenne-Izegem PVBA* [1977] 1 Lloyd's Rep. 499; *Finagrain SA v Kruse SA* [1976] 2 Lloyd's Rep. 508; *Bremer Handelsgesellschaft mbH v C. Mackprang Jr* [1979] 1 Lloyd's Rep. 221, 228; *Avimex SA v Dewulf & Cie* [1979] 2 Lloyd's Rep. 57, 67; *Peter Cremer v Granaria BV* [1981] 2 Lloyd's Rep. 583; *Telfair Shipping Corp v Athos Shipping Co SA* [1981] 2 Lloyd's Rep. 74, 87; *Peyman v Lanjani* [1985] Ch. 457, 501; *Cobec Brazilian Trading and Warehousing Corp v Alfred C. Toepfer* [1983] 2 Lloyd's Rep. 386; *Bremer Handelsgesellschaft mbH v Deutsche Conti-Handelsgesellschaft mbH* [1983] 2 Lloyd's Rep. 45; *Nichimen Corp v Gatoil Overseas Inc* [1987] 2 Lloyd's Rep. 46; *Yukong Line Ltd of Korea v Rendsberg Investments Corp of Liberia* [1996] 2 Lloyd's Rep. 604, 607; *Tameside MBC v Barlow Securities Group Services Ltd* [2001] EWCA Civ 1, [2001] B.L.R. 113, 122 ("it is not the function of the court to resolve ambiguities and, unless it can find a reasonably clear and definite meaning, then it is not entitled to make the finding that the representation was indeed clear and unequivocal"); *Persimmon Homes (South Coast) Ltd v Hall Aggregates (South Coast) Ltd* [2009] EWCA Civ 1108, [2009] N.P.C. 118; *Lancashire Insurance Co Ltd v MS Frontier Reinsurance Ltd* [2012] UKPC 42. When deciding whether or not the representation is clear and unequivocal, the court should consider the relevant communications as a whole: *Force India Formula One Team Ltd v 1 Malaysia Racing Team Sdn Bhd* [2013] EWCA Civ 780 at [38]. More difficult is the question whether a demand for payment (or acceptance of payment) amounts to a waiver of the right to terminate. There is authority in the field of landlord and tenant law for the proposition that a demand for future instalments of rent accruing due in the future amounts to a waiver of the right to terminate for breach (*David Blackstone Ltd v Burnetts (West End) Ltd* [1973] 1 W.L.R. 1487) but it has been doubted whether such a principle, assuming that it exists, forms part of the general law of contract (*Parbulk II A/S v Heritage Maritime Ltd SA (The Mahakam)* [2011] EWHC 2917 (Comm), [2012] 1 Lloyd's Rep. 87 at [22]). A court may infer that a demand for payment is not consistent with an unequivocal communication that the contract is at an end (*Force India Formula One Team Ltd v 1 Malaysia Racing Team Sdn Bhd* [2013] EWCA Civ 780 at [40]) but it may not be willing to conclude that a demand (as opposed to acceptance) of payment will in all circumstances amount to an

- affirmation of the contract (*Parbulk II A/S v Heritage Maritime Ltd SA (The Mahakam)* [2011] EWHC 2917 (Comm), [2012] 1 Lloyd's Rep. 87 at [22]). Much will depend on the surrounding circumstances and, this being the case, it is dangerous to attempt to extract a universal rule as to whether a demand for payment does or does not amount to an affirmation or a waiver of the right to terminate. cf. *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep. 109, 126. See also above, paras 4-090—4-093.
58. *U.G.S. Finance Ltd v National Mortgage Bank of Greece* [1964] 1 Lloyd's Rep. 446, 450; *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, 425; *Panchaud Frères SA v Etablissements General Grain Co* [1970] 1 Lloyd's Rep. 53, 57; *Kosmar Villa Holidays Inc v Trustees of Syndicate 1243* [2008] EWCA Civ 147, [2008] 1 C.L.C. 307 at [38].
59. *Bremer Handelsgesellschaft mbH v C. Mackprang Jr* [1979] 1 Lloyd's Rep. 221, 228; *Avimex SA v Dewulf & Cie* [1979] 2 Lloyd's Rep. 57, 67–68.
60. *Peyman v Lanjani* [1985] Ch. 457 (affirmation).
61. *Panchaud Frères SA v Etablissements General Grain Co* [1970] 1 Lloyd's Rep. 53, 57, 59 (see above, para.24-006); *Peyman v Lanjani* [1985] Ch. 457, 501; *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India* [1990] 1 Lloyd's Rep. 391, 399.
62. *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India* [1990] 1 Lloyd's Rep. 391, 398; *Kosmar Villa Holidays Inc v Trustees of Syndicate 1243* [2008] EWCA Civ 147, [2008] 1 C.L.C. 307 at [38]. See also above, para.24-004.
63. *Hughes v Metropolitan Ry Co* (1877) 2 App. Cas. 439, see above, para.4-097.
64. *Toepfer v Warinco AG* [1978] 2 Lloyd's Rep. 569, 576. See above, paras 4-096, 4-098.
65. *Finagrain SA v Kruse SA* [1976] 2 Lloyd's Rep. 508, 535; *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep. 109, 127; *Bunge SA v Schleswig-Holsteinische Landweretschaftliche Hauptgenossenschaft GmbH* [1978] 1 Lloyd's Rep. 480; *Société Italo-Belge pour le Commerce et l'Industrie SA v Palm and Vegetable Oils (Malaysia) Sdn Bhd* [1982] 1 All E.R. 19; *Peter Cremer v Granaria BV* [1981] 2 Lloyd's Rep. 583; cf. *Alfred C. Toepfer v P. Cremer* [1975] 2 Lloyd's Rep. 118, 123. See also above, paras 4-094—4-096.
66. *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India* [1990] 1 Lloyd's Rep. 391, 399; *Yukong Line Ltd of Korea v Rendsburg Investments Corp of Liberia* [1996] 2 Lloyd's Rep. 604, 607; *Force India Formula One Team Ltd v 1 Malaysia Racing Team Sdn Bhd* [2013] EWCA Civ 780, [2013] R.P.C. 36 at [37].
67. *Kosmar Villa Holidays Inc v Trustees of Syndicate 1243* [2008] EWCA Civ 147, [2008] 1 C.L.C. 307 at [38].
68. See above, para.22-046.
69. Sale of Goods Act 1979 s.11(2); Benjamin's Sale of Goods, 9th edn (2014), paras 12–036—12–038. cf. *European Grain & Shipping Ltd v Peter Cremer* [1983] 1 Lloyd's Rep. 211.
70. *Bentsen v Taylor, Sons & Co* [1893] 2 Q.B. 274; *Hain S.S. Co Ltd v Tate & Lyle Ltd* (1936) 41 Com. Cas. 350, 363; *Chandris v Isbrandtsen Moller Co Inc* [1951] 1 K.B. 240, 248; *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, 395.
71. *Heyman v Darwins Ltd* [1942] A.C. 356, 361.
72. [1962] A.C. 413. See also *Tredegear Iron and Coal Co Ltd v Hawthorn Bros & Co* (1902) 18 T.L.R. 716; *International Correspondence Schools v Ayres* (1912) 106 L.T. 845; *Anglo-African*

Shipping Co of New York Inc v Mortner [1962] 1 Lloyd's Rep. 81, 94; *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 W.L.R. 373; *Gator Shipping Corp v Trans-Asiatic Oil Ltd SA* [1978] 2 Lloyd's Rep. 357; *Asamera Oil Corp Ltd v Sea Oil and General Corp* (1979) 89 D.L.R. (3d) 1, 26.

73.

! Goodhart (1962) 78 L.Q.R. 263; Furmston (1962) 25 M.L.R. 364; Scott [1962] Camb. L.J. 12. cf. Nienaber [1962] Camb. L.J. 213; Peel, *Treitel on The Law of Contract*, 4th edn (2015), paras 21–011—21–015 and, for a more general review of the case law, see Liu (2011) 74 M.L.R. 171.

74.

! [1962] A.C. 413, 431. This dictum was applied or approved in *Attica Sea Carriers Corp v Ferrostaal Poseidon Bulk Reederei GmbH* [1976] 1 Lloyd's Rep. 250, 255; *Gator Shipping Corp v Trans-Asiatic Oil Ltd SA* [1978] 2 Lloyd's Rep. 357, 372–374; *Clea Shipping Corp v Bulk Oil International Ltd* [1983] 2 Lloyd's Rep. 645; *Stocznia Gdanska SA v Latvian Shipping Co* [1995] 2 Lloyd's Rep. 592, 600–602 (Clarke J.), [1996] 2 Lloyd's Rep. 132, 138–139 CA. (It was unnecessary for the House of Lords in *Stocznia Gdanska* to consider this point on appeal ([1998] 1 W.L.R. 574, 581)); *Ocean Marine Navigation Ltd v Koch Carbon Inc (The "Dynamic")* [2003] EWHC 1936 (Comm), [2003] 2 Lloyd's Rep. 693 at [23]; *Ministry of Sound (Ireland) Ltd v World Online Ltd* [2003] EWHC 2178 (Ch) at [64]–[66]. *Reichman v Beveridge* [2006] EWCA Civ 1659, [2007] Bus L.R. 412 at [17]; *Isabella Shipowner SA v Shagang Shipping Co Ltd* [2012] EWHC 1077 (Comm), [2012] 2 Lloyd's Rep. 61 at [42]–[50]; *Barclays Bank Plc v Unicredit Bank AG* [2012] EWHC 3655 (Comm), [2013] 2 Lloyd's Rep. 1 at [107]; and *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2015] EWHC 283 (Comm), [2015] 1 Lloyd's Rep. 359 (where it was suggested by Leggatt J. at [94]–[98] that this line of cases should be seen alongside the cases concerned with the limits which the courts have implied on the exercise of a contractual discretion and the "increasing recognition in the common law world of the need for good faith in contractual dealings"). However, the Court of Appeal in *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2016] EWCA Civ 789 at [45] did not find it necessary to invoke a duty of good faith in order to decide the outcome of the case and expressed its concern about the dangers which may follow were a general principle of good faith to be established and invoked in a case such as the present. In any event, the Court of Appeal concluded that Lord Reid's legitimate interest test was not applicable in a case where the commercial purpose of the adventure had been frustrated such that further performance had become impossible (at [42]–[43] and [61]).

75.

[1962] A.C. 413, 430, 432, 439; *Finelli v Dee* (1968) 67 D.L.R. (2d) 293; *Denmark Productions Ltd v Boscobel Productions Ltd* [1969] 1 Q.B. 699; *Hounslow LBC v Twickenham Garden Developments Ltd* [1971] Ch. 233, 251–254; *Attica Sea Carriers Corp v Ferrostaal Poseidon Bulk Reederei GmbH* [1976] 1 Lloyd's Rep. 250, 256; *Telephone Rentals v Burgess Salmon* [1987] 5 C.L. 52; *Ministry of Sound (Ireland) Ltd v World Online Ltd* [2003] EWHC 2178 (Ch) at [49]–[61]; *Isabella Shipowner SA v Shagang Shipping Co Ltd* [2012] EWHC 1077 (Comm), [2012] 2 Lloyd's Rep. 61 at [35]–[41].

76.


In the absence of special circumstances the liability of an employer in damages for wrongful dismissal does not extend beyond the notice period which the employer could lawfully have given under the contract: *Boyo v Lambeth LBC* [1994] I.C.R. 727.

77.

Denmark Productions Ltd v Boscobel Productions Ltd [1969] 1 Q.B. 699; cf. *Boyo v Lambeth LBC* [1994] I.C.R. 727, 747 where Staughton L.J. inclined to the view that the wrongfully dismissed employee should be able to sue for his wages. The criticism made by Staughton L.J. was noted by Lord Wilson in *Geys v Société Générale, London Branch* [2012] UKSC 63, [2013] 1 A.C. 513, at [79] but the Supreme Court was not asked to resolve the issue on the facts. In *Sunrise Brokers LLP v Rodgers* [2014] EWCA Civ 1373, [2015] I.C.R. 272, [58] Longmore L.J. noted that in the light of *Geys* the question may arise as to why the employee should not be allowed to sue for his salary or wages in such a situation. However, in the absence of clear authority that the employee is entitled to sue for his or her wages, it would appear that the remedy of the employee remains that he or she must sue for damages and therefore is subject to the duty to mitigate. See Vol.II, paras 40-200—40-202.

78.

See (contracts of employment): Vol.II, para.40-192. See also *Heymans v Darwins Ltd* [1942] A.C. 356, 371.

- [79.](#) *Shindler v Northern Raincoat Co Ltd* [1960] 1 W.L.R. 1038, 1048. When the time for performance arrives the doctrine of mitigation does come into play. The inapplicability of the doctrine of mitigation to cases of anticipatory breach has been criticised: see Burrows, *Remedies for Torts and Breach of Contract*, 3rd edn (2004), p.128.
- [80.](#)  *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2016] EWCA Civ 789 at [41]–[44] and [61]–[64].
- [81.](#) *Frost v Knight* (1872) L.R. 7 Exch. 111, 112; *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, 395, 419, 437–438; *Fercometal SARL v Mediterranean Shipping Co SA* [1989] A.C. 788.
- [82.](#) *Frost v Knight* (1827) L.R. 7 Exch. 111, at 112; *Avery v Bowden* (1855) 5 E. & B. 714; (1856) 6 E. & B. 953 (below, para.24-025); *Heyman v Darwins Ltd* [1942] A.C. 356, 361; *Fercometal SARL v Mediterranean Shipping Co SA* [1989] A.C. 788 (below, para.24-026).
- [83.](#) *Leigh v Paterson* (1818) 8 Taunt. 540; *Brown v Muller* (1872) L.R. 7 Ex. 319; *Tredegar Iron and Coal Co Ltd v Hawthorn Bros & Co* (1902) 18 T.L.R. 716; *Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory* [1979] A.C. 91, 104.
- [84.](#) [1905] 2 K.B. 543. See Dawson (1980) 96 L.Q.R. 229; Carter [1989] L.M.C.L.Q. 81.
- [85.](#) This appears from, e.g. the report in (1905) 74 L.J.K.B. 688. On the significance of this fact, see Benjamin's *Sale of Goods*, 9th edn (2014), paras 19–184—19–188, and see *Gill & Duffus SA v Berger & Co Inc* [1984] A.C. 382.
- [86.](#) [1905] 2 K.B. 543, 551. See *Brett v Schneideman Bros Ltd* [1923] N.Z.L.R. 938; *Peter Turnbull & Co Pty Ltd v Mundas Trading Co (Australia) Pty Ltd* (1954) 90 C.L.R. 235, 246; *Cerealmangimi SpA v Toepfer* [1981] 1 Lloyd's Rep. 337; *Bunge Corp v Vegetable Vitamin Foods (Private) Ltd* [1985] 1 Lloyd's Rep. 613.
- [87.](#) Benjamin's *Sale of Goods* at paras 9–011—9–016, 19–184—19–188.
- [88.](#) *Taylor v Oakes, Roncoroni & Co* (1922) 38 T.L.R. 349, 351, affirmed, 517; *Esmail v J. Rosenthal & Sons Ltd* [1964] 2 Lloyd's Rep. 447, 466 (this point was not discussed on appeal in *J. Rosenthal & Sons Ltd v Esmail* [1965] 1 W.L.R. 1117 HL); *Fercometal SARL v Mediterranean Shipping Co SA* [1989] A.C. 788.
- [89.](#) *Fercometal SARL v Mediterranean Shipping Co SA* [1989] A.C. 788. The correctness of *Braithwaite's Case* [1905] 2 K.B. 543 had been previously left open by the House of Lords in *J. Rosenthal & Sons Ltd v Esmail* [1965] 1 W.L.R. 1117 (Lord Pearson) and in *Gill & Duffus Ltd v Berger & Co Inc* [1984] A.C. 382, 395. See also *Cohen & Co v Ockerby & Co Ltd* (1917) 24 C.L.R. 288; *Taylor v Oakes, Roncoroni & Co* (1922) 38 T.L.R. 349, 517; *Bowes v Chaleyer* (1923) 32 C.L.R. 159, 169, 192, 197–199.
- [90.](#) But in *Segap Garages Ltd v Gulf Oil (Great Britain) Ltd*, *The Times*, October 24, 1988 (below, para.24-026); the Court of Appeal considered that a breach by the affirming party would be excused if he proved that it had been caused by or was due to the repudiatory breach. cf. *Foran v Wight* (1989) 168 C.L.R. 385, 409–410, 421–422, 447–449, 459. Equally, the fact that there is “no half-way house” does not deprive the innocent party of a period of time in which to decide whether to affirm or terminate: *Stocznia Gdanska SA v Latvian Shipping Co* [2002] EWCA Civ 889, [2002] 2 Lloyd's Rep. 436 at [87] and see above, para.24-002.
- [91.](#) *Fercometal SARL v Mediterranean Shipping Co SA* [1989] A.C. 788, 805–806. Estoppel could also arise if the repudiating party represents that he will not exercise a right conferred on him by the contract. A wider role for estoppel was acknowledged by Brennan J. in *Foran v Wight* (1989) 168 C.L.R. 385, 421–422.
- [92.](#) *Bulk Oil (Zug) AG v Sun International Ltd* [1984] 1 Lloyd's Rep. 531.

93. *BV Oliehandel Jonglarid v Coastal International Ltd* [1983] 2 Lloyd's Rep. 463.
94. *Heyman v Darwins Ltd* [1942] A.C. 356, 361. The appropriateness of the word "acceptance" has, however, been questioned: Smith, "Anticipatory Breach of Contract" in Lomnicka and Morse, *Contemporary Issues in Commercial Law: Essays in Honour of A.G. Guest*, pp.175, 184–188.
95. *Vitol SA v Norelf Ltd* [1996] A.C. 800, 810–811; *Carter v Lifeplan Products Ltd* [2013] EWCA Civ 453 at [18]; *Stocznia Gdanska SA v Latvian Shipping Co* [2001] 1 Lloyd's Rep. 537, 563, 566. (Where the acceptance took the form of a notice to rescind which was in fact invalid. The important fact was held to be that the letter which constituted the acceptance unequivocally stated that the contractual obligations were at an end. The claimants had a right to terminate the contract and the fact that they did not set that ground out in the letter which constituted the acceptance was held to be irrelevant. The analysis of Thomas J. was upheld by the Court of Appeal but not without some hesitation: see [2002] EWCA Civ 889, [2002] 2 Lloyd's Rep. 436 at [88]–[92]. The safest course of action would have been for the innocent party expressly to have reserved its common law rights.) The latter case demonstrates that an invalid invocation of a right to terminate contractually, on account of a breach of contract, is capable of amounting to an acceptance of a repudiatory breach if it unequivocally demonstrates an intention to treat the contractual obligations as at an end. Given that the same conduct is capable of giving rise both to a contractual right to terminate and to a common law entitlement to accept a repudiatory breach, recourse to the former does not necessarily constitute an affirmation of the contract since in both cases the innocent party is electing to terminate the contract (see also *Gold Group Properties Ltd v BDW Trading Ltd* [2010] EWHC 1632 (TCC), [2010] All E.R. (D) 18 (Jul) at [110]). Matters are otherwise, however, in the case where a termination notice makes explicit reference only to a particular contractual clause. In such a case the notice might demonstrate that the giver of the notice was only relying upon the contractual clause and was not intending to accept the repudiation: *Shell Egypt West Manzala GmbH v Dana Gas Egypt Ltd* [2010] EWHC 465 (Comm), [2010] All E.R. (D) 156 (Mar) at [31].
96. *Heyman v Darwins Ltd* [1942] A.C. 356, 361; *The Mihalios Angelos* [1971] 1 Q.B. 164, 204. The innocent party need not personally, or by an agent, notify the repudiating party of his election to treat the contract as at an end. It is sufficient that the fact of the election is brought to the attention of the repudiating party, for example, by notification by an unauthorised broker or by another intermediary may be sufficient: *Vitol SA v Norelf Ltd* [1996] A.C. 800, 811.
97. *State Trading Corp of India Ltd v M. Golodetz Ltd* [1989] 2 Lloyd's Rep. 277, 286; *Holland v Wiltshire* (1954) 90 C.L.R. 409, 416. See also Dawson [1981] C.L.J. 83, 103. cf. *Vitol SA v Norelf Ltd (The Santa Clara)* [1993] 2 Lloyd's Rep. 301, 304 where Phillips J. preferred to leave open the question whether "an innocent party can accept an anticipatory repudiation by conduct which is not communicated to the party in anticipatory breach". When deciding whether or not inconsistent actions amount to an acceptance of a repudiation, the courts apply an objective test: *Enfield London BC v Sivanandan* [2004] EWHC 672 (QB), [2004] All E.R. (D) 73 (Apr) at [38]–[39].
98. *Dalkia Utilities Services Plc v Celtech International Ltd* [2006] EWHC 63 (Comm), [2006] 1 Lloyd's Rep. 599 at [135]–[144]. Matters are otherwise in the case where the innocent party's rights under the general law differ from those arising under the express term of the contract. In such a case the innocent party must elect between the two rights and the terms in which it informs the other party of its decision may be significant (*Stocznia Gdanska SA v Latvian Shipping Co* [2002] EWCA Civ 889, [2002] 2 Lloyd's Rep. 436 at [44] and *Vivergo Fuels Ltd v Redhall Engineering Solutions Ltd* [2013] EWHC 4030 (TCC) at [514]–[519]). See, more generally, Peel [2013] L.M.C.L.Q. 519.
99. *Howard v Pickford Tool Co* [1951] 1 K.B. 417, 421. See also *Cranleigh Precision Engineering Ltd v Bryant* [1965] 1 W.L.R. 1293; *Thomas Marshall (Exports) Ltd v Guinle* [1979] Ch. 227; *Gunton v Richmond-on-Thames LBC* [1981] Ch. 448; *London Transport Executive v Clarke* [1981] I.C.R. 355; *State Trading Corp of India Ltd v M. Golodetz Ltd* [1989] 2 Lloyd's Rep. 277, 285; *ADS Aerospace Ltd v EMS Global Tracking Ltd* [2012] EWHC 2310 (TCC), 145 Con. L.R. 29 at [150].

100. **!** *Harrison v Northwest Holt Group Administration* [1985] I.C.R. 668; *Boyo v Lambeth LBC* [1994] I.C.R. 727; *Vitol SA v Norelf Ltd* [1996] A.C. 800; *Holland v Glendale Industries Ltd* [1998] I.C.R. 493; *Sookraj v Samaroo* [2004] UKPC 50 at [17]; *South Caribbean Trading Ltd v Trafigura Beheer BV* [2004] EWHC 2676 (Comm), [2005] 1 Lloyd's Rep. 128 at [129]–[130]; *Banham Marshall Services Unlimited v Lincolnshire CC* [2007] EWHC 402 (QB), [2007] All E.R. (D) 02 (Mar) at [52]; *BSkyB Ltd v HP Enterprise Services UK Ltd* [2010] EWHC 86 (TCC), 129 Con. L.R. 147 at [1373]; *Vitol SA v Beta Renewable Group SA* [2017] EWHC 1734 (Comm)
101. *Denmark Productions Ltd v Boscobel Productions Ltd* [1969] 1 Q.B. 699, 732; *State Trading Corp of India Ltd v M. Golodetz Ltd* [1989] 2 Lloyd's Rep. 277, 286; *Lefevre v White* [1990] 1 Lloyd's Rep. 569, 574, 576.
102. *Vitol SA v Norelf Ltd* [1996] A.C. 800, 811. In such a case the contractor may be absolved from his contractual obligation before he communicates his acceptance: *Potter v RJ Temple* [2003] All E.R. (D) 327 (Dec).
103. *Vitol SA v Norelf Ltd* [1996] A.C. 800, 811.
104. **!** However, where the innocent party does nothing, in circumstances where it is not failing to perform a particular contractual obligation, a court is likely to conclude its inactivity is at best equivocal and so does not amount to an acceptance of the repudiation: *Alan Ramsay Sales & Marketing Ltd v Typhoo Tea Ltd* [2016] EWHC 486 (Comm), [2016] E.C.C. 12 at [79].
105. *Jaks (UK) Ltd v Cera Investment Bank SA* [1998] 2 Lloyd's Rep. 89, 96 (where the party alleged to be in breach was the bank under a letter of credit but the inactivity related to the nonperformance of the contract of sale).
106. *Scarf v Jardine* (1882) 7 App. Cas. 345, 361; *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India* [1990] 1 Lloyd's Rep. 391, 398. cf. *Vold* (1926) 5 Texas L. Rev. 9.
107. *Aegnoussiotis Shipping Corp of Monrovia v A/S Kristian Jebsens Rederi of Bergen* [1977] 1 Lloyd's Rep. 268, 276.
108. *Ridgway v Hungerford Market Co* (1835) 3 A. & E. 171, 177, 178, 180; *Baillie v Kell* (1838) 4 Bing N.C. 638; *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 Ch. D. 339, 352, 364; *Taylor v Oakes Roncoroni Co* (1922) 127 L.T. 267, 269; *British & Beningtons Ltd v N.W. Cachar Tea Co* [1923] A.C. 48, 71; *Etablissements Chainbaux SARL v Harbormaster Ltd* [1955] 1 Lloyd's Rep. 303, 314; *Universal Cargo Carriers Corp v Citati* [1957] 2 Q.B. 401, 443–445; *affirmed in part* [1957] 1 W.L.R. 979, and *reversed in part* [1958] 2 Q.B. 254; *Denmark Productions Ltd v Boscobel Productions Ltd* [1969] 1 Q.B. 699, 722, 732; *The Mihalis Angelos* [1971] 1 Q.B. 164, 195, 200, 204; *Cyril Leonard & Co v Simo Securities Trust* [1972] 1 W.L.R. 80, 85, 87, 89; *Scandinavian Trading Co A/B v Zodiac Petroleum SA* [1981] 1 Lloyd's Rep. 81, 90; *State Trading Corp of India Ltd v M. Golodetz Ltd* [1988] 2 Lloyd's Rep. 182; *Sheffield v Conrad* (1988) 22 Con. L.R. 108; *South Caribbean Trading Ltd v Trafigura Beheer BV* [2004] EWHC 2676 (Comm), [2005] 1 Lloyd's Rep. 128 at [133]–[134]. The latter case demonstrates that there are limits to the willingness of the courts to speculate about the reaction of the innocent party to the breach of which he was unaware. In *Reinwood Ltd v L Brown & Sons Ltd* [2008] EWCA Civ 1090, [2009] B.L.R. 37 Lloyd L.J. observed (at [51]) that, although the principle is often used in relation to facts unknown to the party refusing at the time of its refusal, there “is no reason why it should not be used in relation to facts which were known to that party at that time. Waiver can apply to qualify that principle, but only in cases of, in effect, estoppel”. Care must be also taken when applying the general rule to cases in which it is alleged that the repudiatory breach takes the form of a renunciation. In such a case an essential ingredient of the words or conduct amounting to a repudiation is that they are communicated to or otherwise known to the innocent party. If they are not, there cannot be a renunciation: *Seadrill Management Services Ltd v OAO Gazprom* [2009] EWHC 1530 (Comm), [2010] 1 Lloyd's Rep. 543 at [265].
109. *Ridgway v Hungerford Market Co* (1835) 3 A. & E. 171; *Baillie v Kell* (1838) 4 Bing N.C. 638; *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 Ch. D. 339; *Cyril Leonard & Co v Simo*

Securities Trust [1972] 1 W.L.R. 80. The rule does not apply in cases of *unfair dismissal*: *Earl v Slater & Wheeler (Airline) Ltd* [1973] 1 W.L.R. 51; *W. Devis & Sons Ltd v Atkins* [1977] A.C. 931; cf. *Polkey v A.E. Dayton Services Ltd* [1988] A.C. 344; Vol.II, para.40-226.

110.

! *Heisler v Anglo-Dal Ltd* [1954] 1 W.L.R. 1273, 1278; *Andre et Cie v Cook Industries Inc* [1987] 2 Lloyd's Rep. 463, 468–469; *Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce* [1997] 4 All E.R. 514, 526–527. But it would appear that the point must be one which could have been taken at the time. In *C&S Associates UK Ltd v Enterprise Insurance Co Plc* [2015] EWHC 3757 (Comm) at [93] Males J. held that this exception applies only to anticipatory breaches or, to the extent that this is different, to situations where if the point had been taken steps could have been taken to avoid the party being in breach altogether, either by giving it an opportunity to perform its obligation in time or by enabling it to perform in some other valid way.

111.

To invoke waiver or estoppel it is, however, necessary to show that there was an unequivocal representation made by one party, by conduct or otherwise, which was acted upon by the other. It may not be easy to establish the existence of such an unequivocal representation: *Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce* [1997] 4 All E.R. 514, 527, 530.

112.

This has been held to be the true interpretation of the difficult case of *Panchaud Frères SA v Etablissements General Grain Co* [1970] 1 Lloyd's Rep. 53 (para.24-006); see *B.P. Exploration Co (Libya) Ltd v Hunt* [1979] 1 W.L.R. 783, 811 and *Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce* [1997] 4 All E.R. 514, 528.

113.

Support for such a separate principle can be gleaned from dicta of the Court of Appeal in *Panchaud Frères SA v Etablissements General Grain Co* [1970] 1 Lloyd's Rep. 53, 57, 59 but the proposition that some “separate doctrine” can be derived from *Panchaud Frères* alone has since been decisively rejected by the Court of Appeal: *Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce* [1997] 4 All E.R. 514, 528, 530.

114.

Northern Foods Plc v Focal Foods Ltd [2003] 2 Lloyd's Rep. 728, 748–750.

115.

Heyman v Darwins Ltd [1942] A.C. 356, 361; *Fercometal SARL v Mediterranean Shipping Co SA* [1989] A.C. 788.

116.

[1989] 2 Lloyd's Rep. 277; See further Treitel (1990) 106 L.Q.R. 185, 188–190.

117.

[1989] 2 Lloyd's Rep. 277, 286.

118.

DRC Distribution v Ulva Ltd [2007] EWHC 1716 (QB), [2007] All E.R. (D) 357 (Jul) at [54].

119.

Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp Ltd [1981] A.C. 909; *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal* [1983] 1 A.C. 854.

120.

Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp Ltd [1981] A.C. 909, 987–988.

121.

! See generally Peel, *Treitel on The Law of Contract*, 14th edn (2015), para.18–094.

122.

Heyman v Darwins Ltd [1942] A.C. 356, 397; *Universal Cargo Carriers Corp v Citati* [1957] 2 Q.B. 401, 436; affirmed in part [1957] 1 W.L.R. 979, and reversed in part [1958] 2 Q.B. 254. The question whether repudiation by “renunciation” of a contract differs in principle from what may be termed repudiation by non-performance was left open by Langley J. in *Amoco (UK) Exploration Co v British American Offshore Ltd* Unreported November 16, 2001 QB, at [105]. It may be that it is easier to establish a repudiatory breach in the case of a renunciation than in the other categories. Thus in *Astea (UK) Ltd v Time Group Ltd* [2003] EWHC 725 (TCC), [2003] All E.R. (D) 212 (Apr) it was observed (at [151]) that “a flat refusal to continue performance will probably amount to a repudiation however much work has been done”. Matters are likely to be more difficult in the case where the breach is alleged to take the form of defective work rather

than an outright refusal to work.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 7 - Performance and Discharge

Chapter 24 - Discharge by Breach

Section 2. - Renunciation ¹²³

Renunciation

24-018

❗ A renunciation of a contract occurs when one party by words or conduct evinces an intention not to perform, or expressly declares that he is or will be unable to perform, his obligations under the contract in some essential respect. ¹²⁴ ❗ The renunciation may occur before or at the time fixed for performance. ¹²⁵ An absolute refusal by one party to perform his side of the contract will entitle the other party to treat himself as discharged, ¹²⁶ as will also a clear and unambiguous assertion by one party that he will be unable to perform when the time for performance should arrive. ¹²⁷ Short of such an express refusal or declaration, however, the test is to ascertain whether the action or actions of the party in default are such as to lead a reasonable person to conclude that he no longer intends to be bound by its provisions. ¹²⁸ The renunciation is then evidenced by conduct. Also the party in default:

“... may intend in fact to fulfil (the contract) but may be determined to do so only in a manner substantially inconsistent with his obligations,” ¹²⁹

or may refuse to perform the contract unless the other party complies with certain conditions not required by its terms. ¹³⁰ In such a case, there is little difficulty in holding that the contract has been renounced. ¹³¹ Nevertheless, not every intimation of an intention not to perform or of an inability to perform some part of a contract will amount to a renunciation. Even a deliberate breach, actual or threatened, will not necessarily entitle the innocent party to treat himself as discharged, since it may sometimes be that such a breach can appropriately be sanctioned in damages. ¹³² If the contract is entire and indivisible, ¹³³ that is to say, if it is expressly or impliedly agreed that the obligation of one party is dependent or conditional upon complete performance by the other, then a refusal to perform or declaration of inability to perform any part of the agreement will normally entitle the party in default to treat himself as discharged from further liability. ¹³⁴ But in any other case:

“It is not a mere refusal or omission of one of the contracting parties to do something which he ought to do, that will justify the other in repudiating the contract; but there must be an absolute refusal to perform his side of the contract.” ¹³⁵

If one party evinces an intention not to perform or declares his inability to perform some, but not all, of his obligations under the contract, then the right of the other party to treat himself as discharged depends on whether the nonperformance of those obligations will amount to a breach of a condition of the contract ¹³⁶ or deprive him of substantially the whole benefit which it was the intention of the parties that he should obtain from the obligations of the parties under the contract then remaining unperformed. ¹³⁷ ❗ Words or conduct which do not amount to a renunciation will not justify a discharge. ¹³⁸

Unequivocal

24-019

The renunciation must be “made quite plain”. ¹³⁹ In particular, where there is a genuine dispute as to the construction of a contract, the courts may be unwilling to hold that an expression of an intention by one party to carry out the contract only in accordance with his own erroneous interpretation of it amounts to a repudiation ¹⁴⁰; and the same is true of a genuine mistake of fact ¹⁴¹ or law. ¹⁴² Even the giving of notice of rescission, or the commencement of proceedings by one party claiming rescission of the contract, does not necessarily entitle the other to treat the contract as repudiated, since such action may be taken in order to determine the respective rights of the parties, and so not evince an intention to abandon the contract. ¹⁴³ On the other hand, it is, generally, no defence for a party who is alleged to have repudiated the contract to show that he acted in good faith. ¹⁴⁴ The courts have struggled to reconcile the latter proposition with their reluctance to conclude that a party who has acted in good faith but was mistaken has thereby repudiated the contract.

Reconciliation of the case-law

24-020

⚠ The result of this tension is that the cases are not at all easy to reconcile ¹⁴⁵ and have been said to be “highly fact sensitive”. ¹⁴⁶ The test that is applied by the courts can, however, be set out in straightforward terms: it is whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract. ¹⁴⁷ ⚠ It is the application of this test to the facts of individual cases which has proved to be less than straightforward. All of the circumstances must be taken into account insofar as they bear on an objective assessment of the intention of the contract breaker. ¹⁴⁸ Thus, in an appropriate case, a court may have regard to the motive of the contract breaker where it reflects something of which the innocent party was, or a reasonable person in his position would have been, aware. ¹⁴⁹ In the case where the breach takes the form of a notice which does not comply with the terms of the contract, a court is unlikely to find the breach to be repudiatory where the notice-giver had made a genuine mistake in issuing the deficient notice, the recipient of the notice was aware of the mistake and deliberately refrained from pointing out the mistake until after the noticegiver purported to terminate the contract in reliance upon the deficient notice. ¹⁵⁰

Employer and employee

24-021

In respect of an action for wrongful dismissal at common law, or proceedings for unfair dismissal under statute, the question what acts or omissions amount to or justify such dismissal is dealt within the chapter on employment in Vol.II of this work. ¹⁵¹

Anticipatory breach ¹⁵²

24-022

⚠ If, before the time arrives at which a party is bound to perform a contract, he expresses an intention to break it, or acts in such a way as to lead a reasonable person to the conclusion that he does not intend to fulfil his part, ¹⁵³ this constitutes an “anticipatory breach” ¹⁵⁴ of the contract and entitles the other party to take one of two courses. He may “accept” ¹⁵⁵ ⚠ the renunciation, treat it as discharging him from further performance, and sue for damages forthwith, or he may wait till the time for performance arrives and then sue. ¹⁵⁶ On the other hand, where the anticipatory breach takes a

continuing form,¹⁵⁷ the fact that the innocent party initially continued to press for performance does not normally preclude him from later electing to terminate the contract provided that the party in breach has persisted in his stance up to the moment of termination.¹⁵⁸

Breach accepted

24-023

The first alternative was established by *Hochster v De la Tour*,¹⁵⁹ where a travelling courier sued his employer who wrote before the time for performance arrived that he would not require his services. The courier sued for damages at once and it was held that he was entitled to do so. In *Johnstone v Milling*¹⁶⁰ the effect of an anticipatory breach was thus stated by Lord Esher M.R.:

“A renunciation of a contract, or, in other words, a total refusal to perform it by one party before the time for performance arrives, does not, by itself, amount to a breach of contract but may be so acted upon and adopted by the other party as a rescission of the contract as to give an immediate right of action. Where one party assumes to renounce the contract, that is, by anticipation refuses to perform it, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract ... The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he too treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation.”¹⁶¹

It is nevertheless clear that, in cases of anticipatory breach by renunciation of the contract, the cause of action is not the future breach; it is the renunciation itself.¹⁶² The doctrine is not based on the fiction that the eventual cause of action may, in anticipation, be treated as a cause of action.¹⁶³ So, if the anticipatory breach is accepted as a discharge of the contract, it is not open to the party in breach subsequently to tender performance within the time originally fixed.¹⁶⁴ Further, the innocent party can claim damages at once even though his right to future performance of the contract is then only contingent.¹⁶⁵

24-024

If the breach is accepted, the innocent party is relieved from further performance of his obligations under the contract. He is likewise relieved from proving, in any action against the party in default, that he was ready and willing at the date of the renunciation to perform the contract in accordance with its terms.¹⁶⁶ It follows that it is no defence to liability in such an action to show that, if the contract had not been renounced, the innocent party would not at the time fixed for performance have been able to perform it,¹⁶⁷ although proof of such inability to perform might possibly be material in the assessment of damages.¹⁶⁸

Breach not accepted

24-025

The second alternative¹⁶⁹ is illustrated by *Avery v Bowden*.¹⁷⁰ In that case there was a contract by charterparty that a ship should sail to Odessa and there take a cargo from the charterer's agent, the cargo to be loaded within a certain number of days. The ship arrived at Odessa and the master demanded a cargo, but the charterer's agent was unable to supply one. The master nevertheless continued to demand a cargo. Before the loading days had expired war broke out between England and Russia and performance became legally impossible. When the charterer was sued for breach of the charterparty, the defence was sustained that there had been no failure of performance before war broke out. Even, however, if the agent's conduct had amounted to an anticipatory renunciation of the contract, so that the shipowner would have been entitled to accept it and claim damages at once, he had lost the right to do so by electing to keep the contract alive, and it continued in force until it was discharged by frustration. In other words, if the second alternative is chosen, the contract subsists at

the risk of both parties, and the anticipatory renunciation is ineffective. This is well expressed by Cotton L.J. in *Johnstone v Milling* where he says ¹⁷¹:

“The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all the obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances which would justify him in declining to complete it.”

24-026

Thus in *Fercometal Sarl v Mediterranean Shipping Co SA*, ¹⁷² a voyage charterparty contained a clause entitling the charterers to cancel the charter should the vessel not be ready to load on or before July 9, 1982. Prior to that date the charterers prematurely purported to cancel it. This constituted an anticipatory breach and repudiation of the contract. The repudiation was not accepted by the shipowners. Nevertheless the nominated vessel was not ready to load by the due date and the charterers then sent a second notice cancelling the charter. The House of Lords held that the shipowners, by affirming the contract, had kept it alive for the benefit of both parties, so that the charterers were entitled, notwithstanding their previous repudiation, to cancel on the ground of the vessel's nonreadiness to load in accordance with the terms of the charterparty. Also in *Segap Garages Ltd v Gulf Oil (Great Britain) Ltd*, ¹⁷³ the defendants, in breach of contract, failed to supply motor fuel to the plaintiffs. This would have entitled the plaintiffs, had they chosen to do so, to treat the contract as repudiated, but they elected to treat it as still continuing. The plaintiffs nevertheless refused to pay for motor fuel already supplied. This refusal, under the terms of the contract, entitled the defendants to terminate the contract and they did so terminate it. The Court of Appeal held that the plaintiffs could recover damages in respect of nondelivery of motor fuel prior to the termination, but not in respect of the period following termination. By electing not to accept the defendants' repudiation, the plaintiffs had kept the contract alive for the benefit of both parties.

Anticipatory breach and actual breach


24-027



When establishing whether or not there has been a renunciation of the contract, there is no distinction between the tests for what is an anticipatory breach and what is a breach after the time for performance has arrived. ¹⁷⁴ It follows, therefore, that where the conduct of the promisor is such as to lead a reasonable person to the conclusion that he does not intend to fulfil his obligations under the contract when the time for performance arrives, the promisee may treat this as a renunciation of the contract and sue for damages forthwith. The innocent party is not obliged to wait for the time for performance because the renunciation, coupled with the acceptance of that renunciation, renders the breach legally inevitable and the effect of the doctrine of anticipatory breach is precisely to enable the innocent party to anticipate an inevitable breach and to commence proceedings immediately. ¹⁷⁵

Renunciation in the course of performance


24-028

The law is similar where a party renounces a contract in the course of its performance, as, for instance, where the subject-matter is a sale of goods to be delivered by instalments. Thus, where the purchaser, after accepting some, refuses to take any more of the goods concerned, the vendor may sue him for damages at once without manufacturing and tendering the remainder. ¹⁷⁶

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- [123.](#) Andrews, Clarke, Tettenborn and Virgo, *Contractual Duties: Performance, Breach, Termination and Remedies* (2012), Ch.6.
- [124.](#)  See also *Martin v Stout* [1925] A.C. 359; *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandelsgesellschaft mbH* [1980] 2 Lloyd's Rep. 556; affirmed [1983] 2 A.C. 34 (place of renunciation); *Grand China Logistics Holding (Group) Co Ltd v Spar Shipping AS* [2016] EWCA Civ 982, [2016] 2 Lloyd's Rep. 447 at [66]–[78]; *Teekay Tankers Ltd v STX Offshore & Shipbuilding Co Ltd* [2017] EWHC 253 (Comm), [2017] 1 Lloyd's Rep. 387 at [217]. The question whether there has been a renunciation depends on what a reasonable person would understand from the conduct of the party alleged to have renounced the contract and all of the circumstances prevailing at the time of the termination, including the history of the transaction or relationship.
- [125.](#) Where the renunciation takes place before the time fixed for performance, it is known as an anticipatory breach: below, para.24-022.
- [126.](#) *Freeth v Burr* (1874) L.R. 6 C.P. 208, 214; *Thompson v Corroon* (1992) 42 W.I.R. 157.
- [127.](#) *Anchor Line Ltd v Keith Rowell Ltd* [1980] 2 Lloyd's Rep. 351; *The Munster* [1982] 1 Lloyd's Rep. 370; *Texaco Ltd v Eurogulf Shipping Co Ltd* [1987] 2 Lloyd's Rep. 541.
- [128.](#) *Universal Cargo Carriers Corp v Citati* [1957] 2 Q.B. 401, 436; affirmed in part [1957] 1 W.L.R. 979 and reversed in part [1958] 2 Q.B. 254. See also *Morgan v Bain* (1874) L.R. 10 C.P. 15; *Bloomer v Bernstein* (1874) L.R. 9 C.P. 588; *Forslind v Becheley-Crundall*, 1922 S.C. 173 HL; *Maple Flock Co v Universal Furniture Products (Wembley) Ltd* [1934] 1 K.B. 148, 157; *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 1 W.L.R. 698; *Chilean Nitrate Sale & Corp v Marine Transportation Co Ltd* [1982] 1 Lloyd's Rep. 570, 580; *Re Olympia & York Canary Wharf Ltd (No.2)* [1993] B.C.C. 159, 168; *Nottingham Building Society v Eurodynamics Plc* [1995] F.S.R. 605, 611–612; *Seadrill Management Services Ltd v OAO Gazprom* [2009] EWHC 1530 (Comm), [2010] 1 Lloyd's Rep. 543 at [249]. cf. below, para.24-019.
- [129.](#) *Ross T. Smyth & Co v Bailey, Son & Co* [1940] 3 All E.R. 60, 72; *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc* [1979] A.C. 757; *Kuwait Rocks Co v AMN Bulkcarriers Inc (The "Astra")* [2013] EWHC 865 (Comm), [2013] 2 Lloyd's Rep. 69; *Spar Shipping SA v Grand China Logistics Holding (Group) Co Ltd* [2015] EWHC 718 (Comm), [2015] 1 All E.R. (Comm) 879 at [208].
- [130.](#) *BV Oliehandel Jongkind v Coastal International Ltd* [1983] 2 Lloyd's Rep. 463.
- [131.](#) *Withers v Reynolds* (1831) 2 B. & Ad. 882; *Booth v Bowron* (1892) 8 T.L.R. 641.
- [132.](#) *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 261, 365. See below, para.24-042.
- [133.](#) See above, para.21-028; below, para.24-045.
- [134.](#) *Longbottom & Co Ltd v Bass Walker & Co Ltd* [1922] W.N. 245. See also *Ebbw Vale Steel Co v Blaina Iron Co* (1901) 6 Com. Cas. 33.
- [135.](#) *Freeth v Burr* (1878) L.R. 9 C.P. 208, 213, 214; *Chilean Nitrate Sales Corp v Marine Transportation Co Ltd* [1982] 1 Lloyd's Rep. 570, 572; *Aktion Maritime Corp of Liberia v S. Kamas & Brothers Ltd* [1987] 1 Lloyd's Rep. 283, 306; *Torvald Klaveness A/S v Arni Maritime Corp* [1994] 1 W.L.R. 1465, 1476.
- [136.](#) See above, para.13-025; below, para.24-040.

- [137.](#)  *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc* [1979] A.C. 757; *Afovos Shipping Co SA v Pagnan & Filli* [1983] 1 W.L.R. 195, 203; *Weeks v Bradshaw* [1993] E.G.C.S. 65; *Amoco (UK) Exploration Co v British American Offshore Ltd* Unreported November 16, 2001 Q.B.D. at [105]; *Dalkia Utilities Services Plc v Celtech International Ltd* [2006] EWHC 63 (Comm), [2006] 1 Lloyd's Rep. 599 at [133]; *Grand China Logistics Holding (Group) Co Ltd v Spar Shipping AS* [2016] EWCA Civ 982, [2016] 2 Lloyd's Rep. 447 at [73]–[76]. When assessing the nature and effects of the breach the court is concerned to do so objectively: *Shyam Jewellers Ltd v Cheeseman* [2001] EWCA Civ 1818 at [58].
- [138.](#) *Franklin v Miller* (1836) 4 A. & E. 499; *Wilkinson v Clements* (1872) L.R. 8 Ch. App. 96; *Re Phoenix Bessemer Steel Co* (1876) 4 Ch. D. 108; *Cornwall v Henson* [1900] 2 Ch. 298; *Dominion Coal Co Ltd v Dominion Iron and Steel Co Ltd* [1909] A.C. 293; *Household Machines v Cosmos Exports* [1947] K.B. 217; *Thorpe v Fasey* [1949] Ch. 649; *Peter Dumenil & Co Ltd v James Ruddin Ltd* [1953] 1 W.L.R. 815.
- [139.](#) *Spettabile Consorzio Veneziana di Armamento di Navigazione v Northumberland Shipbuilding Co Ltd* (1919) 121 L.T. 628, 634, 635; *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 W.L.R. 277, 287, 288; *Anchor Line Ltd v Keith Rowell Ltd* [1980] 2 Lloyd's Rep. 351, 353; *Thompson v Corroon* (1993) 42 W.L.R. 157; *Nottingham Building Society v Eurodynamics Plc* [1995] F.S.R. 605; *Jaks (UK) Ltd v Cera Investment Bank SA* [1998] 2 Lloyd's Rep. 89, 92–93. This proposition applies to words and conduct said to demonstrate that a party is persisting in an earlier repudiation as well as to the earlier repudiation itself (*Safhaven Investments Inc v Springbok Ltd* (1996) 71 P. & C.R. 59, 69). See also *Warinco A.G. v Samor SpA* [1979] 1 Lloyd's Rep. 450; *Metro Meat Ltd v Fares Rural Co Pty Ltd* [1985] 2 Lloyd's Rep. 13; *Sanko S.S. Co Ltd v Eacom Timber Sales Ltd* [1987] 1 Lloyd's Rep. 487; *Alfred C. Toepfer International GmbH v Itex Itagram Export SA* [1993] 1 Lloyd's Rep. 360, 361; *Thompson v Corroon* (1993) 42 W.L.R. 157.
- [140.](#) *James Shaffer Ltd v Findlay Durham & Brodie* [1953] 1 W.L.R. 106; *Sweet & Maxwell Ltd v Universal News Services Ltd* [1964] 2 Q.B. 699; *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 W.L.R. 277; *Telfair Shipping Corp v Athos Shipping Co SA* [1983] 1 Lloyd's Rep. 127; *The Design Company v Elizabeth King* Unreported July 7, 1992 CA; *Vaswani v Italian Motors (Sales and Services) Ltd* [1996] 1 W.L.R. 270; *Mitsubishi Heavy Industries Ltd v Gulf Bank K.S.C.* [1997] 1 Lloyd's Rep. 343, 354; *Orion Finance Ltd v Heritable Finance Ltd* Unreported March 10, 1997 CA.
- [141.](#) *Kent v Godts* (1855) 26 L.T.(O.S.) 88; *Peter Dumenil & Co Ltd v James Ruddin Ltd* [1953] 1 W.L.R. 815; *Alfred C. Toepfer v Peter Cremer* [1975] 2 Lloyd's Rep. 118.
- [142.](#) *Freeth v Burr* (1874) L.R. 9 C.P. 208, 214; *Mersey Steel & Iron Co v Naylor Benzon & Co* (1884) 9 App. Cas. 434. Contrast *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc* [1979] A.C. 757.
- [143.](#) *Spettabile Consorzio Veneziano di Armamento di Navigazione v Northumberland Shipbuilding Co Ltd* (1919) 121 L.T. 628; *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 W.L.R. 277.
- [144.](#) *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc* [1979] A.C. 757.
- [145.](#) In particular, the decisions of the House of Lords in *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 W.L.R. 277 and *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc* [1979] A.C. 757 are not at all easy to reconcile. However, it may be that a comparison with other cases will be of “limited value”; *Eminence Property Developments Ltd v Heaney* [2010] EWCA Civ 1168, [2011] 2 All E.R. (Comm) 223 at [62].
- [146.](#) *Eminence Property Developments Ltd v Heaney* [2010] EWCA Civ 1168, [2011] 2 All E.R. (Comm) 223 at [62].
- [147.](#)  [2010] EWCA Civ 1168, [2011] 2 All E.R. (Comm) 223 at [61]. For a case in which this test

was satisfied see *Flanagan v Liontrust Investment Partners LLP* [2015] EWHC 2171 (Ch) and for a case in which it was not satisfied see *Mr H TV Ltd v ITV2 Ltd* [2015] EWHC 2840 (Comm) at [269]–[275].

148. [2010] EWCA Civ 1168, [2011] 2 All E.R. (Comm) 223 at [63].
149. [2010] EWCA Civ 1168, [2011] 2 All E.R. (Comm) 223 at [63].
150. [2010] EWCA Civ 1168, [2011] 2 All E.R. (Comm) 223 at [63]; *Oates v Hooper* [2010] EWCA Civ 91, [2011] 1 P. & C.R. DG15.
151. Vol.II, paras 40-183—40-192 (wrongful dismissal); Vol.II, paras 40-214—40-247 (unfair dismissal).
152. See generally Q. Liu, *Anticipatory Breach* (2011) and Andrews, Clarke, Tettenborn and Virgo, *Contractual Duties: Performance, Breach, Termination and Remedies* (2012), Ch.7.
153. *Forslind v Becheley-Crundall* 1922 S.C. 173 HL; *Universal Cargo Carriers Corp v Citati* [1957] 2 Q.B. 401; affirmed in part [1957] 1 W.L.R. 979 and reversed in part [1958] 2 Q.B. 254; *Greenaway Harrison Ltd v Wiles* [1994] I.R.L.R. 380; *Stocznia Gdanska SA v Latvian Shipping Co* [2001] 1 Lloyd's Rep. 537, 563; *Proctor & Gamble Ltd v Carrier Holdings Ltd* [2003] EWHC 83 (TCC), [2003] B.L.R. 255 at [35]; *Berkeley Community Villages Ltd v Pullen* [2007] EWHC 1330 (Ch), [2007] 3 E.G.L.R. 101 at [79].
154. For a criticism of this expression, see *Bradley v H. Newsom Sons & Co* [1919] A.C. 16, 53; Dawson [1981] C.L.J. 83; Mustill, *Butterworth Lectures*, 1989–1990, p.1. In *Bunge SA v Nidera BV* [2015] UKSC 43 at [12] Lord Sumption stated that anticipatory breach is “probably more accurately referred to” as renunciation. A difficulty with this statement is that a renunciation may occur at the time fixed for performance and need not necessarily pre-date it, see n.123 above.
155.  See above, para.24-013. There is authority to support the proposition that a party who purports to have accepted the renunciation as terminating the contract must also demonstrate that it subjectively believed that the relevant words or conduct were evincing an intention not to perform and further that, at the time of the alleged acceptance, it actually accepted the same as terminating the contract: *SK Shipping (S) Pte Ltd v Petroexport Ltd (“The Pro Victor”)* [2009] EWHC 2974 (Comm), [2010] 2 Lloyd's Rep. 158 at [90]–[97]. However the need for a subjective belief in this context has been criticised (see Q. Liu [2010] L.M.C.L.Q. 359) and the point was left open by Carr J. in *Vitol SA v Beta Renewable Group SA* [2017] EWHC 1734 (Comm) at [48].
156. In *Berkeley Community Villages Ltd v Pullen* [2007] EWHC 1330 (Ch), [2007] 3 E.G.L.R. 101 at [83] Morgan J. left open the question whether, in the case where a claimant wishes not to bring the contract to an end, it is appropriate to grant an injunction to restrain a sale because it amounts to an anticipatory breach of a contingent future obligation.
157. Not all anticipatory breaches are of a continuing nature: see, for example, *Howard v Pickford Tool Co Ltd* [1951] 1 K.B. 417.
158. *Stocznia Gdanska SA v Latvian Shipping Co* [2002] EWCA Civ 889, [2002] 2 Lloyd's Rep. 436 at [94]–[100]; *Primera Maritime (Hellas) Ltd v Jiangsu Eastern Heavy Industry Co Ltd* [2013] EWHC 3066 (Comm), [2014] 1 All E.R. (Comm) 813.
159. (1853) 2 E. & B. 678; *Xenos v Danube, etc.*, Ry (1863) 13 C.B.(N.S.) 825; *Frost v Knight* (1872) L.R. 7 Ex. 111; *Dominion Coal Co Ltd v Dominion Iron and Steel Co Ltd* (1909) 25 T.L.R. 309; *The Mihalis Angelos* [1971] 1 Q.B. 164.
160. (1886) 16 Q.B.D. 460. For the measure of damages, see *Roper v Johnson* (1873) L.R. 8 C.P. 167; *Melachrino v Nickoll and Knight* [1920] 1 K.B. 693; *Millett v Van Heek & Co* [1921] 2 K.B. 369; *Wright v Dean* [1948] Ch. 686; *Sudan Import Co Ltd v Société Générale de Compensation* [1958] 1 Lloyd's Rep. 310; *Garnac Grain Co Inc v H.M.F. Faure and Fairclough Ltd* [1966] 1

- Q.B. 650 (on appeal [1968] A.C. 1130); *The Mihalios Angelos* [1971] 1 Q.B. 164; *Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory* [1979] A.C. 91; *Chiemgauer Membran und Zeltbau GmbH v The New Millennium Experience Co Ltd*, *The Times*, January 16, 2001; and Vol.II, paras 44-380 et seq. and 44-393 et seq.
161. (1886) 16 Q.B.D. 460, 467. The proposition that a renunciation of the contract before the time for performance has arrived does not amount to a breach until it has been acted upon or adopted has been criticised on the ground that it is inconsistent with *Hochster v De la Tour* (1853) 2 E. & B. 678 and because whether or not there is a breach must depend on what the promisor does and not on what the promisee does thereafter: see Smith, *Contemporary Issues in Commercial Law: Essays in Honour of A.G. Guest*, pp.175, 178–182.
162. *The Mihalios Angelos* [1971] 1 Q.B. 164; *Moschi v Lep Air Services Ltd* [1973] A.C. 331, 356.
163. cf. *Frost v Knight* (1872) L.R. 7 Ex. 111, 114.
164. *Xenos v Danube, etc., Ry* (1863) 13 C.B.(N.S.) 825.
165. *Frost v Knight* (1872) L.R. 7 Ex. 111; *Synge v Synge* [1894] 1 Q.B. 466. Damages will generally, but not inevitably, be assessed at the date of the breach of contract. Exceptionally, damages may be reduced where subsequent events, known to the court at the time of the hearing, have reduced the value of the contractual rights in respect of which the claim has been brought: *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] UKHL 12, [2007] 2 A.C. 353. See further below, para.26-088.
166. *Braithwaite v Foreign Hardwood Co Ltd* [1905] 2 K.B. 543, 551, 554; *Cooper, Ewing & Co Ltd v Hamel and Horley Ltd* (1922) 13 L.L. Rep. 466, 590, 593; *Taylor v Oakes Roncoroni & Co* (1922) 38 T.L.R. 349, 517; *British and Beningtons Ltd v North Western Cachar Tea Co Ltd* [1923] A.C. 48, 66; *Continental Contractors Ltd v Medway Oil and Storage Co Ltd* (1925) 23 L.L. Rep. 55, 124, 128, 132; *Rightside Property Ltd v Gray* [1975] Ch. 72, 82; *Gill & Duffus SA v Berger & Co Inc* [1984] A.C. 382, 395–396; *Chiemgauer Membran und Zeltbau GmbH v The New Millennium Experience Co Ltd*, *The Times*, January 16, 2001; *Marplace (Number 512) Ltd v Chaffe Street (A Firm)* [2006] EWHC 1919 (Ch.), [2006] All E.R. (D) 413 (Jul) at [321]. cf. *Dawson* (1980) 96 L.Q.R. 239. See also *Lloyd* (1974) 37 M.L.R. 121.
167. Aliter, if at the time of the renunciation, there was already a breach of contract (albeit unknown) on the part of the innocent party: *Cooper, Ewing & Co Ltd v Hamel and Horley Ltd* (1922) 13 L.L. Rep. 466; *British and Beningtons Ltd v North Western Cachar Tea Co Ltd* [1923] A.C. 48, 72. cf. *Gill & Duffus SA v Berger & Co Inc* [1984] A.C. 382. See also above, para.24-014. The position has also been held to be otherwise in the case where prior to the repudiatory breach the innocent party had demonstrated that it had no intention of performing its contractual obligations: *Acre 1127 Ltd v De Montfort Fine Art Ltd* [2011] EWCA Civ 87, [2011] All E.R. (D) 111 (Feb) at [51].
168. *Braithwaite v Foreign Hardwood Co Ltd* [1905] 2 K.B. 543, 552; *Taylor v Oakes Roncoroni & Co* (1922) 38 T.L.R. 349; *British and Beningtons Ltd v North Western Cachar Tea Co Ltd* [1923] A.C. 48, 71, 72; *Continental Contractors Ltd v Medway Oil and Storage Co Ltd* (1925) 23 L.L. Rep. 55, 132, 133; *Esmail v Rosenthal & Sons Ltd* [1964] 2 Lloyd's Rep. 447, 466, [1965] 1 W.L.R. 1117; *The Mihalios Angelos* [1971] 1 Q.B. 164; *Gill & Duffus SA v Berger & Co Inc* [1984] A.C. 382, 392, 396, 397; *Chiemgauer Membran und Zeltbau GmbH v The New Millennium Experience Co Ltd*, *The Times*, January 16, 2001; *Acre 1127 Ltd v De Montfort Fine Art Ltd* [2011] EWCA Civ 87, [2011] All E.R. (D) 111 (Feb) at [52]; *Flame SA v Glory Wealth Shipping PTE Ltd* [2013] EWHC 3153 (Comm), [2014] Q.B. 1080 (where Teare J., after a careful evaluation of the leading authorities, concluded, by reference to the compensatory principle applicable to the assessment of damages, that the burden of proof remained upon the innocent party to prove for the purposes of its claim to recover damages that, had there been no repudiation, it would have been able to perform its obligations under the contract).
169. *Michael v Hart & Co* [1902] 1 K.B. 482; *Braithwaite v Foreign Hardwood Co Ltd* [1905] 2 K.B. 543; *Sinason-Teicher Inter-American Grain Corp v Oilcakes and Oilseeds Trading Co Ltd* [1954] 1 W.L.R. 935, 944; affirmed, 1394.

- [170.](#) (1855) 5 E. & B. 714; (1856) 6 E. & B. 953.
- [171.](#) (1886) 16 Q.B.D. 470.
- [172.](#) [1989] A.C. 788.
- [173.](#) *The Times*, October 24, 1988 CA.
- [174.](#) *Thorpe v Fasey* [1949] Ch. 649, 661; *Universal Cargo Carriers Corp v Citati* [1957] 2 Q.B. 401, 438. The distinction between an anticipatory breach and an actual breach may have significant implications for limitation purposes: *Proctor & Gamble Ltd v Carrier Holdings Ltd* [2003] EWHC 83 (TCC), [2003] B.L.R. 255.
- [175.](#) *Universal Cargo Carriers Corp v Citati* [1957] 2 Q.B. 401, 438. The position is otherwise where the mode of anticipatory breach in issue is impossibility created by the act or default of one party. In such a case it is much more difficult to establish that the breach is inevitable, a point which was recognised by Devlin J. in *Citati* at 437. These difficulties are discussed below in para.24-030.
- [176.](#) *Withers v Reynolds* (1831) 2 B. & Ad. 882; *Cort v Ambergate, etc., Ry* (1851) 17 Q.B. 127.

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Section 3. - Impossibility Created by One Party

Impossibility

24-029

Where one party has, by his own act or default, ¹⁷⁷ disabled himself from performing his contractual obligations in some essential respect, the other party will be entitled to treat himself as discharged. ¹⁷⁸ The inability to perform his contractual obligations must be established on the balance of probabilities and the fact that a party has:

“... entered into inconsistent obligations does not in itself necessarily establish such inability, unless these obligations are of such a nature or have such an effect that it can truly be said that the party in question has put it out of his power to perform his obligations.” ¹⁷⁹

The inability to perform need not be due to a deliberate act:

“A party is deemed to have incapacitated himself from performing his side of the contract, not only when he deliberately puts it out of his power to perform the contract, but also when by his own act or default circumstances arise which render him unable to perform his side of the contract or some essential part thereof.” ¹⁸⁰

So, where a person undertook to transfer certain furniture, but before he could do so a judgment creditor took the furniture in execution and sold it, his inability to perform, though not due to his own deliberate act, constituted a breach of the agreement. ¹⁸¹ However, where part only of one party's obligations are rendered impossible of performance, the other party will not be able to treat himself as discharged unless the resulting non-performance would amount to a breach of condition ¹⁸² or would deprive him of substantially the whole benefit of the contract. ¹⁸³

Impossibility and renunciation

24-030

In most cases where the impossibility created by one party has manifested itself by conduct, the innocent party will rely upon renunciation by conduct rather than impossibility, because renunciation is so much easier to establish. ¹⁸⁴ Renunciation is to be preferred because the innocent party need only show that the conduct of the party in default was such as to lead a reasonable man to believe that he did not intend, or was not able, to perform his promise; whereas if the innocent party relies upon impossibility he must show that the contract was *in fact* impossible of performance due to the other party's default. ¹⁸⁵ Nevertheless the innocent party would be well advised to rely on both grounds for treating the contract as at an end, because: (1) renunciation may not, for some reason, ¹⁸⁶ be open to

him; and (2) if he has misinterpreted the conduct of the other party and so rescinded for an inadequate reason he may still fall back on impossibility if it should subsequently appear that the other party was in fact incapable of performing his promise. ¹⁸⁷

Anticipatory breach

24-031

⚠ Anticipatory breach of contract may be constituted by impossibility as well as by renunciation, and similar principles apply to both. So where a shipowner agreed to charter a ship upon her release from government service, but before the release sold her to another person, it was held that he had put it out of his power to perform the agreement and the charterer was entitled to sue for damages forthwith. It was argued for the shipowner that he might have bought back the ship in time to fulfil the contract, but this was regarded as too speculative a possibility. ¹⁸⁸ Also in *Universal Cargo Carriers*

Corp v Citati, ¹⁸⁹ ⚠ where a charterer of a ship agreed to nominate a berth, to provide a cargo, and to finish loading, all before a certain day, and three days before this day had failed to do any of these things, it was held that the shipowner would be entitled to treat this default as an anticipatory breach of contract if it could prove that the charterer would not have been able to perform its obligations under the charterparty before the point in time at which the delay would have frustrated the commercial object of the venture. In this case it was held that it would not be sufficient for the innocent party to show that he had reasonable grounds for believing that the other party would be unable to perform at the appointed time; he would only be justified in treating himself as discharged if the other party was in fact unable to perform at that time: “[a]n anticipatory breach must be proved in fact and not in supposition”. ¹⁹⁰ ⚠

No anticipation of express right to terminate

24-032

⚠ Where it is alleged that one party has, by his own act or default, disabled himself from performing his contractual obligations at some future time and the contract also contains an express provision giving to the innocent party the right to terminate the contract in certain circumstances, care must be taken to establish the basis upon which the innocent party seeks to terminate the contract. Where the basis for the decision to terminate is the express right to determine the contract, the requirements of the clause containing the right to terminate must be complied with. On the other hand, where reliance is placed on the inability of the party to perform his obligations under the contract at some future time, it must be demonstrated that the inability to perform relates to some essential aspect of the obligations of the party in breach. To be entitled to terminate, the innocent party must establish that he had a right to terminate on one or other ground. Where he can establish neither ground, he cannot justify his decision to terminate by combining the two grounds so as to apply the doctrine of anticipatory breach to the contractual right to terminate. It is not possible to anticipate a contractual right to terminate. ¹⁹¹ ⚠ Either the conditions necessary to exercise the right have been satisfied or they have not.

Co-operation and prevention of performance

24-033

It has been noted that the court will readily imply a term that each will co-operate with the other to secure performance of the contract ¹⁹² and that neither party will, by his own act or default, prevent performance of the contract. ¹⁹³ If one party is in breach of his duty to co-operate, so that performance of the contract cannot be effected, the other party will be entitled to treat himself as discharged. ¹⁹⁴ It has also been said to be a general principle of law that, where performance of a condition precedent ¹⁹⁵ is prevented by the act or default of one party, the contract is taken to have been duly performed by the other even though the condition has not been satisfied. ¹⁹⁶ Thus, in *Mackay v Dick* ¹⁹⁷ where a

contract of sale of goods was subject to a condition precedent to be performed by the buyer, but which he neglected to perform, the seller was held entitled to sue for the price. This principle, however, is by no means always applicable,¹⁹⁸ and the party not in default may be compelled to treat the prevention of performance as a repudiation of the contract and to sue for damages for the breach.

Impossibility and frustration

24-034

Similar tests have been applied to determine whether or not a contract has become impossible of performance by reason of the default of one party as have been applied to determine whether there has been a mutual discharge of the contract by reason of the doctrine of frustration.¹⁹⁹

^{177.} See also above, paras 23-061—23-064.

^{178.} *Sir Anthony Main's Case* (1596) 5 Co. Rep. 21a; *Bodwell v Parsons* (1808) 10 East 359; *Amory v Brodrick* (1822) 5 B. & A. 712; *Short v Stone* (1846) 8 Q.B. 358; *Caines v Smith* (1846) 15 M. & W. 189; *O'Neil v Armstrong* [1895] 2 Q.B. 418; *Ogdens Ltd v Nelson* [1905] A.C. 109; *Measures Bros Ltd v Measures* [1910] 2 Ch. 248; *British and Beningtons Ltd v North Western Cachar Tea Co Ltd* [1923] A.C. 48, 72. See also the cases cited in para.24-031 n.186, below.

^{179.} *Alfred C. Toepfer International GmbH v Itex Itagrani Export SA* [1973] 1 Lloyd's Rep. 360, 362; *Geden Operations Ltd v Dry Bulk Handy Holdings Inc (M/V "Bulk Uruguay")* [2014] EWHC 885 (Comm), [2014] 2 Lloyd's Rep. 66.

^{180.} Smith, *Leading Cases*, 13th edn (1929), Vol.II, p.40, cited by Devlin J. in *Universal Cargo Carriers Corp v Citati* [1957] 2 Q.B. 401, 441.

^{181.} *Keys v Harwood* (1846) 2 C.B. 905; *Powell v Marshall, Parkes & Co* [1899] 1 Q.B. 710 (bankruptcy); cf. *Re Agra Bank* (1867) L.R. 5 Eq. 160; *Jennings' Trustees v King* [1952] Ch. 899.

^{182.} See above, para.13-025; below, para.24-040.

^{183.} *Afovos Shipping Co SA v Pagnan & Filli* [1983] 1 W.L.R. 195, 203; see below, para.24-041.


^{184.} *Universal Cargo Carriers Corp v Citati* [1957] 2 Q.B. 401, 437; *Sanko S.S. Co Ltd v Eacom Timber Sales Ltd* [1987] 1 Lloyd's Rep. 487, 492.

^{185.} See below, para.24-031 n.188.

^{186.} *Universal Cargo Carriers Corp v Citati* [1957] 2 Q.B. 401, where Devlin J. held that the erroneous finding of the arbitrator created such a situation (but see [1958] 2 Q.B. 254).

^{187.} *British & Beningtons Ltd v N.W. Cachar Tea Co* [1923] A.C. 48, 70; *Universal Cargo Carriers Corp v Citati* [1957] 2 Q.B. 401, 443.

^{188.} *Omnium D'Enterprises v Sutherland* [1919] 1 K.B. 618; *Lovelock v Franklyn* (1846) 8 Q.B. 371; *Synge v Synge* [1894] 1 Q.B. 466; *Guy-Pell v Foster* [1930] 2 Ch. 169; cf. *Alfred C. Toepfer International GmbH v Itex Itagrani Export SA* [1993] 1 Lloyd's Rep. 360, 362.

^{189.}  [1957] 2 Q.B. 401; affirmed in part [1957] 1 W.L.R. 979 and reversed in part [1958] 2 Q.B. 254. cf. *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 Q.B. 26; *Trade and Transport Inc v Iino Kaiun Kaisha Ltd* [1973] 1 W.L.R. 210; *F. C. Shepherd & Co Ltd v Jerrom* [1987] Q.B. 301, 323, 327–328; Peel, *Treitel on The Law of Contract*, 14th edn (2015), para.17–077.

[190.](#)

❗ [1957] 2 Q.B. 401, 449–450; *Re Simoco Digital UK Ltd: Thunderbird Industries LLC v Simoco Digital UK Ltd* [2004] EWHC 209 (Ch), [2004] 1 B.C.L.C. 541 at [22]–[23]. But see *Embiricos v Sydney Reid & Co* [1914] 3 K.B. 45, 59 (frustration); *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 Q.B. 26, 57 (failure of performance); Treitel on The Law of Contract, paras 17–087–17–088; Carter (1984) 47 M.L.R. 422. A party may not rely on the fact that performance is impossible insofar as that was the result of its own actions: *Barclays Bank Plc v Gathpaham Properties Ltd* [2008] EWHC 721 (Ch), [2008] All E.R. (D) 262 (Apr).

[191.](#)

❗ *Afovos Shipping Co SA v Pagnan & Filli* [1983] 1 W.L.R. 195. This, it is suggested, is the correct interpretation of Lord Diplock's statement (at 203) that the doctrine of anticipatory breach by conduct which disables a party to a contract from performing one of his primary obligations under the contract has no application to a breach of punctual payment of hire clause in a time charterparty of a ship. In so far as Lord Diplock suggested that the doctrine of anticipatory breach applies only to fundamental breaches, his reasoning cannot be supported: see Treitel on The Law of Contract, para.17–084 and *Carter's Breach of Contract* (2012), paras 4-40 and 7-37.

[192.](#)

See above, para.14-014.

[193.](#)

See above, para.14-015.

[194.](#)

Kyprianou v Cyprus Textiles Ltd [1958] 2 Lloyd's Rep. 60; *Metro Meat Ltd v Fares Rural Co Pty Ltd* [1985] 2 Lloyd's Rep. 13. Contrast *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp Ltd* [1981] A.C. 909 (both parties in breach of duty); *Dymocks Franchise Systems (N.S.W.) Pty Ltd v Todd* [2002] UKPC 50, [2002] 2 All E.R. (Comm) 849 at [62]–[63]. The inference that a refusal to co-operate is repudiatory will more readily be drawn in the case of a longterm contract which requires a greater degree of mutual co-operation between the parties.

[195.](#)

See above, para.13-028.

[196.](#)

Hotham v East India Co (1787) 1 Term Rep. 638, 645; *Smith v Wilson* (1807) 8 East 437, 443; *Thomas v Fredricks* (1847) 10 Q.B. 775; *Mackay v Dick* (1881) 6 App. Cas. 251; *Kleinert v Abosso Gold Mining Co Ltd* (1913) 58 S.J.(P.C.) 45.

[197.](#)

(1881) 6 App. Cas. 251.

[198.](#)

Colley v Overseas Exporters [1921] 3 K.B. 302; *Luxor (Eastbourne) Ltd v Cooper* [1941] A.C. 108. See also Benjamin's Sale of Goods, 9th edn (2014), para.16-023; Vol.II, para.31-150.

[199.](#)

Trade and Transport Inc v Iino Kaiun Kaisha Ltd [1973] 1 W.L.R. 210, 221, citing *Davis Contractors Ltd v Fareham U.D.C.* [1956] A.C. 696 (above, para.23-050); *Tsakiroglou & Co Ltd v Noble Thorl* [1962] A.C. 93 (above, para.23-048) and *The Eugenia* [1964] 2 Q.B. 226 (above, para.23-044). See also below, para.24-048.

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Failure of performance

24-035

Failure of performance, whether total or partial, may in certain circumstances entitle the other party to the contract to treat the contract as discharged. But this is not necessarily the case, and difficult questions of fact and law may arise.

Relation of the promises

24-036

In the first place, it is necessary to discover the relation to one another of the promises which form the contract. They may be either independent or dependent. ²⁰⁰ Promises are said to be independent when the obligation of one party is absolute and not conditional upon the performance by the other of his part of the bargain. They are said to be dependent when the obligation of one party depends upon the performance, or the readiness and willingness to perform, of the other ²⁰¹:

“The question whether covenants are to be held dependent or independent of each other, is to be determined by the intention and meaning of the parties as it appears on the instrument, and by the application of common sense to each particular case; to which intention, when once discovered, all technical forms of expression must give way.” ²⁰²

Independent mutual promises

24-037

In the exceptional case of independent mutual promises, each party has his remedy on the promise made in his favour without performing his part of the contract ²⁰³ and conversely neither party can claim to be discharged from liability on the contract by reason of the failure of the other to perform his part. Thus in *Fearon v Earl of Aylesford*, ²⁰⁴ an action on a separation deed, it was said that a husband would be bound to perform a covenant to pay money to a trustee for his wife, even though the wife might have broken a covenant in the same deed not to molest her husband. But the tendency of the courts is against construing contracts as containing two independent promises. So, in *General Billposting Co Ltd v Atkinson*, ²⁰⁵ it was held that a man who had been wrongfully dismissed from his employment was no longer bound by a restrictive covenant contained in his contract of employment as his employers by their action had repudiated the contract. Similarly it has been held that mutual covenants as to draining land by adjoining owners were dependent on each other and not independent promises. ²⁰⁶ On the other hand, it has long been established that a tenant's covenant to pay rent is independent of the landlord's covenant to repair the premises; the tenant is not discharged

from his obligation to pay rent merely because his landlord is unwilling to fulfil his obligation. ²⁰⁷ Also in contracts of apprenticeship the covenants of the master and apprentice are normally independent of each other. ²⁰⁸

Dependent promises

24-038

Assuming that the promises are not independent, the question then arises whether it is any failure by one party to perform a dependent promise which entitles the other to treat himself as discharged from further performance. In historical terms, the right of discharge was said to turn upon the non-performance of a “condition precedent” in the contract. ²⁰⁹ Performance by one party of his promise or “covenant” was regarded as a condition precedent to the liability of the other. However, following the case of *Boone v Eyre* ²¹⁰ in 1777, it was recognised that precise fulfilment of every promise was not necessarily a condition precedent, and Lord Mansfield said ²¹¹:

“Where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent.”

Thus, where one party failed to perform a promise which went to the whole of the consideration, the other party was released from performance as the former had not performed that which was a condition precedent to the latter's liability. ²¹² For example, in *Cutter v Powell*, ²¹³ where a seaman undertook to serve as mate on a voyage for an enhanced sum to be paid in a single payment on completion of the voyage and died before that time, his wife was unable to recover quantum meruit for work done during that part of the voyage that he lived and served. The seaman's continuing to do his duty as mate during the whole voyage was a condition precedent to his recovering the stipulated sum. On the other hand, where the failure of performance went to part only of the consideration or, as it was later expressed, ²¹⁴ did not go to the “root” or substantial consideration, the breach did not entitle the innocent party to be discharged from further liability, but to claim damages only. Further there were terms or “warranties”, collateral to the main purpose of the contract, the breach of which did not relieve him from liability to perform. ²¹⁵

Conditions and warranties

24-039

By the end of the nineteenth century, there emerged a strong tendency to classify the terms of a contract as being either *conditions* (any breach of which entitled the innocent party to refuse further performance and treat himself as discharged) or *warranties* (which merely gave him a right to damages). In the Sale of Goods Act 1893, for example, certain implied stipulations were assigned to one or other category by statute. ²¹⁶ Others were so assigned by virtue of judicial decisions. ²¹⁷ Numerous cases turned on the question whether or not a particular statement or promise amounted to a condition. In one of these, *Bettini v Gye*, ²¹⁸ Blackburn J. stated that, in the absence of an express declaration of intention by the parties, the test was:

“... whether the particular stipulation goes to the root of the matter, so that failure to perform it would render the performance of the rest of the contract a thing different in substance from what the defendant had stipulated for.” ²¹⁹

And in another case ²²⁰ Bowen L.J. remarked:

“... it is often very difficult to decide ... whether a representation which contains a promise ... amounts to a condition precedent, or is only a warranty. There is no way of deciding this question except by looking at the contract in the light of the surrounding circumstances”;

but he suggested that:

“... in order to decide this question of construction, one of the first things you would look to is, to what extent the accuracy of the statement—the truth of what is promised—would be likely to affect the substance and foundation of the adventure which the contract is intended to carry out.”

Such statements as these would suggest that, at that time, the basis for classifying a term as a condition depended on whether its breach would substantially defeat the purpose of the contract.

Failure of performance: breach of condition

24-040

The classification of contractual terms has been dealt with in an earlier chapter in this work. ²²¹ It was there noted that, in the modern law, a term of a contract may be held to be a condition if it has been so categorised by statute or by judicial decision, or if the parties have so agreed in their contract, whether expressly or by necessary implication. ²²² Any failure of performance which constitutes a breach of condition entitles the innocent party to treat himself as discharged from further liability under the contract. ²²³ The word condition has therefore broken free from its historical roots and can no longer be confined to an obligation which must be performed as a condition precedent to the liability of the other party.

Failure of performance: other situations

24-041

⚠ Where the failure of performance is not a breach of condition, but of an “intermediate” term, ²²⁴ it may still justify the innocent party in treating himself as discharged. But in such a case regard must be had to the nature and consequences of the breach in order to determine whether this right has arisen. The question whether a breach of an intermediate term is sufficiently serious to entitle the innocent party to treat himself as discharged is to be determined “by evaluating all the relevant circumstances”. ²²⁵ In conducting this inquiry, the court is not exercising a discretion, but is engaged in a fact-sensitive inquiry ²²⁶ which involves “a multi-factorial assessment” ²²⁷ and the use of various “open-textured expressions”. ²²⁸ ⚠ The bar which must be cleared before there is an entitlement in the innocent party to treat himself as discharged is a “high” one. ²²⁹ A number of expressions have been used to describe the circumstances that warrant discharge, the most common being that the breach must “go to the root of the contract”. ²³⁰ It has also been said that the breach must “affect the very substance of the contract”, ²³¹ or “frustrate the commercial purpose of the venture”, ²³² and, at the present day, a test which is frequently applied ²³³ ⚠ is that stated by Diplock L.J. in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* ²³⁴:

“Does the occurrence of the event deprive the party who has further undertakings to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?”

In that case, the charterers of a ship sought to establish that they were discharged from further performance of the charterparty because of repeated break-downs of the ship due to the fact that it was unseaworthy. It was argued on their behalf that the obligation to provide a seaworthy vessel was a condition of the contract, any breach of which entitled them to treat the contract as repudiated. This argument was rejected by the Court of Appeal, which held that regard must be had to the consequences of the breach.²³⁵ On the facts, the delays which had already occurred, and the delay which was likely to occur,²³⁶ as a result of unseaworthiness, and the conduct of the shipowners in taking steps to remedy the same, were not, when taken together, such as to deprive the charterers of substantially the whole benefit which it was the intention of the parties they should obtain from further use of the ship under the charterparty. The charterers were therefore not entitled to treat themselves as discharged.

Fundamental breach

24-042

The principle of “fundamental breach” or the breach of a “fundamental term” was developed by the courts with a view to limiting the operation of exemption clauses, the rationale being that no party could exclude or restrict his liability for such a breach.²³⁷ As so conceived, a fundamental breach was more far reaching in its effects (a “total breach”)²³⁸ than one which would justify discharge.²³⁹ And a fundamental term was something narrower than a condition: it went to the “core” or substance of the contract.²⁴⁰ However, in *Suisse Atlantique Société d’Armement Maritime SA v NV Rotterdamsche Kolen Centrale*,²⁴¹ the House of Lords expressed the view that the applicability of exemption clauses to particular breaches of a contract was in reality a rule of construction based on the presumed intention of the parties as expressed in the contract.²⁴² So far as the expression “fundamental breach” is concerned, Lord Reid said ²⁴³:

“General use of the term ‘fundamental breach’ is of recent origin and I can find nothing to indicate that it means more or less than the well-known type of breach which entitles the innocent party to treat it as repudiatory and to rescind the contract.”

Accordingly, the expression would seem to be no more than a restatement, in differing terminology, of the principle that a particular breach or breaches may be such as to go to the root of the contract and entitle the other party to treat such breach or breaches as a repudiation of the whole contract.²⁴⁴ Likewise, the expression “fundamental term” appears to mean no more than a condition, i.e. a stipulation which the parties have agreed (expressly or impliedly) to be, or which the general law regards as, a term which goes to the root of the contract so that any breach of that term may at once and without further reference to the facts and circumstances be regarded by the innocent party as justifying discharge.²⁴⁵ This view that a fundamental breach was no more than a repudiatory breach was confirmed by Lord Diplock in *Photo Production Ltd v Securicor Transport Ltd*.²⁴⁶ In that case, the House of Lords held that discharge consequent upon a fundamental, i.e. repudiatory, breach does not disentitle the guilty party from relying on an exemption clause in respect of that breach. It is therefore submitted that there is no separate category of “fundamental” breaches, or terms, producing different effects from those already discussed.²⁴⁷

Deliberate breach

24-043

The question whether or not a failure of performance is deliberate may be a relevant factor in deciding whether or not a breach of contract gives to the innocent party the right to treat himself as discharged,²⁴⁸ since it may indicate the attitude of the party in default towards future performance and so be evidence of an intent to renounce the contract.²⁴⁹ But there is no separate category of “deliberate” breaches and Lord Wilberforce has said ²⁵⁰:

“Some deliberate breaches there may be of a minor character which can be appropriately sanctioned by damages ... To create a special rule for deliberate acts is unnecessary and may lead astray.”

Dishonest breach

24-044

The fact that a breach of contract is accompanied by dishonesty does not of itself automatically convert a breach of contract into a repudiatory breach. ²⁵¹ However, dishonesty is likely to be a material factor in rendering a breach repudiatory where the dishonesty is destructive of a necessary relationship of trust between the parties ²⁵² or it is indicative of an intention no longer to be bound by the contract.

Entire obligations

24-045

The rule that the failure of performance must go to the root of the contract to justify discharge suffers an exception when the party in default has undertaken to complete performance of an obligation which is entire and indivisible, and has agreed that this shall be done before his claim to remuneration is due. In such a case, any failure of performance on his part will normally release the innocent party from liability. ²⁵³ The innocent party will not be bound to pay anything for the partial performance. ²⁵⁴ But even this exception may to some extent be mitigated by the so-called doctrine of “substantial performance”, that is to say, if there is a trivial departure from the exact performance of an entire obligation, the innocent party will not be discharged from liability under the agreement, although he will be entitled to a set-off or counterclaim for damages. ²⁵⁵

Divisible or severable obligations

24-046

Contracts for the delivery of goods by instalments will more often be construed as containing divisible (or severable) obligations rather than one entire obligation. ²⁵⁶ A breach relating to one or more instalments must be considered in the light of its effect on the contract as a whole, so that the innocent party will not necessarily be entitled to treat the whole contract as repudiated by such a breach. ²⁵⁷ In the absence of an express renunciation of the contract, he will not be so entitled unless the other party's acts or conduct amount to “an intimation of an intention to abandon and altogether to refuse performance of the contract” ²⁵⁸ (that is to say, an implied renunciation) ²⁵⁹ or the failure of performance is such as to go to “the root or essence of the contract”. ²⁶⁰ The most relevant factors have been said to be ²⁶¹:

“First, the ratio quantitatively which the breach bears to the contract as a whole, and secondly the degree of probability or improbability that such a breach will be repeated.”

Thus the further the parties have proceeded with the performance of the contract, the less likely it is that one party will be entitled to claim that the contract has been discharged by a single breach. ²⁶²

Stipulations as to time

24-047



The question whether a stipulation as to the time of performance is or is not “of the essence” and a condition of the contract has been considered in previous chapters. ²⁶³

“Frustration by breach” and frustration

24-048

! Similar language has been used to describe the seriousness of the interference with performance of the contract that must be shown to have occurred to justify a discharge and to bring about a discharge of the contract by frustration. ²⁶⁴ ! Nevertheless, “frustration by breach” must be distinguished from the doctrine of frustration of a contract referred to in Ch.23. ²⁶⁵ Frustration by breach arises where the failure of performance is due to the act or default of one of the parties, but true frustration will only occur if the frustrating event was not caused by the fault of either party to the contract. ²⁶⁶ Further, where there has been frustration by breach, the innocent party may elect to affirm the contract; but where there is true frustration, the contract is determined automatically, and it cannot be continued by affirmation. ²⁶⁷

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- ^{200.} *Pordage v Cole* (1669) 1 Wms. Saund. 319; *Guy-Pell v Foster* [1930] 2 Ch. 169.
- ^{201.} Cited with approval in *Denmark Productions Ltd v Boscobel Productions Ltd* [1969] 1 Q.B. 699, 733.
- ^{202.} *Stavers v Curling* (1836) 3 Bing.N.C. 355, 368. cf. *Ritchie v Atkinson* (1808) 10 East 295, 306; *Huntoon Co v Kolynos* [1930] 1 Ch. 528, 558, 559 (where the test is stated in the same terms as the distinction between a condition and a warranty: see below, para.24-039).
- ^{203.} *Pordage v Cole* (1669) 1 Wms. Saund. 319, 320.
- ^{204.} (1884) 14 Q.B.D. 792, 800.
- ^{205.} [1909] A.C. 118. In *Rock Refrigeration Ltd v Jones* [1997] 1 All E.R. 1, 18–20 Phillips L.J. questioned the correctness of General Billposting, but the majority of the Court of Appeal were prepared to assume that it had been correctly decided. See further below, para.24-050 n.277.
- ^{206.} *Kidner v Stimpson* (1918) 35 T.L.R. 63.
- ^{207.} *Taylor v Webb* [1937] 2 K.B. 283 (but see *Regis Property Co Ltd v Dudley* [1959] A.C. 370).
- ^{208.} *Winstone v Linn* (1823) 1 B. & C. 460; cf. *Ellen v Topp* (1851) 6 Exch. 424.
- ^{209.} See *Pordage v Cole* (1669) 1 Wms. Saund. 319; *Kingston v Preston* (1773) 2 Doug. 689, 691; *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha* [1962] 2 Q.B. 26, 65; *Cehave NV v Bremer Handelsgesellschaft* [1976] Q.B. 44, 57, 72; *United Scientific Holdings Ltd v Burnley BC* [1978] A.C. 904, 927; *Hurst v Bryk* [2002] 1 A.C. 185, 193; *Dawson* [1981] C.L.J. 83, 87.
- ^{210.} (1777) 1 Hy. Bl. 273.
- ^{211.} (1777) 1 Hy. Bl. 273, 273n.
- ^{212.} e.g. *Smith v Wilson* (1807) 8 East 437.
- ^{213.} (1795) 6 Term Rep. 320; see above, para.21-031; below, para.24-045.
- ^{214.} *Mersey Steel and Iron Co Ltd v Naylor, Benzon & Co* (1884) 9 App. Cas. 434, 444.

- [215.](#) Sale of Goods Act 1979 ss.11(3), 61(1); Chalmers, *Sale of Goods*, 2nd edn (1981), p.164; 18th edn, p.373; above, para.13–031.
- [216.](#) Sale of Goods Act 1893 ss.12–15. The distinction between conditions and warranties was carried forward into the Sale of Goods Act 1979. In contrast, the Consumer Rights Act 2015 does not refer to conditions or warranties. Instead, Chs 2 (goods) and 3 (digital content) distinguish between the statutory rights that exist under a goods contract or a digital content contract and then sets out separately the remedies that exist if the statutory rights are not met. See below, para.38-459.
- [217.](#) See above, para.13-035.
- [218.](#) (1876) 1 Q.B.D. 183.
- [219.](#) (1876) 1 Q.B.D. 183, 188, citing Parke B. in *Graves v Legg* (1854) 9 Exch. 709, 716.
- [220.](#) *Bentsen v Taylor, Sons & Co* [1893] 2 Q.B. 274, 281.
- [221.](#) See above, para.13-019. See also J.E. Stannard and D. Capper, *Termination for Breach of Contract* (2014), Ch.5.
- [222.](#) See above, para.13-040.
- [223.](#) See above, para.13-025.
- [224.](#) See above, para.13-034. See also Andrews, Clarke, Tettenborn and Virgo, *Contractual Duties: Performance, Breach, Termination and Remedies* (2012), Ch.12 and J.E. Stannard and D. Capper, *Termination for Breach of Contract* (2014) Ch.6.
- [225.](#) *Valilas v Januzaj* [2014] EWCA Civ 436, 154 Con. L.R. 38 at [60].
- [226.](#) [2014] EWCA Civ 436, 154 Con. L.R. 38 at [60].
- [227.](#) [2014] EWCA Civ 436, 154 Con. L.R. 38 at [53].
- [228.](#)  [2014] EWCA Civ 436, 154 Con. L.R. 38 at [59]; *Grand China Logistics Holding (Group) Co Ltd v Spar Shipping AS* [2016] EWCA Civ 982, [2016] 2 Lloyd's Rep. 447 at [75].
- [229.](#) *Telford Homes (Creekside) Ltd v Ampurius Nu Homes Holdings Ltd* [2013] EWCA Civ 577, [2013] 4 All E.R. 377 at [48].
- [230.](#) *Davidson v Gwynne* (1810) 12 East 381, 389; *MacAndrew v Chapple* (1866) L.R. 1 C.P. 643, 648; *Poussard v Spiers* (1876) 1 Q.B.D. 410, 414; *Honck v Muller* (1881) 7 Q.B.D. 92, 100; *Mersey Steel and Iron Co v Naylor, Benzon & Co* (1884) 9 App. Cas. 434, 443; *Guy-Pell v Foster* [1930] 2 Ch. 169, 187; *Heyman v Darwins Ltd* [1942] A.C. 356, 397; *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, 442; *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 W.L.R. 361, 374; *Cehave NV v Bremer Handelsgesellschaft mbH* [1976] Q.B. 44, 60, 73; *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc* [1979] A.C. 757, 779.
- [231.](#) *Wallis, Son and Wells v Pratt and Haynes* [1910] 2 K.B. 1003, 1012.
- [232.](#) *Tarrabochcia v Hickie* (1856) 1 H. & N. 183; *MacAndrew v Chapple* (1866) L.R. 1 C.P. 643, 647, 648; *Stanton v Richardson* (1872) L.R. 7 C.P. 421, 433, 437; *Jackson v Union Marine Insurance Co* (1874) L.R. 10 C.P. 125, 145, 148; *Inverkip S.S. Co v Bunge* [1917] 2 K.B. 193, 201; *Astley Industrial Trust Ltd v Grimley* [1963] 1 W.L.R. 584, 599; *Trade and Transport Incorporated v Iino Kaiun Kaisha Ltd* [1973] 1 W.L.R. 210, 223.
- [233.](#)  *Cehave NV v Bremer Handelsgesellschaft mbH* [1976] Q.B. 44, 82; *United Scientific Holdings*

Ltd v Burnley BC [1978] A.C. 904, 928; *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827, 849; *Nitrate Corp of Chile Ltd v Pansuiza Compania de Navigacion* [1980] 1 Lloyd's Rep. 638 (affirmed [1982] 1 Lloyd's Rep. 570). See also *Freeman v Taylor* (1831) 8 Bing. 124, 138; *MacAndrew v Chapple* (1886) L.R. 1 C.P. 643, 648; *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 W.L.R. 361, 380; *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc* [1979] A.C. 757, 783; *Gunatunga v DeAlwis* (1996) 72 P. & C.R. 161, 171; *Alfred McAlpine Plc v BAI (Run-off) Ltd* [2000] 1 Lloyd's Rep. 437, 444; *Rubicon Computer Systems Ltd v United Paints Ltd* (2000) 2 T.C.L.R. 453; *Anglo Group Plc v Winther Brown & Co Ltd* (2000) 72 Con. L.R. 118, 160; *Astea (UK) Ltd v Time Group Ltd* [2003] EWHC 725 (TCC), [2003] All E.R. (D) 212 (Apr) [149]; *Northern Foods Plc v Focal Foods Ltd* [2003] 2 Lloyd's Rep. 728, 745; *Seadrill Management Services Ltd v OAO Gazprom* [2009] EWHC 1530 (Comm), [2010] 1 Lloyd's Rep. 543; *Telford Homes (Creekside) Ltd v Ampurius Nu Homes Holdings Ltd* [2013] EWCA Civ 577, [2013] 4 All E.R. 377. In *Telford Homes (Creekside) Ltd* Lewison L.J. also drew attention (at [49]) to a possible "tension" between the test of deprivation of "substantially the whole benefit" of the contract (as expressed by Diplock L.J. in *Hongkong Fir*) and the test of deprivation of "a substantial part of the benefit to which [the innocent party] is entitled under the contract" (as expressed by Buckley L.J. in *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 W.L.R. 361, 380). However, in *Urban I (Blonk Street) Ltd v Ayres* [2013] EWCA Civ 816, [2014] 1 W.L.R. 756 at [57] Sir Terence Etherton C. observed that the difference in expression did not "reflect any divergence of principle but merely the application of the same principle to different facts". The preference of the Chancellor was to adhere to the "common formulation", namely that the breach must deprive the innocent party of "substantially the whole benefit" of the contract. *C21 London Estates Ltd v Maurice Macneill Iona Ltd* [2017] EWHC 998 (Ch) at [85]–[89].

[234.](#) [1962] 2 Q.B. 26, 66.

[235.](#) When considering the consequences of the breach the court may have regard to the cumulative effect of the breaches that have taken place: *Moschi v Lep Air Services Ltd* [1973] A.C. 331, 349; *Anglo Group Plc v Winther Brown & Co Ltd* (2000) 72 Con. L.R. 118, 160; *Rice (t/a Garden Guardian) v Great Yarmouth BC*, *The Times*, July 26, 2000; *Alan Auld Associates Ltd v Rick Pollard Associates* [2008] EWCA Civ 655, [2008] B.L.R. 419.

[236.](#) Regard is to be had, not only to the actual consequences which have occurred, but also those which it can reasonably be foreseen will occur as a result of the breach: [1962] 2 Q.B. 26, 57, 63. The date at which the court must decide whether the breach is repudiatory is the date of the purported termination, not the date of the breach: *Telford Homes (Creekside) Ltd v Ampurius Nu Homes Holdings Ltd* [2013] EWCA Civ 577, [2013] 4 All E.R. 377 at [44].

[237.](#) See above, para.15-023.

[238.](#) *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, 431.

[239.](#) See above, paras 15-023—15-024.

[240.](#) *Smeaton Hanscomb & Co Ltd v Sassoon I. Setty, Son & Co* [1953] 1 W.L.R. 1468, 1470; see above, para.13-021.

[241.](#) [1967] 1 A.C. 361; see above, para.15-024.

[242.](#) See above, para.15-024.


[243.](#) [1967] 1 A.C. 361, 397. See also 409–410, 421–422, 431.

[244.](#) [1967] 1 A.C. 361, 422. See also *Thompson v Corroon* (1993) 42 W.I.R. 157.

[245.](#) [1967] 1 A.C. 361, 422.

[246.](#) [1980] A.C. 827, 849; above, para.15-025.

- [247.](#) See above, paras 13-024, 15-027.
- [248.](#) *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, 394, 414, 415, 429; *Rubicon Computer Systems Ltd v United Paints Ltd* (2000) 2 T.C.L.R. 453; *Future Publishing Ltd v Edge Interactive Media Inc* [2011] EWHC 1489 (Ch), [2011] All E.R. (D) 93 (Jun) at [62]; *De Montfort Fine Art Ltd v Acre 1127 Ltd (In Liquidation)* [2011] EWCA Civ 87, [2011] All E.R. (D) 111 (Feb) at [43]. The fact that the breach is “covert” may also be a relevant factor: *Northern Foods Plc v Focal Foods Ltd* [2003] 2 Lloyd’s Rep. 728, 747.
- [249.](#) For the coincidence between renunciation and failure of performance, see *Mersey Steel and Iron Co v Naylor, Benzon & Co* (1884) 9 App. Cas. 434, 441, 444.
- [250.](#) [1967] 1 A.C. 361, 435.
- [251.](#) *De Montfort Fine Art Ltd v Acre 1127 Ltd (In Liquidation)* [2011] EWCA Civ 87, [2011] All E.R. (D) 111 (Feb) at [43].
- [252.](#) *Tullett Prebon Plc v BGC Brokers LP* [2011] EWCA Civ 131, [2011] I.R.L.R. 420; *Northern Foods Plc v Focal Foods Ltd* [2003] 2 Lloyd’s Rep. 728 at 747; *Williams v Leeds United Football Club Ltd* [2015] EWHC 376 (QB), [2015] All E.R. (D) 218 (Feb); *D&G Cars Ltd v Essex Police Authority* [2015] EWHC 226 (QB), [2015] All E.R. (D) 85 (Mar).
- [253.](#) *Ebbw Vale Steel, Iron and Coal Co v Blaina Iron and Tinplate Co* (1901) 6 Com. Cas. 35; *Eshelby v Federated European Bank Ltd* [1932] 1 K.B. 423; *Bolton v Mahadeva* [1972] 1 W.L.R. 1009.
- [254.](#) See above, paras 21-028—21-039.
- [255.](#) *H. Dakin & Co Ltd v Lee* [1916] 1 K.B. 566; *Hoenig v Isaacs* [1952] 2 All E.R. 176; *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 Q.B. 1, 8–10. cf. *Vigers v Cook* [1919] 2 K.B. 475; *Eshelby v Federated European Bank Ltd* [1932] 1 K.B. 423; *Bolton v Mahadeva* [1972] 1 W.L.R. 1009. cf. Beck (1975) 38 M.L.R. 413. See also above, paras 21-033—21-034, where the existence of a doctrine of substantial performance is doubted.
- [256.](#) See Benjamin’s Sale of Goods, 9th edn (2014), paras 8-074 et seq.
- [257.](#) Sale of Goods Act 1979 s.31(2); see Vol.II, para.44-263. In the case of consumer buyers, their rights in relation to instalment deliveries by a trader will be found in s.26 of the Consumer Rights Act 2015 (which applies to contracts made on or after October 1, 2015), on which see below, Vol.II, para.38-488.
- [258.](#) *Freeth v Burr* (1874) L.R. 9 C.P. 208, 213. See also *Bloomer v Bernstein* (1874) L.R. 9 C.P. 588; *Mersey Steel and Iron Co v Naylor Benzon & Co* (1884) 9 App. Cas. 434; *Dominion Coal Co Ltd v Dominion Iron and Steel Co Ltd* [1909] A.C. 293; *Household Machines v Cosmos Exports* [1947] K.B. 217; *Warinco AG v Samor SpA* [1979] 1 Lloyd’s Rep. 450; *Bunge GmbH v C.C.V. Landbouwbelaag G.A.* [1980] 1 Lloyd’s Rep. 458.
- [259.](#) See above, para.24-018.
- [260.](#) *Mersey Steel and Iron Co v Naylor Benzon & Co* (1884) 9 App. Cas. 434, 443–444. See also *Hoare v Rennie* (1859) 5 H. & N. 19; *Jonassohn v Young* (1863) 4 B. & S. 296; *Clarke v Burn* (1866) 14 L.T. 439; *Coddington v Paleologo* (1867) L.R. 2 Ex. 193; *Simpson v Crippin* (1872) L.R. 8 Q.B. 14; *Honck v Muller* (1881) 7 Q.B.D. 92; *Millar’s Karri and Jarrah Co v Weddel Turner & Co* (1908) 100 L.T. 128; *Taylor v Oakes, Roncoroni & Co* (1922) 127 L.T. 267; *Robert A. Munro Ltd v Meyer* [1930] 2 K.B. 312; *Maple Flock Co Ltd v Universal Furniture Products (Wembley) Ltd* [1934] 1 K.B. 148; *Ross T. Smyth & Co Ltd v T.D. Bailey, Son & Co* [1940] 3 All E.R. 60; *Amos & Wood Ltd v Kaprow* (1948) 64 T.L.R. 110; *Regent OHG Aisenstadt und Barig v Francesco of Jermyn Street* [1981] 3 All E.R. 327.

- [261.](#) *Maple Flock Co Ltd v Universal Furniture Products (Wembley) Ltd* [1934] 1 K.B. 148, 157. See also *Millars Karri and Jarrah Co v Weddel Turner & Co* (1908) 100 L.T. 128, 129.
- [262.](#) *Cornwall v Henson* [1900] 2 Ch. 298, 304.
- [263.](#) See above, paras 13-025, 21-011.
- [264.](#)  *Jackson v Union Marine Insurance Co Ltd* (1874) L.R. 10 C.P. 125, 145, 147; *Trade and Transport Inc v Ino Kaiun Kaisha Ltd* [1973] 1 W.L.R. 210, 221; *Nitrate Corp of Chile Ltd v Pansuiza Compania de Navegacion SA* [1980] 1 Lloyd's Rep. 638, 648; affirmed sub nom. *Chilean Nitrate Sale & Corp v Marine Transportation Co Ltd* [1982] 1 Lloyd's Rep. 570; *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2016] EWCA Civ 789 at [25].
- [265.](#) See above, paras 23-001 et seq.
- [266.](#) See above, paras 23-061—23-065. For consideration of “mixed causes”, see *Nitrate Corp of Chile Ltd v Pansuiza Compania de Navegacion SA* [1980] 1 Lloyd's Rep. 638, 649.
- [267.](#) *Hirji Mulji v Cheong Yue S.S. Co Ltd* [1926] A.C. 497, 509. cf. *B.P. Exploration Co (Libya) Ltd v Hunt (No.2)* [1979] 1 W.L.R. 783; affirmed [1983] 2 A.C. 352 (waiver).

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Volume I - General Principles
Part 7 - Performance and Discharge
Chapter 24 - Discharge by Breach
Section 5. - Consequences of Discharge ²⁶⁸

Prospective nature of discharge

24-049

It has become usual to speak of the exercise by one party of his right to treat himself as discharged as a “rescission” of the contract. But, as Lord Porter pointed out in *Heymans v Darwins Ltd* ²⁶⁹:

“To say that the contract is rescinded or has come to an end or has ceased to exist may in individual cases convey the truth with sufficient accuracy, but the fuller expression that the injured party is thereby absolved from future performance of his obligations under the contract is a more exact description of the position. Strictly speaking, to say that on acceptance of the renunciation of a contract the contract is rescinded is incorrect.”


This statement was unanimously approved by the House of Lords in *Johnson v Agnew*, ²⁷⁰ where Lord Wilberforce emphasised ²⁷¹ that this so-called “rescission” is quite different from rescission ab initio, such as may arise for example, in cases of mistake, fraud or lack of consent. It has also become usual to speak of the contract as having been “terminated” or “discharged” by the breach. Again, however, these expressions may be somewhat misleading for they might suggest that the contract ceases for all purposes to exist in that event. Such an approach was indeed adopted by the Court of Appeal in *Harbutt’s “Plasticine” Ltd v Wayne Tank and Pump Co Ltd* ²⁷² so as to prevent the party in default from relying on an exemption clause inserted in a contract which had been “terminated” by breach. But this case was overruled by the House of Lords in *Photo Production Ltd v Securicor Transport Ltd*. ²⁷³ The true position was there stated to be—where the innocent party elects to terminate the contract, i.e. to put an end to all primary obligations of both parties remaining unperformed—that:

“(a) there is substituted by implication of law for the primary obligations of the party in default which remain unperformed a secondary obligation to pay money compensation to the other party for the loss sustained by him in consequence of their nonperformance in the future and (b) the unperformed primary obligations of that other party are discharged.”
²⁷⁴

Obligations which survive discharge

24-050

❗ Of course, in assessing damages, the court must have regard to the terms of the contract in order to ascertain the performance promised in it, ²⁷⁵ including performance which would have fallen due after the date of discharge. ²⁷⁶ It must also give effect to terms of the contract which, for example,

liquidate the damages recoverable ²⁷⁷ or exclude or restrict the remedies otherwise available for breach. ²⁷⁸ But, from the time of discharge, as a general rule both parties are excused from further performance of the primary obligations of the contract which each has still to perform. However, obligations for the resolution of disputes will remain in full force and effect, ²⁷⁹ “as may other clauses having a contractual function which is ancillary or collateral to the subject-matter of the contract”. ²⁸⁰ Arbitration clauses which state without qualification that any difference or dispute which may arise under the contract shall be referred to arbitration will continue to apply notwithstanding the discharge. ²⁸¹ Ultimately, it is a question of construction whether or not the parties intended the contractual obligation in question to survive the termination of the contract. ²⁸²  Moreover, in principle, only those primary obligations falling due after the date of discharge will come to an end; those which have accrued due at the time may still be enforceable as such. ²⁸³ Thus, while both parties are discharged from further performance of their primary obligations under the contract, “rights are not divested or discharged which have been unconditionally acquired”. ²⁸⁴ The party in breach can therefore enforce against the innocent party such rights as it has “unconditionally acquired” by the date of termination.

Termination of partnership agreement

24-051

In *Hurst v Bryk* ²⁸⁵ the House of Lords was content to assume, without finally deciding, ²⁸⁶ that a partnership could be dissolved by one partner accepting his partner's or partners' repudiatory breach of the partnership agreement but held that, following termination, the innocent partner remains liable for the accrued and accruing liabilities of the partnership provided that these liabilities were incurred by the partnership when the innocent partner was a partner in the firm ²⁸⁷ and that the innocent partner also remains liable to his fellow partners to contribute to these liabilities. ²⁸⁸ However, in *Mullins v Laughton* ²⁸⁹ Neuberger J. subsequently held that the dissolution of a partnership by an accepted repudiation is not possible on the basis that the relationship between partners, while contractual, is also subject to equitable principles and to the principles to be found in the Partnership Act 1890. ²⁹⁰ On this basis, while an agreement to enter into a partnership agreement and an agreement whereby partners mutually undertake to observe certain obligations after the partnership has come to an end can be brought to an end by the acceptance of a repudiatory breach, ²⁹¹ an acceptance of a repudiatory breach cannot be invoked in order to bring about the automatic dissolution of the partnership itself. The grounds on which a partnership can be dissolved are regulated principally by the provisions of the Partnership Act 1890 and these do not include the acceptance of a repudiatory breach.


Position of innocent party




24-052

Where the innocent party is entitled to, and does, treat himself as discharged by the other's breach, he is thereby released from future performance of his obligations under the contract. ²⁹² Discharge also deprives him of any right as against the other party to continue to perform them. ²⁹³ After such discharge he is not bound to accept, or pay for, any further performance by the other party. If he has paid money under the contract to the party in default, he will be entitled to recover it by an action for money had and received, ²⁹⁴ but only if the consideration for the payment has totally failed. ²⁹⁵ A deposit paid by him to secure performance is, however, recoverable. ²⁹⁶

Rights acquired before discharge

24-053

 Although both parties are discharged from further performance of the contract, rights are not divested or discharged which have already been unconditionally acquired. ²⁹⁷ Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected. ²⁹⁸ Where, at the time of discharge, money is due under the

contract by the innocent party but that sum remains unpaid, the innocent party is not required to pay that sum if it would then be recoverable by him in a restitutionary claim (for example, on the ground that there had been a (total) failure of consideration). Otherwise, the innocent party can retain or recover sums paid or due before the time at which the repudiation is accepted by him ²⁹⁹  and may maintain an action for damages in respect of any cause of action vested in him at that time. ³⁰⁰  If the contract provides for payment of a deposit, which is forfeitable in the event of breach, the acceptance by the innocent party of the repudiation of the contract by the party in default does not preclude him from recovering and forfeiting the deposit if it is at that time due and unpaid. ³⁰¹  Further in *Damon Compania Naviera SA v Hapag-Lloyd International SA* ³⁰² the vendor and purchaser of three ships agreed that each would sign a memorandum of agreement within a reasonable time, whereupon the purchaser would be liable to pay a deposit of 10 per cent of the purchase price. The purchaser repudiated the contract by failing to sign the memorandum and this repudiation was accepted by the vendor. The Court of Appeal held that, even though the vendor had acquired no accrued right to the deposit at the time he accepted the repudiation, nevertheless at that time he had a vested right to sue the purchaser for damages for breach of his obligation to sign the memorandum, the measure of such damages being the amount of the deposit. However, in the case of contracts for the sale of land or goods, unless the contract otherwise provides, sums due as part payment of the purchase price from the party in default may be irrecoverable. ³⁰³ If the innocent party has expended labour or money under the contract, or delivered goods to the party in default, but payment for these is not yet due, he will be entitled to sue for these on a quantum meruit or quantum valebat. ³⁰⁴ Otherwise, his remedy is to sue for damages for breach of contract. ³⁰⁵

Position of guilty party

24-054

Upon discharge, the primary obligations of the party in default to perform any of the promises made by him and remaining unperformed come to an end, as does his right to perform them. ³⁰⁶ But for his primary obligations there is substituted by operation of law a secondary obligation to pay to the other party a sum of money to compensate him for the loss he has sustained as a result of the failure to perform the unperformed primary obligations. ³⁰⁷

Recovery of deposits and part-payments

24-055

The party in default will not be entitled to recover any deposit paid by him as security for the performance of his obligations. ³⁰⁸ In principle, other sums paid by him under the contract before the time of discharge will likewise be irrecoverable. ³⁰⁹ But, unless the contract otherwise provides, he may be permitted to recover money paid as a partpayment of the purchase price where the contract is one for the sale of goods or land, ³¹⁰ and it is possible that relief in equity may in certain circumstances be available. ³¹¹ Unpaid instalments which were due prior to the discharge of the contract remain payable by the party in default unless there has been a total failure of consideration in respect of these instalments, in which case they cease to be payable. ³¹²

Entire and divisible obligations

24-056

Whether he has any claim to be recompensed for partial performance of the contract which he has broken will depend on whether the obligation is entire or divisible. ³¹³ If it is entire, he will normally have no claim, unless there is evidence on which to ground the inference of a new contract or an independent restitutionary claim. ³¹⁴ But if the obligation is not entire but divisible, he may be entitled to claim in respect of a divisible part of the performance completed ³¹⁵ (subject to a counterclaim by the innocent party in respect of that part of the contract which remains unperformed). Where goods delivered under a contract of sale are not in conformity with the contract, and are rejected by the

buyer, the property in the goods reverts in the seller.³¹⁶


Effect on guarantor

24-057

Where a creditor “accepts” his debtor’s wrongful repudiation of the contract, and exercises his right to treat himself as discharged, this does not release a guarantor of the debtor from liability in respect of monies payable by the debtor after the date of discharge.³¹⁷ Nor is the guarantor released from liability in respect of sums due but unpaid at that time,³¹⁸ unless those sums could not have been recovered from the debtor himself³¹⁹ and the guarantee does not, on its true construction, require payment by the guarantor in the event of default in payment on the due date.³²⁰

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- ^{268.} See *Shea* (1979) 42 M.L.R. 623; *Beatson* (1981) 97 L.Q.R. 389; *Rose* (1981) 34 C.L.P. 235.
- ^{269.} [1942] A.C. 356, 399.
- ^{270.} [1980] A.C. 367. See also *Bank of Boston Connecticut v European Grain and Shipping Ltd* [1989] A.C. 1056, 1098–1099.
- ^{271.} [1980] A.C. 367, 393. See also *Howard-Jones v Tate* [2011] EWCA Civ 1330, [2012] 2 All E.R. 369.
- ^{272.} [1970] 1 Q.B. 447.
- ^{273.} [1980] A.C. 827; see above, para.15-025.
- ^{274.} [1980] A.C. 827, 849, per Lord Diplock. See also *Moschi v Lep Air Services Ltd* [1973] A.C. 331, 345, 350, 351; *Thompson v Corroon* (1993) 42 W.I.R. 157, 172–173; *Red River UK Ltd v Sheikh* [2010] EWHC 961 (Ch) at [127].
- ^{275.} *Heyman v Darwins Ltd* [1942] A.C. 356, 373; *F.J. Bloemen Pty Ltd v Council of the City of the Gold Coast* [1973] A.C. 115.
- ^{276.} *O’Neil v Armstrong, Mitchell & Co* [1895] 2 Q.B. 418; *Moschi v Lep Air Services Ltd* [1973] A.C. 331; *The Mihalis Angelos* [1971] 1 Q.B. 164. In particular, damages may be reduced where, subsequent events, known to the court at the time of the hearing, have reduced the value of the contractual rights in respect of which the claim has been brought: *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] UKHL 12, [2007] 2 A.C. 353. See above, para.24-023.
- ^{277.} See below, para.26-178.
- ^{278.} See above, para.15-025.
- ^{279.} *Port Jackson Stevedoring Pty Ltd v Salmond and Spraggon (Australia) Pty Ltd* [1981] 1 W.L.R. 138, 145. However, a restrictive covenant in a contract of employment will not generally survive where it is the employer who has repudiated the contract: *General Billposting Co Ltd v Atkinson* [1909] A.C. 118, above, para.16-111, although the correctness of this proposition has been questioned by Phillips L.J. in *Rock Refrigeration Ltd v Jones* [1997] 1 All E.R. 1, 18–20 on the basis that “the law in relation to the discharge of contractual obligations by acceptance of a repudiation has been developed and clarified” since *General Billposting* was decided. The uncertainty was noted but not resolved by Lord Wilson in *Geys v Société Générale, London Branch* [2012] UKSC 63, [2013] 1 A.C. 513 at [68] (and see also Lord Sumption at [141]). The employer may, however, be able to protect his property and trade secrets on the basis that his rights of property will survive the termination of the contract as a result of the employee’s acceptance of his repudiatory breach (*Rock Refrigeration Ltd v Jones* [1997] 1 All E.R. 1, 14

and (on rather wider grounds) 20). The underlying uncertainty in this area relates to the scope of the decision of the House of Lords in *General Billposting*, on which see Freedland (2003) 32 I.L.J. 48 and Dawson (2013) 129 L.Q.R. 508 (where *General Billposting* is examined in the light of recent Commonwealth case law).

280. *Yasuda Fire & Marine Insurance Co of Europe Ltd v Orion Marine Insurance Underwriting Agency Ltd* [1995] Q.B. 174 (principal's contractual right to inspect documents and computer databases relating to transactions entered into by agents held to have survived the termination of the agency agreement). The position is more difficult in relation to obligations of confidence. The Court of Appeal in *Campbell v Frisbee* [2002] EWCA Civ 1374, [2003] I.C.R. 141 held that the question whether an innocent party remains bound by an obligation of confidence following a wrongful repudiation of the contract by the other party was too uncertain to be resolved in summary proceedings. At first instance, [2000] EWHC 328 (Ch), Lightman J. held that the obligation of confidence of a service provider survived the acceptance by the service provider of the repudiation of her contract by the client. While the Court of Appeal concluded that the issue was not suitable for summary determination, they did acknowledge (at [22]) that they considered it unlikely that the innocent party in *Campbell* would be able to establish that Lightman J. had erred in his conclusions in a manner detrimental to her case. This suggests that obligations of confidence are likely to survive termination of the contract following a wrongful repudiation, whether the obligation of confidence survives as an express term of the contract or as a distinct equitable obligation (the latter view is preferred by Clarke (2003) 32 I.L.J. 43, 44–46, but questioned by Freedland (2003) 32 I.L.J. 48, 49). As has been noted (n.277 above), the underlying problem is uncertainty as to the scope of the decision of the House of Lords in *General Billposting Co Ltd v Atkinson* [1909] A.C. 118. The uncertainty in the law was confirmed by Lewison J. in *Renewable Power & Light Plc v Renewable Power & Light Services Inc* [2008] All E.R. (D) 170 (Apr) at [39].
281. *Heyman v Darwins Ltd* [1942] A.C. 356; *F.J. Bloemen Pty Ltd v Council of the City of the Gold Coast* [1973] A.C. 115; *Moschi v Lep Air Services Ltd* [1973] A.C. 331, 351. Similarly, an adjudication provision in a contract will survive the discharge of the contract: *Connex South Eastern Ltd v MJ Building Services Group Plc* [2004] EWHC 1518 (TCC), [2004] B.L.R. 333 at [25].
282.  *Duffen v Frabo SpA* [2000] 1 Lloyd's Rep. 180, 194; *Involnert Management Inc v Aprilgrange Ltd* [2015] EWHC 2225 (Comm), [2016] 1 All ER (Comm) 913 at [171]–[178].
283. *Bank of Boston Connecticut v European Grain and Shipping Ltd* [1989] A.C. 1056. See Beatson (1981) 97 L.Q.R. 389.
284. *McDonald v Dennys Lascelles Ltd* (1933) 48 C.L.R. 457, 476–477; *Bank of Boston Connecticut v European Grain and Shipping Ltd* [1989] A.C. 1056, 1098–1099; *Northern Developments (Cumbria) Ltd v J. & J. Nichol* [2000] B.L.R. 158, 165–166; *Hurst v Bryk* [2002] 1 A.C. 185, 199.
285. [2002] 1 A.C. 185.
286. In *Hurst v Bryk* [2002] 1 A.C. 185, both Lord Millett (at 196D–E) and Lord Nicholls (at 189D) expressly left open the question whether a partnership agreement can be automatically dissolved by an innocent partner or partners treating the other partner's or partners' breach as repudiatory. Lord Millett was of the view (at 196C) that it was arguable that, by entering into the relationship of partnership, the parties had submitted themselves to the jurisdiction of the court of equity and had thereby renounced their right by unilateral action to bring about the automatic dissolution of their relationship by acceptance of a repudiatory breach of the partnership contract. In other words, the issue was not whether acceptance of a repudiatory breach applied to the contract of partnership, but whether it operated to bring about the automatic dissolution of the partnership relationship (at 195A–B). cf. *Hitchman v Crouch Butler Savage Associates (A Firm)* (1982) 80 L.S. Gaz. 550.
287. *Hurst v Bryk* [2002] 1 A.C. 185, 198.
288. *Hurst v Bryk* [2002] 1 A.C. 185, 198–199. The innocent partner may have a claim for damages

against his fellow partners in respect of the breach which brought about the dissolution of the partnership but these losses cannot be measured by reference to the contribution which he must make to the partnership's liabilities because his liability to contribute to them had accrued prior to the breach of the partnership agreement (199). He can recover damages only if he can show that the dissolution of the firm caused him loss which he would not otherwise have sustained.

[289.](#) [2002] EWHC 2761 (Ch), [2003] Ch. 250.

[290.](#) [2002] EWHC 2761 (Ch) at [87]–[93]. In this respect Neuberger J. followed the reasoning of Lord Millett in *Hurst v Bryk* [2002] 1 A.C. 185. The decision of Neuberger J. was in turn followed in *Golstein v Bishop* [2013] EWHC 881 (Ch), [2014] Ch. 131 at [120] and [123], albeit that it was noted that this view has the potential to “leave the innocent party in a position of some difficulty pending an application to the Court for dissolution”. The Court of Appeal ([2014] EWCA Civ 10, [2014] Ch. 455) affirmed that the court’s discretionary power under s.35(d) of the Partnership Act 1890 to dissolve a partnership is distinct from the principles which would be applied by a court when deciding whether a contract had been repudiated or that the repudiatory breach had been affirmed. The reasoning of Lord Millett was also followed by Henderson J. in *Flanagan v Liontrust Investment Partners LLP* [2015] EWHC 2171 (Ch) in the context of limited liability partnerships.

[291.](#) *Hurst v Bryk* [2002] 1 A.C. 185, 193D.

[292.](#) *Heyman v Darwins Ltd* [1942] A.C. 356, 399; *Moschi v Lep Air Services Ltd* [1973] A.C. 331, 345, 350, 351; *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827, 844, 848; *Thompson v Corroon* (1993) 42 W.L.R. 157, 173; cf. *Port Jackson Stevedoring Pty Ltd v Salmond and Spraggon (Australia) Pty Ltd* [1981] 1 W.L.R. 138.

[293.](#) *Moschi v Lep Air Services Ltd* [1973] A.C. 331, 350, 351; *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827, 844.


[294.](#) *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] A.C. 32, 52, 65; *Kwei Tek Chao v British Traders and Shippers Ltd* [1954] 2 Q.B. 459, 475.

[295.](#) See below, paras 29-057–29-060 and 29-067. The total failure requirement may not survive further judicial scrutiny, see *Goss v Chilcott* [1996] A.C. 788, 798. For academic criticism of the insistence upon a total failure see Burrows, *The Law of Restitution*, 3rd edn (2011), pp.330-334.

[296.](#) See below, para.29-068.

[297.](#) *Collidge v Freeport Plc* [2007] EWHC 1216 (QB), [2007] All E.R. (D) 457 (May) at [9].

[298.](#) *McDonald v Dennys Lascelles Ltd* (1933) 48 C.L.R. 457, 476–477; *Johnson v Agnew* [1980] A.C. 367, 396; *Damon Compania Naviera SA v Hapag-Lloyd International SA* [1985] 1 W.L.R. 435, 450; *Hurst v Bryk* [2002] 1 A.C. 185, 199; *SCI (Sales Curve Interactive) Ltd v Titus SARL* [2001] EWCA Civ 591, [2001] 2 All E.R. (Comm) 416 (albeit that, on the facts, it was held that the right invoked had not been unconditionally acquired prior to the termination of the contract). *Odfjell Seachem A/S v Continental des Petroles et D’Investissements* [2004] EWHC 2929 (Comm), [2005] 1 Lloyd’s Rep. 275 at [35]; *Future Publishing Ltd v Edge Interactive Media Inc* [2011] EWHC 1489 (Ch), [2011] All E.R. (D) 93 (Jun) at [67].

[299.](#)  *Dewar v Mintoft* [1912] 2 K.B. 373, 387–388; *Damon Compania Naviera SA v Hapag-Lloyd International SA* [1985] 1 W.L.R. 435, 451; *Hardy v Griffiths* [2014] EWHC 3947 (Ch), [2015] 2 W.L.R. 1239. Contrast *Lowe v Hope* [1970] Ch. 94, although the latter decision has been regarded as incorrectly decided since the decision of the Court of Appeal in *Damon Compania Naviera SA v Hapag-Lloyd International SA*: see *Hardy v Griffiths* [2014] EWHC 3947 (Ch) at [102] and [108].

[300.](#)  *Damon Compania Naviera SA v Hapag-Lloyd International SA* [1985] 1 W.L.R. 435; *Hardy v Griffiths* [2014] EWHC 3947 (Ch), [2015] 2 W.L.R. 1239.

- [301.](#) **!** *Brooks v Beinrstein* [1909] 1 K.B. 98; *Leslie Shipping Co v Welstead* [1921] 3 K.B. 420; *Chatterton v Maclean* [1951] 1 All E.R. 761; *Overstone Ltd v Shipway* [1962] 1 W.L.R. 117; *Galbraith v Mitchenall Estates Ltd* [1965] 2 Q.B. 473; *Hyundai Shipbuilding & Heavy Industries Co Ltd v Pournaras* [1978] 2 Lloyd's Rep. 502; *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 1 W.L.R. 1129; *Cadogan Petroleum Holdings Ltd v Global Process Systems LLC* [2013] EWHC 214 (Comm), [2013] 2 Lloyd's Rep. 26; *Griffon Shipping LLC v Firodi Shipping Ltd (The Griffon)* [2013] EWCA Civ 1567, [2014] 1 All E.R. (Comm) 593; *Hardy v Griffiths* [2014] EWHC 3947 (Ch), [2015] 2 W.L.R. 1239. cf. *Wehner v Dene Steam Shipping Co* [1905] 2 K.B. 929; *China National Foreign Trade Transportation Corp v Evlogia Shipping Co SA of Panama* [1979] 1 W.L.R. 1018 HL (overpayment); *Thompson v Corroon* (1993) 42 W.L.R. 157, 173.
- [302.](#) [1985] 1 W.L.R. 435.
- [303.](#) *Palmer v Temple* (1839) 9 A. & E. 508; *Dies v British and International Mining and Finance Corp Ltd* [1939] 1 K.B. 724. See also *Mayson v Clouet* [1924] A. C. 980, 986; *McDonald v Dennys Lascelles Ltd* (1933) 48 C.L.R. 457, 477; *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 1 W.L.R. 1129, 1134, 1142, 1153; *Beatson* (1981) 97 L.Q.R. 389; and below, para.29-069. For the possibility of equitable relief, see below, para.26-213.
- [304.](#) See below, paras 29-070—29-072.
- [305.](#) But see the effect of a buyer's repudiation on the seller's rights in respect of goods: *Benjamin's Sale of Goods*, 9th edn (2014), para.15–107.
- [306.](#) *Hurst v Bryk* [1999] Ch. 1, 21–22.
- [307.](#) *Moschi v Lep Air Services Ltd* [1973] A.C. 331, 345, 350, 351; *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827, 848–851; *Port Jackson Stevedoring Pty Ltd v Salmond and Spraggon (Australia) Pty Ltd* [1981] 1 W.L.R. 138, 145.
- [308.](#) *Palmer v Temple* (1839) 9 A. & E. 508, 520; *Howe v Smith* (1884) 27 Ch. D. 87; *Linggi Plantations Ltd v Jagatheesan* [1972] 1 M.L.J. 89, 91 PC; *Thompson v Corroon* (1993) 42 W.L.R. 157, 173; and see below, para.29-068. But see *Law of Property Act 1925* s.49(2).
- [309.](#) See above, para.24-053 n.299, below, para.29-069.
- [310.](#) See above, para.21-026 and para.24-053 n.301.
- [311.](#) See below, para.26-209; *Beatson* (1981) 97 L.Q.R. 389.
- [312.](#) *Mirinskaya v Evans* [2007] EWHC 2073 (TCC), (2007) 114 Con. L.R. 131.
- [313.](#) See above, para.24-045.
- [314.](#) See above, paras 21-031—21-032.
- [315.](#) See above, paras 21-038, 24-046.
- [316.](#) *Kwei Tek Chao v British Traders and Shippers Ltd* [1954] 2 Q.B. 459, 487; *Rosenthal & Sons Ltd v Esmail* [1965] 1 W.L.R. 1117, 1131.
- [317.](#) *Moschi v Lep Air Services Ltd* [1973] A.C. 331; see Vol.II, Ch.45.
- [318.](#) *Hyundai Shipbuilding and Heavy Industries Co Ltd v Pournaras* [1978] 2 Lloyd's Rep. 502; *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 1 W.L.R. 1129 HL; see below, para.29-069.
- [319.](#) See above, para.24–054 n.305.

- [320.](#) *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 1 W.L.R. 1129 HL and see Vol.II, Ch.45.

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