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Ewan McKendrick

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22. Breach of Contract and Termination

Ewan McKendrick

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Abstract

This chapter begins with a definition of ‘breach of contract’ and then outlines the circumstances in which a breach of contract gives to the innocent party a right to terminate further performance of the contract. These include breach of a condition and breach of an intermediate term where the consequences of the breach are sufficiently serious. The chapter also considers the problems that can arise in deciding the status of a term which has not been classified by the parties as a condition, a warranty, or an intermediate term. It examines termination clauses and the significance attached to the good faith of the party who is alleged to have repudiated the contract. The chapter includes a brief comparison of English law with the Vienna Convention on Contracts for the International Sale of Goods and with the Principles of European Contract Law, and also addresses the question of whether an innocent party is obligated to exercise its right to terminate further performance of the contract, and considers the loss of the right to terminate. It concludes with a discussion of the law of anticipatory breach of contract.

Keywords: English contract law, breach of contract, condition, warranty, innominate or intermediate term, contract termination, termination clause, good faith, anticipatory breach

Central Issues

1. A breach of contract consists of a failure, without lawful excuse, to perform a contractual obligation. The breach can take different forms, such as a refusal to perform, defective performance, or late performance. Breach of contract is generally a form of strict liability; that is to say it is not usually necessary to prove fault in order to establish the existence of a breach.

2. While every breach of contract gives rise to a right to claim damages in respect of the loss occasioned by the breach, not every breach of contract gives to the innocent party the right to terminate the contract. Identification of the circumstances in which a party is entitled to terminate a contract in the event of a breach by the other party raises difficult technical questions, but it also gives rise to some difficult questions of policy. In the event of a breach, should the law encourage the parties to stick together and work out their differences or should it confer upon the parties a wide right to terminate their relationship so as to enable them to find alternative performance elsewhere? English law generally attaches considerable significance to the right to terminate and it recognizes a wider right to terminate than that to be found in many other legal systems in the world. The right to terminate, as a matter of English law, depends in part upon the nature of the term broken (whether or not it is a condition) but also upon the consequences of the breach. A large part of this chapter is devoted to the identification of the circumstances in which the law entitles a party to terminate further performance of the contract and to the policy issues which are at stake in these cases.
3. A breach of contract does not, of itself, bring a contract to an end. The breach may give to the innocent party the right to terminate the contract but it is for the innocent party to decide whether or not to exercise that right. The innocent party has a right of election; that is to say he can choose either to affirm the contract or to terminate it. Once he has made his decision, it is, in principle, irrevocable.
4. It is possible to breach a contract before the time for performance has arrived. This is known as an anticipatory breach of contract. An example is a case in which one party informs the other, before the time for performance, that he will not perform his obligations under the contract. In such a case the innocent party is not required to wait until the time for performance to arrive (although he is entitled to do so): he can decide immediately to terminate the contract and claim damages. The innocent party may decide to ignore the breach, continue with performance, and claim the contract price. The right of the innocent party to take the latter step was recognized by the House of Lords in *White & Carter (Councils) Ltd* v. *McGregor*. Both the existence and the scope of this right are the subject of some controversy. The controversy will be examined in the last part of this chapter.

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22.1 Introduction

Breach of contract is a topic of some complexity. The complexity is both factual and legal. It is factually complex in the sense that the existence or otherwise of a breach of contract is often a matter of considerable dispute between the parties. In some cases both parties allege that there has been a breach of contract (for example, the buyer alleges that the seller is in breach of contract in selling goods which are not of satisfactory quality, while the seller in turn alleges that the buyer is in breach of contract in failing or refusing to pay for the goods). It is the task of the court to examine these allegations and to ascertain who has in fact broken the contract (and in some cases it may be that both parties are in breach of contract). Difficulties also arise from the complexity of the legal rules themselves. Breach is a very technical area of law, where it is necessary to

proceed with caution. The need for caution is particularly apparent in the case of commercial contracts because one false step can be extremely expensive. A contracting party which purports to terminate a contract when it is not in fact entitled to do so may find itself liable for damages for wrongful termination of the contract (and the damages payable in such cases may be substantial).

The approach taken in this chapter is to proceed by asking a number of questions. These questions are as follows:

(i) What is a breach of contract?

(ii) When does a breach of contract give rise to a right to terminate further performance of the contract?

(iii) Must the innocent party exercise its right to terminate further performance of the contract?

(iv) When is the right to terminate lost?

(v) What is an anticipatory breach of contract and what rights are generated by an anticipatory breach?

22.2 What Is a Breach of Contract?

Not every failure to perform amounts to a breach of contract. Take the case of a person who buys a theatre ticket, pays for it in advance, but does not bother to collect the ticket or to turn up for the performance. The
p. 763 failure to collect the ticket or to turn up for the performance ↵ does not constitute a breach of contract for the simple reason that the purchaser of the ticket has not promised to attend the performance (unless perhaps the purchaser is a theatre critic or a celebrity who has promised to attend the play in order to generate some publicity). The contractual obligation is to pay for the ticket, not to attend the performance. Thus, in order to determine whether there has been a breach of contract it is necessary to examine the terms of the contract, both express and implied. The breach lies in the failure, without lawful excuse, to perform a contractual obligation. That failure may take many different forms, including the following: (i) an express refusal to perform the contract or a particular term of the contract (for example, a buyer of goods informs the seller that he no longer wants the goods and will not pay for them); (ii) defective performance (for example, a seller supplies the buyer with goods that do not work and are not of satisfactory quality or not fit for the purpose for which they were sold); and (iii) incapacitating oneself from performing the contract (for example, the seller of goods sells the goods which he had agreed to sell to one buyer to another buyer so that he can no longer physically comply with his obligation to sell the goods to the first buyer).

It is, however, important to stress that not every failure to perform a contractual obligation amounts to a breach of contract. In some instances the law provides the party who fails to perform his contractual obligation with an excuse for his non-performance. Take the case of the buyer who refuses to pay for the goods which have been delivered to him on the ground that the goods are defective. The buyer who lawfully rejects the goods and refuses to pay for them is not in breach of contract in so acting. He has a lawful excuse for his actions in that the prior breach of contract by the seller and his lawful rejection of the goods discharged him from his obligation to pay for them. The law also provides a party with a lawful excuse for

non-performance where, prior to the time for performance, the contract between the parties is frustrated (on which see Chapter 21). The effect of frustration is automatically to determine the contract between the parties and to release them from their future obligations to perform under the terms of the contract.

The existence of a breach of contract does not generally depend upon a finding that the non-performing party intentionally broke the contract or was otherwise at fault. In other words, liability for breach of contract is strict. This is not to say that liability is absolute. As we have noted, the law does on occasion relieve a contracting party of liability for a failure of performance that would otherwise amount to a breach of contract. But these exceptions operate within very narrow confines. The principal exception is the doctrine of frustration. The conclusion that liability for breach of contract is generally strict is one that is worthy of note. At first sight it may appear rather unusual. What is the justification for imposing liability on a party who has not been at fault? Liability based on fault seems much easier to justify. Thus when we turn from the law of contract to the law of tort, we find that strict liability is viewed with some suspicion by the courts (legislative examples of the imposition of strict liability are rather more common; see for example Part I of the Consumer Protection Act 1987) and that liability based on fault is the norm. A similar picture can be found when we look to the law of contract in some civilian systems where liability for breach of contract is based upon fault. The justification for the imposition of strict liability is that a defendant who has voluntarily assumed an obligation to perform should be required to perform that obligation. Thus a carrier who promises to deliver goods to their intended recipient before midday on the day after taking receipt of the goods will be liable for a failure to deliver the goods by the stipulated time even in the case where the failure to deliver is caused by an event which is not attributable to the fault of the carrier. The carrier who wishes to qualify his liability should do so by the terms of his contract. Thus he could assume an obligation to use 'best endeavours' or 'reasonable
p. 764 endeavours' to deliver the goods at the stated time, ↵ or he could insert an exclusion clause or a force majeure clause into the contract stating that he is not to be held liable for a failure to deliver the goods where the cause of the failure is an event which is outside his control. It would not, however, be true to say that the justification for the imposition of strict liability can be found in all cases in the voluntary assumption of such a liability. In some cases the law imposes upon one contracting party a strict obligation, irrespective of the wishes of that party. A clear example is the term implied into contracts for the sale of goods that the goods must be of satisfactory quality (see section 14 of the Sale of Goods Act 1979, discussed in more detail at 10.2, and section 9 of the Consumer Rights Act 2015). This obligation is imposed on a seller of goods who sells in the course of a business. The effect of this implied term is to impose liability on the seller irrespective of the wishes of the particular seller. The justification offered in support of the imposition of liability in such cases is the need to protect the buyer, in particular the consumer buyer who is assumed to be in a weaker position than the seller. In any event, the seller will, in all probability, have a claim for breach of contract against his supplier, until liability is finally chased back to the manufacturer of the defective product.

However, it should not be assumed that liability for breach of contract is always strict. It is not. In some cases it is necessary to establish that the defendant was at fault. An example is provided by section 13 of the Supply of Goods and Services Act 1982 which provides that:

> [i]n a contract for the supply of a service where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill.

In this instance the obligation that is imposed on the supplier is one to take reasonable care so that it is only by demonstrating that the supplier has failed to exercise reasonable care and skill that a breach can be established. English law recognizes the existence of a number of obligations to exercise reasonable care. But the fact that some obligations are confined to the exercise of reasonable care does not mean that the general rule is one of liability based on fault. It is not. The general rule is that liability is strict.

It should also be noted that English law has a unitary notion of breach of contract. That is to say liability does not generally depend upon the cause of the breach of contract. In this respect English law is much simpler than some continental systems (such as that in Germany) which traditionally have distinguished between different forms of liability and thus built up an elaborate classification system. In Germany liability was, until relatively recently, based on impossibility of performance, delay, and positive breach of contract. However, on 1 January 2002 Germany introduced a very significant reform to its law of contract, and the effect of that reform is to bring German law much closer to the common law model. International instruments, such as the Vienna Convention on Contracts for the International Sale of Goods (on which see 22.3.7), have tended to adopt a unitary notion of breach or non-performance and these instruments may prove to be very important in persuading other jurisdictions to adopt a unified liability system for breach of contract.

Finally, it is important to point out that, while every breach of contract gives rise to a remedy in damages (even if the claim is only for nominal damages; see further 23.1), not every breach generates a right to terminate further performance of the contract. The right to terminate further performance of the contract is only available in certain circumstances and it is the purpose of the next section of this chapter to identify the
p. 765 circumstances that ↵ trigger the right to terminate. Termination can be an extremely important remedy (or right) in practice because it is exercised by the parties themselves. That is to say it is not necessary to go to court and seek an order of the court before terminating further performance of the contract. It is up to the parties to decide whether or not to terminate. However, it is important to remember that the courts may be asked, after the event, to decide whether or not the party who purported to terminate the contract was in fact entitled to do so. This supervisory jurisdiction of the court assumes considerable practical significance, especially when it is borne in mind that a party who purports to terminate when it does not in fact have the right to terminate will be found to have wrongfully terminated the contract and may find itself exposed to a claim for substantial damages. It is for this reason that the lawyer must exercise great care when advising a party whether or not it should terminate further performance of the contract. Draftsmen often go to considerable lengths to draft a clause that gives a clear right to terminate, although these clauses can, on occasion, give rise to difficulties of interpretation: see, for example, *Rice* v. *Great Yarmouth District Council* [2003] TCLR 1 CA, discussed in more detail at 22.3.5. Difficult issues can also arise in ascertaining the relationship between the right to terminate under a term of the contract and the right to terminate which arises under the general law (see *Stocznia Gdynia SA* v. *Gearbulk Holdings Ltd* [2009] EWCA Civ 75, [2009] BLR 196). It is therefore a matter of some importance to consider the circumstances in which a breach of contract gives to the innocent party the right to terminate further performance of the contract.

22.3 The Existence of a Right to Terminate

When considering whether or not a breach of contract entitles the innocent party to terminate further performance of the contract, one of a number of different approaches could be adopted. One approach is to leave it to the parties to decide when the right to terminate will arise. The difficulty with this approach is that the parties may not make their own provision for termination and so it is necessary for the law to provide a 'default rule' that is applicable where the parties make no provision themselves. Alternatively, one could leave it to the unfettered discretion of the court to decide whether or not there exists a right to terminate. The difficulty with this approach is that it results in too much uncertainty. Parties need to know their rights before they go to court so that they can avoid disputes or, where they do arise, settle them without incurring the cost of going to court. So there is a need for clear rules. On the other hand, clear rules can be inflexible and lead to injustice. There is therefore a need to strike a balance between the interest in certainty and the need to produce fair and just solutions when the rules are applied to individual fact situations.

English law has struggled to strike that balance in an appropriate way. But it is not alone. Other legal systems have struggled similarly. There is no one obvious solution to the problem. It is a policy issue and it is possible to strike the balance between certainty and fairness in different places. Traditionally English law is located towards the certainty end of the spectrum in that it places considerable emphasis on the need to ensure that the parties can know where they stand in the event of a breach (see, in particular, *Bunge Corporation New York* v. *Tradax Export SA, Panama* [1981] 1 WLR 711, discussed at 22.3.4). But at the same time there is a line of cases, usually associated with the recognition of intermediate or innominate terms (see *Hong Kong Fir* v. *Kawasaki Kisen Kaisha* [1962] 2 QB 26, discussed at 22.3.3), in which greater emphasis is placed on flexibility and fairness,
p. 766 so that the entitlement of the ↵ innocent party to terminate depends upon the seriousness of the breach which has taken place. Thus there is a tension at the heart of English law, in that it employs two apparently inconsistent strategies at the same time. The first and traditional strategy is to focus on the nature of the term broken. Thus, on this view, if the term broken is of sufficient importance, the law will confer upon the innocent party the right to terminate further performance of the contract, irrespective of the consequences of the breach. But where the term broken is of minimal significance then the right to terminate will not arise. The difficulty with this strategy is the obvious one, namely that there are many contract terms that fall into the middle: they are neither very important, nor very trivial, so how is it to be decided whether or not the breach of such a term gives rise to the right to terminate? The difficulties with this strategy have led some to argue that the focus of the law should be upon the consequences of the breach, rather than the nature of the term broken. This is the second strategy and it finds expression in the cases in which the courts have classified the term which has been broken as an innominate term so that the entitlement to terminate depends upon the consequences of the breach. The result of the adoption of this strategy is, it is said, to produce fairer outcomes to cases in that judges and arbitrators can then tailor the remedy to meet the facts of the case. But flexibility carries with it a price and that price is uncertainty in that it becomes more difficult for parties to predict the likely outcome of litigation with the result that it may become more difficult to resolve disputes.

In this section consideration will be given to the circumstances in which a breach of contract gives a right to the innocent party to terminate further performance of the contract. A right to terminate will generally arise where the term broken is a condition but not where the term broken is a warranty. Where the term broken is

intermediate, or innominate, the right to terminate will depend upon the consequences of the breach. Where the consequences are serious then a right to terminate will arise. Conversely, where the consequences of the breach are not serious, a right to terminate will not arise and the innocent party will be confined to a remedy in damages. This section is therefore broken down into a number of distinct parts. Section 22.3.1 considers the right to terminate in the event of a breach of a condition. Section 22.3.2, which is extremely brief, notes that there is no right to terminate in the event of a breach of a warranty. Section 22.3.3 is devoted to intermediate terms, while 22.3.4 explores the problems that can arise in deciding whether a term which has not been classified by the parties is a condition, a warranty, or an intermediate term. Section 22.3.5 examines termination clauses, while 22.3.6 considers the significance, if any, to be attached to the good faith of the party who is alleged to have repudiated the contract. Section 22.3.7 brings this section to a close with a brief comparative discussion, in which English law will be compared with the Vienna Convention and with the Principles of European Contract Law.

22.3.1 Breach of a Condition

It is now established law that breach of a 'condition' of the contract gives to the innocent party a right to terminate further performance of the contract. The difficulty lies in discerning whether or not a particular term amounts to a condition. As Professor Treitel has stated ('"Conditions" and "Conditions Precedent"' (1990) 106 *LQR* 185), 'one of the most notorious sources of difficulty in the law of contract is the variety of senses in which it uses the expression "condition"'. In the first place the word 'condition' is used in different senses by the commercial community. A common example is provided by standard terms of trade which are used by
p. 767 businesses up and down the country. These terms are often headed 'terms ↵ and conditions of business', but it is clear in this context that not all the terms contained in the document are 'conditions' in the sense that a breach automatically generates a right to terminate further performance of the contract. In other contexts the meaning of the word 'condition' is not so clear and it can give rise to difficulties of interpretation (see, for example, *L Schuler AG* v. *Wickman Machine Tool Sales Ltd* [1974] AC 235, discussed later in this section). Secondly, the word 'condition' has been used by the law in different senses and indeed its meaning has changed over time (see generally J English 'The Nature of "Promissory Conditions"' (2021) 137 *LQR* 630). Conditions may be either contingent or promissory. A contingent condition refers to an event that neither party has promised to bring about and upon which hinges the obligation to perform. Suppose that A promises to pay B £100 on 30 January 2025 provided that they are both still alive at that date. Neither party promises to stay alive until that date but their continued survival is a condition precedent to the entitlement of B to the £100. Contingent conditions may be either conditions precedent or subsequent. The example given is of a condition precedent. By changing the facts slightly we can create a condition subsequent. Suppose that A promises to pay B £100 per year until either of them dies. In this case death is an event that operates to bring an end to the obligation to make the payment. Again, neither party has promised not to die. Death is simply the event upon which the obligation to pay comes to an end. A promissory condition, on the other hand, is a reference to an event which one party has promised to bring about or not to bring about, as the case may be.

Our difficulties do not end here. As Professor Treitel points out ((1990) 106 *LQR* 185), 'even the concept of promissory condition is used in two senses. … The first relates to the *order* of performance, while the second relates to the *conformity* of the performance rendered with that promised' (emphasis in the original). It relates to the order of performance where the obligation of one party to perform is dependent upon prior

performance by the other party of a particular obligation. So, for example, a builder may enter into a contract with a householder to carry out some building work. Payment is to be made on completion of the work. Completion of the work is a condition precedent to the obligation of the householder to pay for the work. The condition is a promissory one because the builder has promised to carry out the work and it is a condition that relates to an event, namely the completion of performance by the builder. But suppose that the builder completes the work defectively. In such a case the builder may have breached a promissory condition of the contract but here the condition relates not to the order of performance but to the quality of that performance.

The most important distinction for our purposes is between a promissory condition and a contingent condition. In this chapter we are concerned with promissory conditions. More precisely, our focus is upon conditions which relate to conformity rather than to the order of performance. Nevertheless, it is not easy to maintain the latter distinction, especially when reading nineteenth-century case-law where the judges used the phrase 'condition precedent' to refer both to the order of performance and to the conformity of that performance with the terms of the contract (see, for example, *Bentsen* v. *Taylor Sons & Co* [1893] 2 QB 274, 281). Where the condition relates to the order of performance and the condition has not been fulfilled, the party whose performance is dependent upon the fulfilment of the condition is entitled to withhold performance until such time as the condition is fulfilled, but the failure does not necessarily entitle him to bring the contract between the parties to an end. Where, however, the condition relates to the conformity of performance, and the condition has been broken, the innocent party is entitled to bring the contract between the parties to an end. So important remedial consequences can turn on the distinction between a condition
p. 768 precedent which relates to the order of performance and a condition precedent which relates ↵ to conformity of performance. The dual usage of 'condition precedent' creates unnecessary difficulties and, as Professor Treitel points out ((1990) 106 *LQR* 185, 186), our difficulties would be reduced if we reserved the phrase 'condition precedent' for use when discussing the order of performance or the event which gives rise to the obligation to perform and used the word condition to denote the term itself or the content of the obligation that has been assumed. In the remainder of this part we shall be concerned with conditions only in so far as they relate to the conformity of performance with the terms of the contract.

Not every term of a contract is a condition in this sense. A term may be classified as a condition in one of three ways, namely (i) by Parliament, (ii) by the courts, or (iii) by the contracting parties themselves. There are relatively few examples of classification of terms by Parliament. A rare example is provided by the Sale of Goods Act 1979 which classifies a number of terms implied into contracts of sale. The terms that the seller has a right to sell the goods, that the goods must correspond with description, that the goods must be of satisfactory quality, reasonably fit for their purpose and correspond with sample are all classified as conditions (Sale of Goods Act 1979, sections 12(5A), 13(2), 14(6), and 15(3), on which see 10.2). The consequence of this is that any breach of one of these obligations by a seller gives to a buyer a right to reject the goods. The right of the buyer to reject the goods has, however, been qualified by section 15A(1) of the Sale of Goods Act 1979, which provides that where the buyer would, apart from this subsection, have the right to reject goods by reason of a breach on the part of a seller of a term implied by sections 13–15 of the Sale of Goods Act 1979, but the breach is so slight that it would be unreasonable for him to reject them, then the breach is not to be treated as a breach of a condition but may be treated as a breach of a warranty. The aim of this provision is to stop buyers rejecting goods for what may be termed 'technical' reasons. An infamous example of this is provided by the case of *Arcos Ltd* v. *E A Ronaasen and Son* [1933] AC 470. The parties entered into a contract for the sale of

timber staves cut to a thickness of 1/2 inch. The purchasers alleged the sellers had breached the contract as the staves were of the wrong thickness, being 9/16 of an inch thick. The House of Lords held that the purchasers were entitled to reject the timber. Lord Atkin stated (at p. 479) that:

> [i]f the written contract specifies conditions of weight, measurement and the like, those conditions must be complied with. A ton does not mean about a ton, or a yard about a yard. Still less when you descend to minute measurements does 1/2 inch mean about 1/2 inch. If the seller wants a margin he must and in my experience does stipulate for it.

The buyers were held to be entitled to reject the timber notwithstanding the fact that their motive for trying to get out of the contract was that it had turned out to be a bad bargain for them as a result of a fall in the market price of timber. The House of Lords were aware of the reasons for the buyers' wish to get out of the contract but were of the view that they were irrelevant. Thus Lord Atkin stated (at pp. 479–480):

> No doubt there may be microscopic deviations which business men and therefore lawyers will ignore. … It will be found that most of the cases that admit any deviation from the contract are cases where there has been an excess or deficiency in quantity which the Court has considered negligible. But apart from this consideration the right view is that the conditions of the contract must be strictly performed. If a condition is not performed the buyer has a right to reject. I do not myself think that there is any difference between business men and lawyers on this matter. No doubt, in business, men
> p. 769 often find it unnecessary or inexpedient ↵ to insist on their strict legal rights. In a normal market if they get something substantially like the specified goods they may take them with or without grumbling and a claim for an allowance. But in a falling market I find that buyers are often as eager to insist on their legal rights as courts of law are ready to maintain them. No doubt at all times sellers are prepared to take a liberal view as to the rigidity of their own obligations, and possibly buyers who in turn are sellers may also dislike too much precision. But buyers are not, as far as my experience goes, inclined to think that the rights defined in the code are in excess of business needs.

Section 15A marks a distinct shift in philosophy because it restricts the right of buyers to reject the goods and, to this extent, will curtail the ability of buyers to 'insist on their strict legal rights' in a 'falling market'. But section 15A is hedged around by the requirement that the consequences of the breach must be 'slight', that it must be 'unreasonable' for the buyer to reject the goods, and it is also open to the parties to contract out of the subsection (see section 15A(2)) so that the buyer's right to reject is not constrained in this way.

Classification by the courts is rather more difficult. The basis on which the courts decide whether a term, which has not been classified by Parliament or by the parties, is a condition, a warranty, or an intermediate term is discussed at 22.3.4 after we have considered the law relating to warranties and intermediate terms.

The easiest way to create a condition is for the parties themselves to agree that a particular term is to be classified as a condition. There is no finite list of conditions in English law. It is open to the parties to classify as a condition a term which would not otherwise be so classified (that is to say the courts would not conclude that the term was a condition in the absence of express agreement to this effect by the parties). On one view,

this ability to classify as a condition a clause which would not otherwise constitute a condition can generate unreasonable results, in the sense that a trivial breach of contract may confer upon the innocent party a right to terminate further performance of the contract. It is therefore necessary for contracting parties to make clear that it was their intention to classify the term as a condition. This is not as easy as it sounds given that the word ‘condition’ is used in different senses in the law. An example of the problems that can arise is provided by the following case:

L Schuler AG v. Wickman Machine Tool Sales Ltd
[1974] AC 235, House of Lords

The facts of the case are set out in the speech of Lord Reid.

Lord Reid

My Lords, the appellants are a German company which manufactures machine tools and other engineering products. The respondents are a selling organization. On May 1, 1963, they entered into an elaborate 'distributorship agreement' under which the appellants (whom I shall call Schuler) granted to the respondents (called Sales in the agreement but whom I shall call Wickman) the sole right to sell Schuler products in territory which included the United Kingdom. These products included '*panel presses*' defined in clause 2 and general products. The panel presses are large machine tools used by motor manufacturers. Wickman were to act as agents for Schuler in selling the panel presses but were to purchase and re-sell the general products.

p. 770 ↵ Wickman's obligation with regard to the promotion of sales of Schuler products is contained in clauses 7 and 12(b) which are in the following terms:

'7. Promotion by Sales

(a) Subject to Clause 17 Sales will use its best endeavours to promote and extend the sale of Schuler products in the Territory.

(b) It shall be condition of this Agreement that:

(i) Sales shall send its representatives to visit the six firms whose names are listed in the Schedule hereto at least once in every week for the purpose of soliciting orders for panel presses;

(ii) that the same representative shall visit each firm on each occasion unless there are unavoidable reasons preventing the visit being made by that representative in which case the visit shall be made by an alternate representative and Sales will ensure that such a visit is always made by the same alternate representative.

Sales agrees to inform Schuler of the names of the representatives and alternate representatives instructed to make the visits required by this Clause.

12(b) Sales undertakes, at its expense, to look after Schuler's interest carefully and will visit Schuler customers regularly, particularly those customers principally in the motor car and electrical industries whose names are set out on the list attached hereto and initialled by the parties hereto and will give all possible technical advice to customers.'

The six firms referred to in clause 7 are six of the largest motor manufacturers in this country. The agreement was to last until the end of 1967 so that clause 7(b)(i) required Wickman to make a total of some 1400 visits during the period of the agreement. Wickman failed in their obligation. At first there were fairly extensive failures to make these visits. Then there were negotiations with a view to improving the position and Schuler have been held to have waived any right arising out of those failures. Thereafter there was an improvement but there were still a considerable number of failures.

After some correspondence Schuler wrote to Wickman in October, 1964, terminating the agreement on the ground that failure to fulfil their obligation for weekly visits to the six firms entitled Schuler to treat that failure as a repudiation of the agreement by Wickman. In accordance with clause 19 of the agreement this question was referred to arbitration. In spite of the apparently simple and limited nature of the question in dispute, proceedings before the arbitrator were elaborate and protracted. Ultimately the arbitrator issued his award in the form of a special case on Oct. 6, 1969. He held that Schuler were not entitled to terminate the agreement. This finding was reversed by Mr Justice Mocatta but restored by the Court of Appeal.

In order to explain the contention of the parties, I must now set out clause 11 of the agreement.

'11. Duration of Agreement

(a) This Agreement and the rights granted hereunder to Sales shall commence on the First day of May 1963 and shall continue in force (unless previously determined as hereinafter provided) until the 31st day of December 1967 and thereafter unless and until determined by either party upon giving to the other not less than 12 months' notice in writing to that effect expiring on the said 31st day of December 1967 or any subsequent anniversary thereof PROVIDED that Schuler or Sales may by notice in writing to the other determine this Agreement forthwith if:

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(i) the other shall have committed a material breach of its obligations hereunder and shall have failed to remedy the same within 60 days of being required in writing so to do or

(ii) the other shall cease to carry on business or shall enter into liquidation (other than a Members' voluntary liquidation for the purposes of reconstruction or amalgamation) or shall suffer the appointment of a Receiver of the whole or a material part of its undertaking; and PROVIDED FURTHER that Schuler may by notice determine this Agreement forthwith if Sales shall cease to be a wholly-owned subsidiary of Wickman Limited.

(b) The termination of this Agreement shall be without prejudice to any rights or liabilities accrued due prior to the date of termination and the terms contained herein as to discount commission or otherwise will apply to any orders placed by Sales with Schuler and accepted by Schuler before such termination.'

Wickman's main contention is that Schuler were only entitled to determine the agreement for the reasons and in the manner provided in clause 11. Schuler, on the other hand, contend that the terms of clause 7 are decisive in their favour: they say that 'It shall be a condition of this agreement' in clause 7(b) means that any breach of clause 7(b)(i) or 7(b)(ii) entitles them forthwith to terminate the agreement. So as there were admittedly breaches of clause 7(b)(i) which were not waived they were entitled to terminate the contract.

I think it right first to consider the meaning of clause 11 because, if Wickman's contention with regard to this is right, then clause 7 must be construed in light of the provisions of clause 11. Clause 11 expressly provides that the agreement 'shall continue in force (unless previously determined as hereinafter provided) until' Dec. 31, 1967. That appears to imply the corollary that the agreement shall not be determined before that date in any other way than as provided in clause 11. It is argued for Schuler that those words cannot have been intended to have that implication. In the first place Schuler say that anticipatory breach cannot be brought within the scope of clause 11 and the parties cannot have intended to exclude any remedy for an anticipatory breach. And, secondly, they say that clause 11 fails to provide any remedy for an irremediable breach however fundamental such breach might be.

There is much force in this criticism. But on any view the interrelation and consequences of the various provisions of this agreement are so ill-thought out that I am not disposed to discard the natural meaning of the words which I have quoted merely because giving to them their natural meaning implies that the draftsman has forgotten something which a better draftsman would have remembered. If the terms of clause 11 are wide enough to apply to breaches of clause 7 then I am inclined to hold that clause 7 must be read subject to the provisions of clause 11.

It appears to me that clause 11(a)(i) is intended to apply to all material breaches of the agreement which are capable of being remedied. The question then is what is meant in this context by the word 'remedy'. It could mean obviate or nullify the effect of a breach so that any damage already done is in some way made good. Or it could mean cure so that matters are put right for the future. I think that the latter is the more natural meaning. The word is commonly used in connection with diseases or ailments and they would normally be said to be remedied if they were cured although no cure can remove the past effect or result of the disease before the cure took place. And in general it can only be in a rare case that any remedy of something that has gone wrong in the performance of a continuing positive obligation will, in addition to putting it right for the future, remove or nullify damage already incurred before the remedy was applied. To restrict the meaning of remedy to cases where all
p. 772 damage ↵ past and future can be put right would leave hardly any scope at all for this clause. On the other hand, there are cases where it would seem a misuse of language to say that a breach can be remedied. For example, a breach of clause 14 by disclosure of confidential information could not be said to be remedied by a promise not to do it again.

So the question is whether a breach of Wickman's obligation under clause 7(b)(i) is capable of being remedied within the meaning of this agreement. On the one hand, failure to make one particular visit might have irremediable consequences, e.g., a valuable order might have been lost when making that visit would have obtained it. But looking at the position broadly I incline to the view that breaches of

this obligation should be held to be capable of remedy within the meaning of clause 7. Each firm had to be visited more than 200 times. If one visit is missed I think that one would normally say that making arrangements to prevent a recurrence of that breach would remedy the breach. If that is right and if clause 11 is intended to have general application then clause 7 must be read so that a breach of clause 7(b)(i) does not give to Schuler a right to rescind but only to require the breach to be remedied within 60 days under clause 11(a)(i). I do not feel at all confident that this is the true view but I would adopt it unless the provisions of clause 7 point strongly in the opposite direction, so I turn to clause 7.

Clause 7 begins with the general requirement that Wickman shall 'use its best endeavours' to promote sales of Schuler products. Then there is in clause 7(b)(i) specification of those best endeavours with regard to panel presses, and in clause 12(b) a much more general statement of what Wickman must do with regard to other Schuler products. This intention to impose a stricter obligation with regard to panel presses is borne out by the use of the word 'condition' in clause 7(b). I cannot accept Wickman's argument that condition here merely means term. It must be intended to emphasize the importance of the obligations in sub-clauses (b)(i) and (b)(ii). But what is the extent of that emphasis?

Schuler maintains that the word 'condition' has now acquired a precise legal meaning; that, particularly since the enactment of the Sale of Goods Act, 1893, its recognised meaning in English law is a term of a contract any breach of which by one party gives to the other party an immediate right to rescind the whole contract. Undoubtedly the word is frequently used in that sense. There may, indeed, be some presumption that in a formal legal document it has that meaning. But it is frequently used with a less stringent meaning. One is familiar with printed 'Conditions of Sale' incorporated into a contract, and with the words 'For conditions see back' printed on a ticket. There it simply means that the 'conditions' are terms of the contract.

In the ordinary use of the English language 'condition' has many meanings, some of which have nothing to do with agreements. In connection with an agreement it may mean a pre-condition: something which must happen or be done before the agreement can take effect. Or it may mean some state of affairs which must continue to exist if the agreement is to remain in force. The legal meaning on which Schuler relies is, I think, one which would not occur to a layman; a condition in that sense is not something which has an automatic effect. It is a term the breach of which by one party gives to the other an option either to terminate the contract or to let the contract proceed and, if he so desires, sue for damages for the breach.

Sometimes a breach of a term gives that option to the aggrieved party because it is of a fundamental character going to the root of the contract, sometimes it gives that option because the parties have chosen to stipulate that it shall have that effect. Mr Justice Blackburn said in *Bettini* v. *Gye* (1875) 1 QB 183, at p. 187: 'Parties may think some matter, apparently of very little importance, essential; and if they sufficiently express an intention to make the literal fulfilment of such a thing a condition precedent, it will be one. ...'

In the present case it is not contended that Wickman's failures to make visits amounted in themselves to fundamental breaches. What is contended is that the terms of clause 7 'sufficiently express an intention' to make any breach, however small, of the obligation to make ↵ visits a

condition so that any such breach shall entitle Schuler to rescind the whole contract if they so desire.

Schuler maintains that the use of the word 'condition' is in itself enough to establish this intention. No doubt some words used by lawyers do have a rigid inflexible meaning. But we must remember that we are seeking to discover intention as disclosed by the contract as a whole. Use of the word 'condition' is an indication—even a strong indication—of such an intention but it is by no means conclusive.

The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear.

Clause 7(b) requires that over a long period each of the six firms shall be visited every week by one or other of two named representatives. It makes no provision for Wickman being entitled to substitute others even on the death or retirement of one of the named representatives. Even if one could imply some right to do this, it makes no provision for both representatives being ill during a particular week and it makes no provision for the possibility that one or other of the firms may tell Wickman that they cannot receive Wickman's representative during a particular week. So if the parties gave any thought to the matter at all they must have realized the probability that in a few cases out of the 1400 required visits a visit as stipulated would be impossible. But if Schuler's contention is right failure to make even one visit entitles them to terminate the contract however blameless Wickman might be. This is so unreasonable that it must make me search for some other possible meaning of the contract. If none can be found then Wickman must suffer the consequences. But only if that is the only possible interpretation.

If I have to construe clause 7 standing by itself then I do find difficulty in reaching any other interpretation. But if clause 7 must be read with clause 11 the difficulty disappears. The word 'condition' would make any breach of clause 7(b), however excusable, a material breach. That would then entitle Schuler to give notice under clause 11(a)(i) requiring the breach to be remedied. There would be no point in giving such a notice if Wickman were clearly not in fault but if it were given Wickman would have no difficulty in showing that the breach had been remedied. If Wickman were at fault then on receiving such a notice they would have to amend their system so that they could show that the breach had been remedied. If they did not do that within the period of the notice then Schuler would be entitled to rescind.

In my view, that is a possible and reasonable construction of the contract and I would therefore adopt it. The contract is so obscure that I can have no confidence that this is its true meaning but for the reasons which I have given I think that it is the preferable construction. It follows that Schuler was not entitled to rescind the contract as it purported to do. So I would dismiss this appeal.

Lord Wilberforce

[dissenting]

The second legal issue which arises I would state in this way: whether it is open to the parties to a contract, not being a contract for the sale of goods, to use the word 'condition' to introduce a term, breach of which *ipso facto* entitles the other party to treat the contract as at an end.

p. 774 The proposition that this may be done has not been uncriticized. It is said that this is contrary to modern trends which focus interest rather upon the nature of the breach, allowing ↵ the innocent party to rescind or repudiate whenever the breach is fundamental, whether the clause breached is called a condition or not: that the affixing of the label 'condition' cannot pre-empt the right of the Court to estimate for itself the character of the breach. Alternatively it is said that the result contended for can only be achieved if the consequences of a breach of a 'condition' (sc., that the other party may rescind) are spelt out in the contract. …

My Lords, this approach has something to commend it: it has academic support. The use as a promissory term of 'condition' is artificial, as is that of 'warranty' in some contexts. But in my opinion this use is now too deeply embedded in English law to be uprooted by anything less than a complete revision. …

The alternative argument, in my opinion, is equally precluded by authority. It is not necessary for parties to a contract, when stipulating a condition, to spell out the consequences of breach: these are inherent in the (assumedly deliberate) use of the word. …

It is upon this legal basis, as to which I venture to think that your Lordships are agreed, that this contract must be construed. Does clause 7(b) amount to a 'condition' or a 'term'? (to call it an important or material term adds, with all respect, nothing but some intellectual assuagement). My Lords, I am clear in my own mind that it is a condition, but your Lordships take the contrary view. On a matter of construction of a particular document, to develop the reasons for a minority opinion serves no purpose. … I would only add that, for my part, to call the clause arbitrary, capricious or fantastic, or to introduce as a test of its validity the ubiquitous reasonable man (I do not know whether he is English or German) is to assume, contrary to the evidence, that both parties to this contract adopted a standard of easygoing tolerance rather than one of aggressive, insistent punctuality and efficiency. This is not an assumption I am prepared to make, nor do I think myself entitled to impose the former standard upon the parties if their words indicate, as they plainly do, the latter. I note finally, that the result of treating the clause, so careful and specific in its requirements, as a term is, in effect, to deprive the appellants of any remedy in respect of admitted and by no means minimal breaches. The arbitrator's finding that these breaches were not 'material' was not, in my opinion, justified in law in the face of the parties' own characterization of them in their document: indeed the fact that he was able to do so, and so leave the appellants without remedy, argues strongly that the legal basis of his finding—that clause 7(b) was merely a term—is unsound.

I would allow this appeal.

Lord Morris of Borth-y-Gest, ***Lord Simon of Glaisdale***, and ***Lord Kilbrandon*** delivered speeches dismissing the appeal.

Commentary

It is of the utmost importance to pay careful attention to the details of clauses 7, 11, and 12(b). One of the problems with this case is that the contract was badly drafted and the majority used this fact in order to support their construction of the contract. Badly drafted contracts are not an unknown phenomenon. The particular problem which arose on the facts of this case was the relationship between clauses 7 and 11. First, let us examine the clauses separately.

Clause 7(b), standing alone, does appear to create a condition. It is expressly so described. None of their Lordships doubted that the parties were entitled, by the use of clear words, to elevate clause 7(b) to the status of a condition. Thus Lord Kilbrandon stated (at p. 271) that 'it is undoubted that parties may, if they so desire, make any term whatever, unimportant as it might seem to be to an observer relying upon *a priori* reasoning of
p. 775 his own, a condition ↵ giving entitlement, on its breach, to rescission at the instance of the party aggrieved'. Clause 7(b) seems clear enough in this respect. Thus, had there been no clause 11 in the contract, it is suggested that it is likely that Schuler would have been entitled to terminate the contract pursuant to clause 7(b).

Clause 11, on the other hand, did not confer an immediate right to terminate. Rather, it required Schuler to give notice to Wickman and then gave Wickman a period of time in which to remedy the breach. This is a common form of clause found in commercial contracts as it strikes a balance between the competing interests of the parties by giving the defaulting party an opportunity to make good his breach but at the same time it protects the position of the innocent party by giving him an express right to terminate the contract in the event that the breach is not made good.

The problem in this case is that the events which happened appeared to fall within both clauses 7(b) and 11 but the remedial consequences appeared to differ depending upon which clause was held to govern the facts of the case. If clause 7(b) prevailed then Schuler appeared to be entitled to terminate immediately, while if clause 11 prevailed then Schuler's right to terminate could only be exercised after the expiry of the notice period without the breach being remedied. What, then, was the relationship between the two clauses? As Lord Reid stated, the inter-relationship between them was 'ill-thought out'.

Two issues arose here. The first was whether or not the events fell within the scope of clause 11 at all. There was a good argument to the effect that they did not. The breach by Wickman was a matter of past historical fact and it can be argued that it could not be 'remedied' as required by clause 11. Clauses such as clause 11 are relatively straightforward where the breach takes the form of delivery of defective goods. In such a case the breach can be remedied by the delivery of goods which conform with the terms of the contract. But it is, at first sight, not altogether easy to see how a breach of clause 7(b) could be 'remedied'. One cannot wind the clock back and make the missed visit. Lord Reid, however, looked at the position 'broadly' and concluded that the breach could be remedied by making arrangements to prevent a recurrence of the breach. When considering whether or not a breach is remediable, English law adopts a practical approach (*Force India Formula One Team Ltd* v. *Etihad Airways PJSC* [2010] EWCA Civ 1051, [2011] ETMR 10), albeit the construction adopted was a rather benevolent one, at least as far as Wickman was concerned.

This led on to the second issue which was that, given that the events did appear to fall within the scope of both clauses, what remedial consequences flowed from this? Lord Reid concluded that breach of clause 7(b) did not confer upon Schuler an immediate right to terminate the contract, irrespective of the consequences of the breach. Rather, a breach of clause 7(b) was automatically a material breach for the purposes of clause 11 and thus gave to Schuler the right to invoke the machinery of clause 11. In this way, clause 7(b) did not become redundant. Its role was to assist in the definition of a material breach for the purposes of clause 11 and not to confer upon Schuler an immediate right of termination.

In many ways Wickman were rather fortunate. The key fact appears to be that the contract was badly drafted and the majority gave to Wickman the benefit of the doubt that arose in relation to the meaning of the word 'condition' in clause 7(b). There is considerable force in Lord Wilberforce's observation that the majority construction assumed, contrary to the evidence, that the parties had 'adopted a standard of easygoing tolerance rather than one of aggressive, insistent punctuality and efficiency'.

The effect of the decision was to leave Schuler exposed to a claim for damages by Wickman because they were held to have wrongfully terminated the contract between the parties. While Schuler would have a claim
p. 776 against Wickman for the losses that they suffered as a ↵ result of Wickman's failure to make the scheduled visits, it is unlikely that such a claim would provide them with much consolation because of the probable difficulty in proving that they had suffered any loss as a result of Wickman's failure to make a particular visit. Does this not suggest that the intention of Schuler was in fact to give themselves a right to terminate the contract in order to avoid these problems of proving that they had suffered loss as a result of the breach?

It is important to see this case in its context. It is not authority for the proposition that the word 'condition' cannot mean a condition in the sense that a breach of it gives rise to a right to terminate. The conclusion of the House of Lords was influenced heavily by the fact that the contract was badly drafted and by the difficulties caused by the relationship between clauses 7 and 11. The word 'condition' in a well-drafted contract should generally suffice to demonstrate that what is intended is that a breach of the clause should give rise to the right to terminate. An alternative is to avoid the use of the word 'condition' and use the phrase 'of the essence' instead. The efficacy of this phrase is demonstrated by the following case:

Lombard North Central plc v. Butterworth
[1987] QB 527, Court of Appeal

The plaintiff finance company leased a computer to the defendant for a period of five years. The contract stipulated, in clause 2(a), that time was of the essence with regard to payment of the quarterly rentals. Clause 5 stated that failure to make due and punctual payment entitled the plaintiffs to terminate the contract, while clause 6 provided that, on termination, the plaintiffs were entitled to recover all arrears of instalments and all future instalments that would have fallen due had the agreement not been terminated. The defendant quickly fell into arrears and, after giving due notice, the plaintiffs repossessed the computers. The plaintiffs brought an action against the defendant in order to recover the arrears as at the date of the termination and also the future instalments payable under the contract. The claim was brought both under clause 6 of the contract and for damages at common law. The Court of Appeal held that clause 6 was unenforceable as a penalty clause but that the plaintiffs were entitled to recover the arrears and the future instalments as damages at common law following upon the defendant's repudiatory breach of contract.

Mustill LJ

The hiring agreement contained the following material provisions:

'The lessee … agrees:

2. (a) to pay to the lessor: (i) punctually and without previous demand the rentals set out in Part 3 of the Schedule together with value added tax thereon punctual payment of each which shall be of the essence of this lease:. …

5. In the event that (a) the lessee shall (i) make default in the due and punctual payment of any of the rentals or of any sum of money payable to the lessor hereunder or any part thereof … then upon the happening of such event … the lessor's consent to the lessee's possession of the goods shall determine forthwith without any notice being given by the lessor, and the lessor may terminate this lease either by notice in writing, or by taking possession of the goods. …

p. 777

6. In the event that the lessor's consent to the lessee's possession of the goods shall be determined under clause 5 hereof (a) the lessee shall pay forthwith to the lessor (i) all arrears of rentals; (ii) all further rentals which would but for the determination of the lessor's consent to the lessee's possession of the goods have fallen due to the end of the fixed period of this lease less a discount thereon for accelerated payment at the rate of 5 per cent per annum; and (iii) damages for any breach of this lease and all expenses and costs incurred by the lessor in retaking possession of the goods and/or enforcing the lessor's rights under this lease together with such value added tax as shall be legally payable thereon; (b) the lessor shall be entitled to exercise any one or more of the rights and remedies provided for in clause 5 and sub-clause (a) of this clause and the determination of the lessor's consent to the lessee's possession of the goods shall not affect or prejudice such rights and remedies and the lessee shall be and remain liable to perform all outstanding liabilities under this lease notwithstanding that the lessor may have taken possession of the goods and/or exercised one or more of the rights and remedies of the lessor; (c) any right or remedy to which the lessor is or may become entitled under this lease or in consequence of the lessee's conduct may be enforced from time to time separately or concurrently with any other right or remedy given by this lease or now or hereinafter provided for or arising by operation of law so that such rights and remedies are not exclusive of the other or others of them but are cumulative.' …

Three issues were canvassed before us …

[He set out the first two issues and continued]

3. Does the provision in clause 2(a) of the agreement that time for payment of the instalments was of the essence have the effect of making the defendant's late payment of the outstanding instalments a repudiatory breach? …

I would, however, wish to deal with the third point. … The reason why I am impelled to hold that the plaintiffs' contentions are well-founded can most conveniently be set out in a series of propositions.

1. Where a breach goes to the root of the contract, the injured party may elect to put an end to the contract. Thereupon both sides are relieved from those obligations which remain unperformed.
2. If he does so elect, the injured party is entitled to compensation for (a) any breaches which occurred before the contract was terminated and (b) the loss of his opportunity to receive performance of the promisor's outstanding obligations.
3. Certain categories of obligation, often called conditions, have the property that any breach of them is treated as going to the root of the contract. Upon the occurrence of any breach of condition, the injured party can elect to terminate and claim damages, whatever the gravity of the breach.
4. It is possible by express provision in the contract to make a term a condition, even if it would not be so in the absence of such a provision.
5. A stipulation that time is of the essence, in relation to a particular contractual term, denotes that timely performance is a condition of the contract. The consequence is that delay in performance is treated as going to the root of the contract, without regard to the magnitude of the breach.
6. It follows that where a promisor fails to give timely performance of an obligation in respect of which time is expressly stated to be of the essence, the injured party may elect to terminate and recover damages in respect of the promisor's outstanding obligations, without regard to the magnitude of the breach.

p. 778

7. A term of the contract prescribing what damages are to be recoverable when a contract is terminated for a breach of condition is open to being struck down as a penalty, if it is not a genuine covenanted pre-estimate of the damage, in the same way as a clause which prescribes the measure for any other type of breach. No doubt the position is the same where the clause is ranked as a condition by virtue of an express provision in the contract.
8. A clause expressly assigning a particular obligation to the category of condition is not a clause which purports to fix the damages for breaches of the obligation, and is not subject to the law governing penalty clauses.
9. Thus, although in the present case clause 6 is to be struck down as a penalty, clause 2(a)(i) remains enforceable. The plaintiffs were entitled to terminate the contract independently of clause 5, and to recover damages for loss of the future instalments. This loss was correctly computed by the master.

These bare propositions call for comment. The first three are uncontroversial. The fourth was not, I believe, challenged before us, but I would in any event regard it as indisputable. That there exists a category of term, in respect of which any breach whether large or small entitles the promisee to treat himself as discharged, has never been doubted in modern times, and the fact that a term may be assigned to this category by express agreement has been taken for granted for at least a century. ...

The fifth proposition is a matter of terminology, and has been more taken for granted than discussed. ...

> The sixth proposition is a combination of the first five. There appears to be no direct authority for it, and it is right to say that most of the cases on the significance of time being of the essence have been concerned with the right of the injured party to be discharged, rather than the principles upon which his damages are to be computed. Nevertheless, it is axiomatic that a person who establishes a breach of condition can terminate and claim damages for loss of the bargain, and I know of no authority which suggests that the position is any different where late performance is made into a breach of condition by a stipulation that time is of the essence. ...
>
> I return to the propositions stated above. The seventh is uncontroversial, and I would add only the rider that when deciding upon the penal nature of a clause which prescribes a measure of recovery for damages resulting from a termination founded upon a breach of condition, the comparison should be with the common law measure: namely, with the loss to the promisee resulting from the loss of his bargain. If the contract permits him to treat the contract as repudiated, the fact that the breach is comparatively minor should in my view play no part in the equation.
>
> I believe that the real controversy in the present case centres upon the eighth proposition. ... I acknowledge, of course, that by promoting a term into the category where all breaches are ranked as breaches of condition, the parties indirectly bring about a situation where, for breaches which are relatively small, the injured party is enabled to recover damages as on the loss of the bargain, whereas without the stipulation his measure of recovery would be different. But I am unable to accept that this permits the court to strike down as a penalty the clause which brings about this promotion. To do so would be to reverse the current of more than 100 years' doctrine, which permits the parties to treat as a condition something which would not otherwise be so. I am not prepared to take this step. ...
>
> For these reasons I conclude that the plaintiffs are entitled to retain the damages which the master
p. 779 has awarded. This is not a result which I view with much satisfaction: partly because ↵ the plaintiffs have achieved by one means a result which the law of penalties might have prevented them from achieving by another, and partly because if the line of argument under clause 2 had been developed from the outset, the defendant might have found an answer based on waiver which the court is now precluded from assessing, for want of the necessary facts. Nevertheless, it is the answer to which, in my view, the authorities clearly point. Accordingly, I would dismiss the appeal.

Nicholls LJ

> Thus far I have reached my conclusion regarding repudiation [his conclusion being that the facts did not justify a finding of repudiation] without giving any weight or effect to the provision in clause 2(a) of the lease, that punctual payment of each rental instalment was of the essence of the lease.
>
> I must now consider a further submission advanced by the plaintiffs that, time of payment having been made of the essence by this provision, it was open to the plaintiffs, once default in payment of any one instalment on the due date had occurred, to treat the agreement as having been repudiated by the defendant, and claim damages for loss of the whole transaction, even though in the absence of this provision such a default would not have had that consequence. On this, the question which

> arises is one of construction: on the true construction of the clause, did the 'time of the essence' provision have the effect submitted by the plaintiffs? In my view, the answer to that question is 'Yes'. The provision in clause 2(a) has to be read and construed in conjunction with the other provisions in the agreement, including clauses 5 and 6. So read, it is to be noted that failure to pay any instalment triggers a right for the plaintiffs to terminate the agreement by re-taking possession of the goods (clause 5), with the expressed consequence that the defendant becomes liable to make payments which assume that the defendant is liable to make good to the plaintiffs the loss by them of the whole transaction (clause 6). Given that context, the 'time of the essence' provision seems to me to be intended to bring about the result that default in punctual payment is to be regarded (to use a once fashionable term) as a breach going to the root of the contract and, hence, as giving rise to the consequences in damages attendant upon such a breach. I am unable to see what other purpose the 'time of the essence' provision in clause 2(a) can serve or was intended to serve or what other construction can fairly be ascribed to it.
>
> If that construction of the agreement is correct then, as at present advised, it seems to me that the legal consequence is that the plaintiffs are entitled to claim damages for loss of the whole transaction. I say 'as at present advised', because on this no argument to the contrary was advanced on behalf of the defendant, and Mustill LJ's illuminating analysis leaves no escape from the conclusion that parties are free to agree that a particular provision in their contract shall be a condition such that a breach of it is to be regarded as going to the root of the contract and entitling the innocent party (1) to accept that breach as a repudiation, and (2) to be paid damages calculated upon that footing.
>
> I have to say that I view the impact of that principle in this case with considerable dissatisfaction, for this reason … the principle applied in *Financings Ltd* v. *Baldock* [1963] 2 QB 104 was that when an owner determines a hire purchase agreement in exercise of a power so to do given him by the agreement on non-payment of instalments, he can recover damages for any breaches up to the date of termination but (in the absence of repudiation) not thereafter. There is no practical difference between (1) an agreement containing such a power and (2) an agreement containing a provision to the effect that time for payment of each instalment is of the essence, so that any breach will go to the root of the contract. The difference between these two agreements is one of drafting form, and
>
> **p. 780**
>
> wholly without substance. Yet under an ↵ agreement drafted in the first form, the owner's damages claim arising upon his exercise of the power of termination is confined to damages for breaches up to the date of termination, whereas under an agreement drafted in the second form the owner's damages claim, arising upon his acceptance of an identical breach as a repudiation of the agreement, will extend to damages for loss of the whole transaction.
>
> Nevertheless, as at present advised, I can see no escape from the conclusion that such is the present state of the law. This conclusion emasculates the decision in *Financings Ltd* v. *Baldock*, for it means that a skilled draftsman can easily side-step the effect of that decision. Indeed, that is what has occurred here.

> I add only that I can see nothing in *Financings Ltd* v. *Baldock* itself that would assist the defendant on this point. Each member of the court emphasised that in that case there had been no repudiation of the agreement, and Diplock LJ observed, at p. 118, that in that case time of payment was not of the essence of the contract and, at p. 120, that 'in the absence of any express provision to the contrary in the contract' the failure to pay two instalments on the due date did not of themselves go to the root of the contract.
>
> For these reasons, I too would dismiss this appeal.
>
> ***Lawton LJ*** concurred.

Commentary

The result of this case is particularly striking because the finance company first attempted to recover the arrears as at the date of the termination and the future instalments (subject to a discount for accelerated receipt) under clause 6, but it was held that they could not do so because clause 6 was a penalty clause (on which see further 23.11). But they were able to recover the same sum by way of an action for damages, using clause 2(a) to demonstrate that the defendant had repudiated the contract. Thus the plaintiffs were able to obtain by one method (a common law claim for damages) something which they were unable to obtain by another method (a claim brought under clause 6 of the contract).

Lombard should be contrasted with the earlier decision of the Court of Appeal in *Financings Ltd* v. *Baldock* [1963] 2 QB 104, where a hirer failed to pay the first two instalments on the hire purchase of a lorry. The contract stipulated that:

> should the hirer fail to pay the initial instalments … or any subsequent instalment … within ten days after the same shall have become due or if he shall die … the owner may … by written notice … forthwith and for all purposes terminate the hiring.

The Court of Appeal held that this clause gave the owners the right to terminate the contract, but that they were only entitled to recover by way of damages the unpaid instalments as at the date of the termination of the contract (and not the loss of the future instalments). The vital difference between *Baldock* and *Lombard* is that clause 2(a) of the contract in *Lombard* stated that time of payment was of the essence of the contract. The effect of this was to turn a failure to pay into a breach of a condition so that the breach was repudiatory and the plaintiffs were in consequence entitled to recover loss of bargain damages. By contrast, the owners in *Baldock* were unable to demonstrate that the defendant had repudiated the contract. Breach of the clause relating to payment was not in itself repudiatory, and they could not show that the hirer had evinced an intention no longer to be bound by the terms of the contract. This being the case, the owners were only
p. 781 entitled to recover the loss of rentals as ↵ at the date of termination. Thus elevation of a term to the status of a condition can be important not only in relation to the right to terminate but also for the damages recoverable upon the termination of the contract.

The decision in *Lombard* has its critics (see GH Treitel, 'Damages on Rescission for Breach of Contract' [1987] *LMCLQ* 143 and W Bojczuk, 'When is a Condition not a Condition?' [1987] *JBL* 353) and its supporters (B Opeskin, 'Damages for Breach of Contract Terminated under Express Terms' (1990) 106 *LQR* 293). Professor Treitel argues that it is only where the breach is repudiatory under the general law, that is apart from the express agreement of the parties, that the owner is entitled to recover loss of bargain damages. In his view, loss of bargain damages should not be available where the owner 'rescinds for a minor breach under an express contractual provision entitling him to do so'. The difficulty with this argument is that the law does not generally distinguish between a condition that arises under the general law and a condition which has been created by an express provision in the contract (see *Stellar Chartering and Brokerage Inc* v. *Efibanca-Ente Finanziario Interbancario Spa (The Span Terza, No 2)* [1984] 1 WLR 27, 33). It is therefore suggested that *Lombard*, harsh though it appears, was correctly decided.

Lombard further demonstrates that parties are free to classify as a condition a term which would not otherwise amount to a condition. Freedom of contract here prevails. This stands in contrast with the approach operative in some other jurisdictions where the question whether or not a breach is sufficiently fundamental to entitle a party to terminate is a question for the law (or the courts) and not for the parties themselves.

When considering the policy issues at stake in *Lombard* it is important to remember that the Consumer Credit Act 1974 (as amended) enacts substantial protection for individuals who enter into hire purchase and other credit agreements. A consumer who falls within the scope of this Act receives considerable protection; in particular, the Act places substantial limits on the ability of the owner to retake possession of the goods. The problem case is the one, such as *Lombard*, which falls outside the scope of the Consumer Credit Act 1974 because, once one is outside the scope of the Act, the unfortunate hirer is left exposed to the chill winds of the common law.

22.3.2 Breach of a Warranty

A warranty is a lesser, subsidiary term of the contract. Breach of a warranty gives rise to a claim for damages but it does not, it is suggested, give an innocent party the right to terminate further performance of the contract. The Sale of Goods Act 1979 classifies certain obligations of a seller of goods as warranties (see 10.2). Thus the term that the goods are free from any charge or encumbrance not disclosed or known to the buyer before the contract is made and that the buyer will enjoy quiet possession of the goods except in so far as it may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance so disclosed or known is classified as a warranty (section 12(5A)).

The view that breach of a warranty cannot give rise to a right to terminate further performance of the contract has been challenged by Professor Treitel who maintains (*Some Landmarks of Twentieth Century Contract Law* (Oxford University Press, 2002), p. 124) that:

> there is the possibility that the breach of a term which is a warranty because it is … 'collateral to the main purpose of the contract' may, in exceptional circumstances, have unexpectedly serious effects; and there is some support in the judgment of Ormrod LJ in *The Hansa Nord* ↵ for the view that, if a seller's breach of warranty does have such effects, or if the breach is one which is deliberate in the sense that the seller could easily put it right but refuses to do so, then the buyer could reject. It is quite hard to think of a realistic sale of goods example since the ambit of the statutorily implied terms as to quality or fitness for a particular purpose is now so wide and since all these terms are classified by the Sale of Goods Act as conditions. Perhaps we might take the case of a contract for the hire of a car in which the owner 'warranted' to make the car available at 8 am on Derby Day and then the previous day told the hirer that it would not be available until 8 pm. In all probability, the court would conclude that the word 'warranty' was not here used in its technical sense but meant 'condition'. But if for some reason the drafting precluded this line of reasoning, the court might well hold that in such a case it was not appropriate to require the hirer to pay the agreed hire and then to claim damages; and that the breach, though one of 'warranty', justified his immediate cancellation of the contract.

p. 782

The problem which concerns Professor Treitel is the case where the breach has serious consequences for the innocent party but the term broken has been classified by the parties as a 'warranty'. In many ways, this is the flip-side of *Schuler* v. *Wickman* (22.3.1). If the court is not satisfied that the word 'warranty' was used in its technical sense, then use of the word 'warranty' should not act as a barrier to a party terminating the contract where the consequences of the breach are serious. On the other hand, in the case where the parties do use the word 'warranty' in its technical sense, then it is submitted that there should be no right to terminate. Just as it is open to the parties to agree that any term is a condition (in its technical sense) so it should be open to the parties to agree that any term is a warranty (in its technical sense) and, in such a case, the breach of the warranty should not give rise to a right to terminate but only a right to recover damages. However, the courts are likely to be slow to conclude that the parties intended to use the word 'warranty' in this technical sense. This being the case, unless the term states clearly that any breach, regardless of the seriousness of the consequences, will never entitle the innocent party to terminate the contract, it is unlikely that the courts will conclude that the term is a warranty in its technical sense (*Sports Connection Pte Ltd* v. *Deuter Sports GmbH* [2009] SGCA 22, [2009] 3 SLR 883). If the term is not a warranty it is likely to be treated as an intermediate or innominate term and the entitlement to terminate will depend largely upon the consequences of the breach (*RDC Concrete Pte Ltd* v. *Sato Kogyo (S) Pte Ltd* [2007] 4 SLR 413). It is to intermediate terms that we now turn.

22.3.3 Breach of an Intermediate Term

The origin of intermediate terms (as we know them today) is to be found in the decision of the Court of Appeal in *Hong Kong Fir* v. *Kawasaki Kisen Kaisha* [1962] 2 QB 26. The origin of this category may, perhaps, be doubtful but there is no doubt that the category of intermediate or innominate terms exists and that they are rather prevalent. The main contribution which they have made is that they give to the courts a degree of remedial flexibility in that they can decide whether or not the breach was repudiatory by having regard to the consequences of the breach rather than the nature of the term broken. The difficulty which the existence of

intermediate terms poses for legal advisers is that they give rise to a degree of uncertainty in that it can be very difficult to predict whether or not the judge will conclude that the breach was sufficiently serious to entitle the innocent party to terminate the contract.

p. 783 ***Hong Kong Fir Shipping Co Ltd v. Kawasaki Kisen Kaisha Ltd***
[1962] 2 QB 26, Court of Appeal

By a time charter (that is to say, the hire of a ship for a period of time) the shipowners agreed to deliver the vessel, the *Hong Kong Fir*, to the charterers for a period of 24 months. Clause 1 of the time charter stated that the vessel was 'in every way fitted for ordinary cargo service' and the shipowners further undertook in clause 3 to 'maintain her in a thoroughly efficient state in hull and machinery during service'. Hire was not, however, payable in respect of any period exceeding 24 hours lost as a result of the vessel undergoing repairs. Such 'off-hire time' was, at the charterers' option, to be added to the hire period.

The ship was delivered to the charterers on 13 February 1957 and set sail for Virginia. At the date of delivery the ship was unseaworthy because her engine rooms were under-manned and the engine-room staff were incompetent. The ship immediately set sail for Osaka. She arrived in Osaka on 25 May 1957 but, in that period, had been off-hire for some 30 days because of the need to carry out repairs to her engine. When she arrived in Osaka it was discovered that the ship would be off-hire for a further period of 15 weeks in order to carry out repairs to the engine. During the period between February and June 1957 there was a considerable fall in the freight market (this meant that the charter was no longer an attractive one from the perspective of the charterers because they could obtain a ship at a lower rate of hire elsewhere). On 6 June 1957 (and again on 11 September 1957) the charterers wrote to the shipowners to inform them that they were terminating the charter and seeking damages for breach of contract. On 13 September 1957 the shipowners formally accepted that the contract was at an end. The shipowners then brought an action against the charterers in which they claimed damages on the ground that the charterers had wrongfully repudiated the contract.

At first instance Salmon J held that the ship was unseaworthy but that the charterers were not entitled to terminate the charter on account of the unseaworthiness of the ship. The charterers appealed to the Court of Appeal but their appeal was dismissed on the ground that the breach of contract by the shipowners was not sufficiently serious to entitle the charterers to terminate further performance of the contract.

Sellers LJ

[stated the facts and continued]

By clause 1 of the charterparty the shipowners contracted to deliver the vessel at Liverpool 'she being in every way fitted for ordinary cargo service'. She was not fit for ordinary cargo service when delivered because the engine room staff was incompetent and inadequate and this became apparent as the voyage proceeded. It is commonplace language to say that the vessel was unseaworthy by reason of this inefficiency in the engine room. Ships have been held to be unseaworthy in a variety of ways and those who have been put to loss by reason thereof (in the absence of any protecting clause in favour of a shipowner) have been able to recover damages as for a breach of warranty. It would be

unthinkable that all the relatively trivial matters which have been held to be unseaworthiness could be regarded as conditions of the contract or conditions precedent to a charterer's liability and justify in themselves a cancellation or refusal to perform on the part of the charterer. ...

[He considered the authorities and continued]

In my judgment authority over many decades and reason support the conclusion in this case that
p. 784 there was no breach of a condition which entitled the charterers to accept it as a ↵ repudiation and to withdraw from the charter. It was not contended that the maintenance clause is so fundamental a matter as to amount to a condition of the contract. It is a warranty which sounds in damages.

Upjohn LJ

Why is this apparently basic and underlying condition of seaworthiness not, in fact, treated as a condition? It is for the simple reason that the seaworthiness clause is breached by the slightest failure to be fitted 'in every way' for service. Thus ... if a nail is missing from one of the timbers of a wooden vessel or if proper medical supplies or two anchors are not on board at the time of sailing, the owners are in breach of the seaworthiness stipulation. It is contrary to common sense to suppose that in such circumstances the parties contemplated that the charterer should at once be entitled to treat the contract as at an end for such trifling breaches

...

It is open to the parties to a contract to make it clear either expressly or by necessary implication that a particular stipulation is to be regarded as a condition which goes to the root of the contract, so that it is clear that the parties contemplate that any breach of it entitles the other party at once to treat the contract as at an end. That matter has to be determined as a question of the proper interpretation of the contract. Bramwell B in *Tarrabochia* v. *Hickie* 1 H & N 183 has warned against the dangers of too ready an implication of such a condition. ... Where, however, upon the true construction of the contract, the parties have not made a particular stipulation a condition, it would in my judgment be unsound and misleading to conclude that, being a warranty, damages is necessarily a sufficient remedy.

In my judgment the remedies open to the innocent party for breach of a stipulation which is not a condition strictly so called, depend entirely upon the nature of the breach and its foreseeable consequences. Breaches of stipulation fall, naturally, into two classes. First there is the case where the owner by his conduct indicates that he considers himself no longer bound to perform his part of the contract; in that case, of course, the charterer may accept the repudiation and treat the contract as at an end. The second class of case is, of course, the more usual one and that is where, due to misfortune such as the perils of the sea, engine failures, incompetence of the crew and so on, the owner is unable to perform a particular stipulation precisely in accordance with the terms of the contract try he ever so hard to remedy it. In that case the question to be answered is, does the breach of the stipulation go

so much to the root of the contract that it makes further commercial performance of the contract impossible, or in other words is the whole contract frustrated? If yea, the innocent party may treat the contract as at an end. If nay, his claim sounds in damages only.

If I have correctly stated the principles, then as the stipulation as to the seaworthiness is not a condition in the strict sense the question to be answered is, did the initial unseaworthiness as found by the judge, and from which there has been no appeal, go so much to the root of the contract that the charterers were then and there entitled to treat the charterparty as at an end? The only unseaworthiness alleged, serious though it was, was the insufficiency and incompetence of the crew, but that surely cannot be treated as going to the root of the contract for the parties must have contemplated that in such an event the crew could be changed and augmented. In my judgment, on this part of his case [counsel for the charterers] necessarily fails.

Diplock LJ

Every synallagmatic contract contains in it the seeds of the problem: in what event will a party be relieved of his undertaking to do that which he has agreed to do but has not yet done? The contract
p. 785 may itself expressly define some of these events, as in the cancellation ↵ clause in a charterparty; but, human prescience being limited, it seldom does so exhaustively and often fails to do so at all. In some classes of contracts such as sale of goods. ... Parliament has defined by statute some of the events not provided for expressly in individual contracts of that class; but where an event occurs the occurrence of which neither the parties nor Parliament have expressly stated will discharge one of the parties from further performance of his undertakings, it is for the court to determine whether the event has this effect or not.

The test whether an event has this effect or not has been stated in a number of metaphors all of which I think amount to the same thing: does the occurrence of the event deprive the party who has further undertakings still 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?

This test is applicable whether or not the event occurs as a result of the default of one of the parties to the contract, but the consequences of the event are different in the two cases. Where the event occurs as a result of the default of one party, the party in default cannot rely upon it as relieving himself of the performance of any further undertakings on his part, and the innocent party, although entitled to, need not treat the event as relieving him of the further performance of his own undertakings. This is only a specific application of the fundamental legal and moral rule that a man should not be allowed to take advantage of his own wrong. Where the event occurs as a result of the default of neither party, each is relieved of the further performance of his own undertakings, and their rights in respect of undertakings previously performed are now regulated by the Law Reform (Frustrated Contracts) Act, 1943.

> This branch of the common law has reached its present stage by the normal process of historical growth, and the fallacy in counsel for the charterers' contention that a different test is applicable when the event occurs as a result of the default of one party from that applicable in cases of frustration where the event occurs as a result of the default of neither party lies, in my view, from a failure to view the cases in their historical context. The problem: in what event will a party to a contract be relieved of his undertaking to do that which he has agreed to do but has not yet done? has exercised the English courts for centuries … but until the rigour of the rule in *Paradine* v. *Jane* (1647) Aleyn 26 was mitigated in the middle of the last century by the classic judgments of Blackburn J in *Taylor* v. *Caldwell* (1863) 3 B & S 826 and Bramwell B in *Jackson* v. *Union Marine Insurance Co Ltd* (1874) LR 10 CP 125 it was in general only events resulting from one party's failure to perform his contractual obligations which were regarded as capable of relieving the other party from continuing to perform that which he had undertaken to do. …
>
> [He considered the historical development of the law and continued]
>
> Once it is appreciated that it is the event and not the fact that the event is a result of a breach of contract which relieves the party not in default of further performance of his obligations, two consequences follow. (1) The test whether the event relied upon has this consequence is the same whether the event is the result of the other party's breach of contract or not, as Devlin J pointed out in *Universal Cargo Carriers Corporation* v. *Citati* [1957] 2 QB 401, 434. (2) The question whether an event which is the result of the other party's breach of contract has this consequence cannot be answered by treating all contractual undertakings as falling into one of two separate categories: 'conditions' the breach of which gives rise to an event which relieves the party not in default of further performance of his obligations, and 'warranties' the breach of which does not give rise to such an event.
>
> Lawyers tend to speak of this classification as if it were comprehensive, partly for … historical reasons … and partly because Parliament itself adopted it in the Sale of Goods Act, 1893, as respects a
> p. 786 number of implied terms in contracts for the sale of goods and has in that ↵ Act used the expressions 'condition' and 'warranty' in that meaning. But it is by no means true of contractual undertakings in general at common law.
>
> No doubt there are many simple contractual undertakings, sometimes express but more often because of their very simplicity ('It goes without saying') to be implied, of which it can be predicated that every breach of such an undertaking must give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract and such a stipulation, unless the parties have agreed that breach of it shall not entitle the non-defaulting party to treat the contract as repudiated, is a 'condition'. So too there may be other simple contractual undertakings of which it can be predicated that no breach can give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract; and such a stipulation, unless the parties have agreed that breach of it shall entitle the non-defaulting party to treat the contract as repudiated, is a 'warranty'.

> There are, however, many contractual undertakings of a more complex character which cannot be categorised as being 'conditions' or 'warranties', if the late nineteenth-century meaning adopted in the Sale of Goods Act 1893, and used by Bowen LJ in *Bentsen* v. *Taylor, Sons & Co* [1893] 2 QB 274, 280 be given to those terms. Of such undertakings all that can be predicated is that some breaches will and others will not give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract; and the legal consequences of a breach of such an undertaking, unless provided for expressly in the contract, depend upon the nature of the event to which the breach gives rise and do not follow automatically from a prior classification of the undertaking as a 'condition' or a 'warranty'. For instance, to take Bramwell B's example in *Jackson* v. *Union Marine Insurance Co Ltd* LR 10 CP 125, 142 itself, breach of an undertaking by a shipowner to sail with all possible dispatch to a named port does not necessarily relieve the charterer of further performance of his obligation under the charterparty, but if the breach is so prolonged that the contemplated voyage is frustrated it does have this effect. …
>
> As my brethren have already pointed out, the shipowners' undertaking to tender a seaworthy ship has, as a result of numerous decisions as to what can amount to 'unseaworthiness', become one of the most complex of contractual undertakings. It embraces obligations with respect to every part of the hull and machinery, stores and equipment and the crew itself. It can be broken by the presence of trivial defects easily and rapidly remediable as well as by defects which must inevitably result in a total loss of the vessel. Consequently the problem in this case is, in my view, neither solved nor soluble by debating whether the shipowner's express or implied undertaking to tender a seaworthy ship is a 'condition' or a 'warranty'. It is like so many other contractual terms an undertaking one breach of which may give rise to an event which relieves the charterer of further performance of his undertakings if he so elects and another breach of which may not give rise to such an event but entitle him only to monetary compensation in the form of damages. It is, with all deference to counsel for the charterers' skilful argument, by no means surprising that among the many hundreds of previous cases about the shipowner's undertaking to deliver a seaworthy ship there is none where it was found profitable to discuss in the judgments the question whether that undertaking is a 'condition' or a 'warranty'; for the true answer, as I have already indicated, is that it is neither, but one of that large class of contractual undertakings one breach of which may have the same effect as that ascribed to a breach of 'condition' under the Sale of Goods Act, 1893, and a different breach of which may have only the same effect as that ascribed to a breach of 'warranty' under that Act.
>
> p. 787 What the learned judge had to do in the present case, as in any other case where one party to a contract relies upon a breach by the other party as giving him a right to elect to rescind ↵ the contract, and the contract itself makes no express provision as to this, was to look at the events which had occurred as a result of the breach at the time at which the charterers purported to rescind the charterparty and to decide whether the occurrence of those events deprived the charterers of substantially the whole benefit which it was the intention of the parties as expressed in the charterparty that the charterers should obtain from the further performance of their own contractual undertakings. …

> The question which the learned judge had to ask himself was, as he rightly decided, whether or not at the date when the charterers purported to rescind the contract, namely, June 6, 1957, or when the shipowners purported to accept such rescission, namely, August 8, 1957, the delay which had already occurred as a result of the incompetence of the engine-room staff, and the delay which was likely to occur in repairing the engines of the vessel and the conduct of the shipowners by that date in taking steps to remedy these two matters, were, 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 vessel under the charterparty.
>
> In my view, in his judgment—on which I would not seek to improve—the judge took into account and gave due weight to all the relevant considerations and arrived at the right answer for the right reasons.

Commentary

The vital factor in persuading the Court of Appeal to conclude that the obligation to provide a seaworthy ship was an intermediate term was that the term could have been broken in a trivial manner (which could be remedied adequately by an award of damages) or in a way that was so fundamental that it would have undermined the purpose which the parties had in mind in entering into the contract. The conclusion that either every breach gave rise to a right to terminate further performance of the contract or that no breach gave rise to a right to terminate was too stark a choice for the court. The common law was capable of providing a more proportionate and calibrated approach. That approach was to have regard to the consequences of the breach (although it is not entirely clear that the judges intended to create a new category of intermediate terms in so deciding).

Intermediate terms are now well established in the case-law. Their introduction has generated two difficulties. The first lies in distinguishing an intermediate term from a condition and a warranty (an issue which is discussed in the next section). The second difficulty is one of ascertaining how serious the consequences of the breach must be before an innocent party is entitled to terminate for breach of an intermediate term. The test must be applied at the date of the purported termination of the contract, not the date of the breach itself. However, the test is not an easy one to apply and much will depend upon the facts of the individual case. The critical question is: how 'serious' must the consequences of the breach be before the breach is held to be repudiatory? The best answer one can give is that it must be very serious. As Lewison LJ observed in *Telford Homes (Creekside) Ltd* v. *Ampurius Nu Homes Holdings Ltd* [2013] EWCA Civ 577, [2013] 4 All ER 377, [48], the test 'sets the bar high' because the analogy drawn by Diplock LJ in *Hong Kong Fir* was with cases in which a contract has been frustrated. The innocent party must establish either that it has been deprived of 'substantially the whole benefit' of the contract or that it has been deprived of a 'substantial part of the benefit to which [it] is entitled under the contract' (*Decro-Wall International SA* v. *Practitioners in*
p. 788 *Marketing Ltd* [1971] 1 WLR 361, 380). To the extent that ↵ there is a difference between the two formulations of the test, the former is the one that is most regularly applied by the courts (*Urban I (Blonk Street) Ltd* v. *Ayres* [2013] EWCA Civ 816, [2014] 1 WLR 756, [57]).

Case-law demonstrates that the courts have regard to a range of factors in deciding whether or not the breach is sufficiently serious. Factors to which the courts have regard include the benefit which it was intended that the innocent party would obtain from performance of the contract, the losses suffered by the innocent party as a result of the breach, the cost of making performance comply with the terms of the contract, the value of the performance that has been received by the innocent party, the willingness of the party in breach to make good the consequences of the breach, the likelihood of a further breach by the party in breach, and the adequacy of damages as a remedy to the innocent party. Given the range of factors to which the courts have regard and their generality, the balancing of these factors must, at the end of the day, depend to a large extent upon the facts of the individual case.

This uncertainty can cause difficulty in practice. Suppose a case in which the consequences of the breach are serious but not disastrous and the innocent party has substantial doubts about the ability of his contracting party to perform in the future (although he is unlikely to be able to prove that he will not be able to perform in the future). What advice should be given to the innocent party who informs his lawyer that he wishes to terminate the contract? At this point it is important to recall that a party who purports to terminate a contract when not in fact entitled to do so will be held to have repudiated the contract (for recent examples in which a purported termination was held to be a repudiatory breach see *Telford Homes (Creekside) Ltd* v. *Ampurius Nu Homes Holdings Ltd* [2013] EWCA Civ 577, [2013] 4 All ER 377 and *Urban I (Blonk Street) Ltd* v. *Ayres* [2013] EWCA Civ 816, [2014] 1 WLR 756). This being the case, advisers to the innocent party may be likely to err on the side of caution: that is to say they are likely to advise him that a decision to terminate carries with it a risk that a court may subsequently decide that he was not entitled to terminate and hold him liable in damages for the loss suffered by the other party as a result of any wrongful termination. On the other hand, if he contents himself with a claim for damages for the loss that he has suffered as a result of the breach, he should be compensated for the loss that he has suffered and will eliminate the risk of incurring any liability to the other party. A risk-averse party is unlikely to terminate in such a case. In this way, classification of a term as an intermediate term may operate in practice to inhibit use of termination as a remedy.

22.3.4 Making the Choice

How do courts decide whether or not a particular term is a condition, a warranty, or an innominate term? Where the nature of the term has been classified by Parliament, the courts must clearly respect and give effect to that classification. A similar analysis prevails where binding authority requires a court to follow the decision of an earlier court. And in the case where the nature of the term has been classified by the parties, the courts will, subject to the considerations which influenced the House of Lords in *Schuler* v. *Wickman*, respect the choice of the parties.

But what do the courts do in the case where the term has not been previously classified? In *Grand China Logistics Holding (Group) Co Ltd* v. *Spar Shipping AS* [2016] EWCA Civ 982, [2016] 2 Lloyd's Rep 447, [92] Hamblen LJ stated that 'the modern English law approach to the classification of contractual terms is that a term is innominate unless it is clear that it is intended to be a condition or a warranty'. The default position would
p. 789 thus appear to be ↵ to classify a term as innominate rather than as a condition (see also *Ark Shipping Company LLC* v. *Silverburn Shipping (IoM) Ltd* [2019] EWCA Civ 1161, [2019] 2 Lloyd's Rep 603 and *EMFC Loan Syndications LLP* v. *The Resort Group plc* [2021] EWCA Civ 844, [2022] 1 WLR 717, [89]).

An example cited by Hamblen LJ is the decision of the Court of Appeal in *Cehave NV* v. *Bremer Handelsgesellschaft mbH (The Hansa Nord)* [1976] QB 44. The parties entered into two contracts for the sale of citrus pulp pellets. Clause 7 of the contract stated: 'Shipment to be made in good condition … each shipment shall be considered a separate contract.' The buyers paid the price of approximately £100,000 in exchange for the shipping documents. However they rejected the entire cargo on its arrival in Rotterdam on the ground that part of the cargo in one of the holds was found to be damaged. The goods were then sold pursuant to a court order and, through a third party, the buyers were able to purchase them for some £30,000. In these circumstances the buyers sought to recover the purchase price from the sellers. They claimed that they were entitled to reject the goods and recover the price on two grounds. The first was that there had been a breach by the sellers of clause 7 of the contract and the second was that the goods were not of 'merchantable quality' so that the sellers were in breach of section 14(2) of the Sale of Goods Act 1893. The buyers succeeded in their arguments before a trade arbitration panel and before Mocatta J, but the sellers appealed successfully to the Court of Appeal. In relation to the buyers' submission that there had been a breach of section 14(2) of the Sale of Goods Act, the Court of Appeal held that the goods were in fact of merchantable quality on the basis that they remained fit for their intended purpose and were, indeed, used by the buyers for that purpose. In relation to the breach of clause 7 of the contract, the Court of Appeal concluded that the buyers were entitled to damages but that the breach did not entitle them to terminate the contract. Clause 7 had not been expressly classified by the parties as a condition, nor was the court bound by authority to conclude that it was a condition. In the absence of party stipulation and binding authority, the court concluded that clause 7 was an intermediate term and not a condition. Thus Lord Denning MR stated that small-scale deviations from the contractual standard should be met by a price allowance and that 'buyers should not have a right to reject the whole cargo unless [the deficiency] was serious and substantial'. To similar effect is the following passage from the judgment of Roskill LJ (at pp. 70–71):

> In my view, a court should not be over ready, unless required by statute or authority to do so, to construe a term in a contract as a 'condition' any breach of which gives rise to a right to reject rather than as a term any breach of which sounds in damages. … In principle, contracts are made to be performed and not to be avoided according to the whims of market fluctuation and where there is free choice between two possible constructions I think the court should tend to prefer that construction which will ensure performance, and not encourage avoidance of contractual obligations.

But the conclusion that the term is innominate is not an inevitable one. Cases can be found in which the courts have gone the other way and classified the term as a condition. One such case is the decision of the Court of Appeal in *Maredelanto Compania Naviera SA* v. *Bergbau-Handel GmbH (The Mihalis Angelos)* [1971] 1 QB 164. The owners chartered the vessel *Mihalis Angelos* to the charterers for a voyage from Haiphong in North Vietnam to Hamburg. Clause 1 of the charterparty stated that the vessel was 'expected ready to load under this
p. 790 charter about 1 July 1965'. The owners had no reasonable basis for this expectation. ↵ The *Mihalis Angelos* was in use on another voyage and was not expected to arrive at Haiphong until 13 or 14 July. Meanwhile the charterers discovered that they had problems of their own. They had chartered the vessel in order to transport a cargo of apatite to Europe but they discovered that there was no apatite ore available in North Vietnam. They believed that the lack of apatite was attributable to the war then taking place in Vietnam and so they purported to cancel the contract on the ground of force majeure. The shipowners interpreted this as a

repudiation of the contract by the charterers and sought to recover damages from the charterers. One of the issues before the court was whether or not clause 1 of the contract was a condition or a warranty. The Court of Appeal held that it was a condition with the result that the charterers were entitled to terminate the charter, notwithstanding the fact that they had initially sought to justify their decision to terminate the contract on a completely different ground. Megaw LJ reached the conclusion that clause 1 was a condition for 'four inter-related reasons'. These were:

First, it tends towards certainty in the law. One of the essential elements of law is some measure of uniformity. One of the important elements of the law is predictability. At any rate in commercial law, there are obvious and substantial advantages in having, where possible, a firm and definite rule for a particular class of legal relationship: for example, as here, the legal categorisation of a particular, definable type of contractual clause in common use. It is surely much better, both for shipowners and charterers (and, incidentally, for their advisers), when a contractual obligation of this nature is under consideration, and still more when they are faced with the necessity for an urgent decision as to the effects of a suspected breach of it, to be able to say categorically: 'If a breach is proved, then the charterer can put an end to the contract', rather than that they should be left to ponder whether or not the courts would be likely, in the particular case, when the evidence has been heard, to decide that in the particular circumstances the breach was or was not such as 'to go to the root of the contract'. Where justice does not require greater flexibility, there is everything to be said for, and nothing against, a degree of rigidity in legal principle.

Second, it would, in my opinion, only be in the rarest case, if ever, that a shipowner could legitimately feel that he had suffered an injustice by reason of the law having given to a charterer the right to put an end to the contract because of the breach by the shipowner of a clause such as this. If a shipowner has chosen to assert contractually, but dishonestly or without reasonable grounds, that he expects his vessel to be ready to load on such-and-such a date, wherein does the grievance lie?

Third, it is, as Mocatta J held, clearly established by authority binding on this court that where a clause 'expected ready to load' is included in a contract for the sale of goods to be carried by sea, that clause is a condition, in the sense that any breach of it enables the buyer to reject the goods without having to show that the dishonest or unreasonable expectation of the seller has in fact been prejudicial to the buyer. The judgment of Bankes LJ, in which Warrington LJ and Atkin LJ concurred, in *Finnish Government* v. *H Ford & Co Ltd* (1921) 6 Ll L Rep 188 is in point. The clause there was 'Steamers expected ready to load February and/or March 1920'. Bankes LJ said, at p. 189: 'I come to the conclusion … that this clause is one containing a contract. It is a contract which is in its nature a condition. …' That authority is not only binding on this court, but is, I think, completely and desirably in conformity with the line of cases which have decided—and the law in that respect is now accepted as being beyond dispute—that a statement in a contract of sale as to the loading period is a condition in the sense which I have indicated. If the contract says 'loading to be during July', the buyer can reject the goods if the loading was not complete until midday on August 1. He is not limited to claiming damages; he is not obliged to show that he has suffered any damage.

p. 791 ↵ It would, in my judgment, produce an undesirable anomaly in our commercial law if such a clause—'expected ready to load'—were to be held to have a materially different legal effect where it is contained in a charterparty from that which it has when it is contained in a sale of goods contract. True, in the latter case the relevant 'expectation' is that of the seller of the goods, who may himself be the charterer; whereas in the former case the relevant 'expectation' is that of the shipowner. But I do not see that that fact is sufficient to warrant the making of a distinction between the two. True, also, as was stressed by counsel for the owners, the charterparty will almost invariably include a cancelling clause; and it is argued that that fact justifies the drawing of a distinction. Again, I think

> not, for various reasons. One of them is that the date before which the cancelling clause cannot be exercised … is itself normally fixed by reference to the date of expected readiness to load, and on the assumption that that is an honest and reasonable expectation.
>
> The fourth reason why I think that the clause should be regarded as being a condition when it is found in a charterparty is that that view was the view of Scrutton LJ so expressed in his capacity as the author of *Scrutton on Charterparties*.

It is important here to see that the court is engaged in a balancing exercise as it endeavours to ascertain whether the term in dispute should be classified as a condition or an innominate term. A similar approach can be seen at work in the decision of the House of Lords in *Bunge Corporation New York* v. *Tradax Export SA* [1981] 1 WLR 711. The parties entered into a contract which incorporated the terms of GAFTA 119 (an industry-wide standard-form contract). The dispute between the parties related to the June shipment of goods. The responsibilities of the parties in relation to the shipment of the goods were divided as follows. The time of shipment was at the buyer's option but the sellers had the option as to the port of shipment. Clause 7 of the contract further provided that the 'buyers shall give at least 15 consecutive days' notice of probable readiness of vessel(s)'. The last day of the delivery period for the June shipment was 30 June 1975 and so, counting back from that date, the last day on which the buyers could give notice consistently with their obligation under clause 7 was 12 June. The buyers in fact gave notice on 17 June. The sellers refused to accept the notice as a valid notice, declared the buyers to be in default, and claimed damages on the basis that the buyers had repudiated the contract through their failure to comply with the terms of clause 7.

The buyers argued that their breach of clause 7 of the contract was not a repudiatory breach of contract. They submitted that clause 7 was an intermediate or an innominate term and that the consequences of the breach were not sufficiently serious to entitle the sellers to terminate the contract because the breach had not deprived them of 'substantially the whole benefit which it was intended that they should obtain from the contract'. Further, the buyers argued that clause 7 was not a condition because, in order to amount to a condition, the sellers had to show that every breach of the clause would result in a loss to the sellers of substantially the whole benefit of the contract. The buyers' arguments were rejected by the House of Lords. It was held that clause 7 of the contract was, on its true construction, a condition of the contract so that the sellers were entitled to terminate further performance of the contract and claim damages from the buyers on the basis that the buyers had repudiated the contract.

The combination of a number of factors persuaded the House of Lords to conclude that the term was a condition. The first, emphasized by Lord Roskill, was the need for certainty in commercial transactions. Secondly, as Lord Lowry pointed out, buyers and sellers operate in a market where one day they may be buyers and on another day they will be sellers. In such a market there is evidently a need for clear rules so that
p. 792 parties can decide whether or ↵ not they are entitled to terminate further performance of the contract. Thirdly, the judges had regard to the fact that the obligations of the parties were interdependent (until the buyer gave the requisite notice the sellers could not exercise their right to nominate the port of shipment). Fourthly, the experience of businessmen was thought to support the conclusion that clause 7 was a condition. Fifthly, the fact that damages for breach of clause 7 would have been very difficult to assess was a further factor which suggested that termination was the remedy which the parties had in mind for a breach of clause 7. Finally, their Lordships rejected the submission made by counsel for the buyers that, in order to amount to a

condition, the breach must be such as to deprive the innocent party of substantially the whole benefit which it was intended that he should receive from the contract. A similar balancing exercise to that undertaken in *Bunge* was adopted by the House of Lords in *Compagnie Commerciale Sucres et Denrées* v. *C Czarnikow Ltd (The Naxos)* [1990] 1 WLR 1337, where it was held that the sellers had breached a condition of the contract in failing to have the goods ready to be delivered on the arrival of the vessel into port.

At this point it is important to return to the observation of Hamblen LJ in *Grand China Logistics* that the modern approach is that a term is innominate unless a contrary intention is made clear. Both *Bunge* and *The Mihalis Angelos* demonstrate that it is possible to satisfy a court that the parties did have a contrary intention, even when that intention has not been set out in express terms by the parties. But the onus is on the parties to provide evidence from which the court can infer that the parties did intend that the disputed term be classified as a condition. Otherwise, the court is likely to classify the term as innominate (see *Ark Shipping Company LLC* v. *Silverburn Shipping (IoM) Ltd* [2019] EWCA Civ 1161, [2019] 2 Lloyd's Rep 603).

22.3.5 Termination Clauses

Rather than have to classify the nature of each and every term of the contract, commercial parties sometimes insert into their contracts a termination clause which confers on the parties (or one of them) an express right to terminate the contract in certain defined circumstances. These clauses can be drafted in very broad terms but, as the next case demonstrates, judges can, by a process of construction, cut down the apparent scope of a termination clause.

Rice (t/a Garden Guardian) v. Great Yarmouth Borough Council
[2003] TCLR 1, Court of Appeal

The claimant entered into two contracts with the defendant local authority. The first contract was for the maintenance and management of the local authority's sport facilities (such as its cricket and football pitches) and the second was for the maintenance of the local authority's parks, gardens, and children's playgrounds. The contracts were dated 14 February 1996 and their duration was stated to be four years from 1 January 1996. Between 9 May 1996 and July 1996 the local authority served a number of default notices on the claimant and on 5 August 1996 letters were hand delivered to the claimant informing him that the local authority had decided to terminate the contract. The claimant sought to recover from the defendant damages for wrongful termination of the contract. The defendant claimed that it was entitled to terminate the contract under clause 23.2.1 which stated that:

p. 793 ↵ 'if the contractor commits a breach of any of its obligations under the Contract; … the Council may, without prejudice to any accrued rights or remedies under the Contract, terminate the Contractor's employment under the Contract by notice in writing having immediate effect.'

Clause 27 of the contract also entitled the defendant to issue against the claimant a notice of default, which specified the misconduct and the time allowed for rectification. The Court of Appeal held that the defendant had not been entitled to terminate the contract and further held that the claimant was entitled to recover damages in respect of the loss which he had suffered as a result of the defendant's wrongful termination of the contract.

Hale LJ

[having set out the facts and the relevant contract clauses continued]

17. The council argued first that clause 23.2.1 should be applied literally so as to give them the right to terminate the contract for the breach of any of the obligations contained in it, other than the trivial. The judge was referred to a number of well-known authorities. On the one hand, 'it is open to the parties to agree that, as regards a particular obligation, any breach shall entitle the party not in default to treat the contract as repudiated': see *Bunge Corporation* v. *Tradax Export SA* [1981] 1 WLR 711, per Lord Wilberforce at 715E. On the other hand ' … if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must yield to business commonsense': see *Antaios Compania SA* v. *Salen Rederierna* [1985] AC 191, per Lord Diplock at p. 201D. …

20. As is well known, the classic position in English (but not Scottish) contract law was that the consequences of breach depended upon the importance of the term broken. A minor breach of an important term, a condition, could entitle the innocent party to terminate the contract. Breach of a less important term, a warranty, would sound only in damages. Then along came the seminal case of *Hong Kong Fir Shipping Co Ltd* v. *Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, in which Diplock LJ, in the words of Lord Wilberforce in *Bunge* v. *Tradax*, above, at p. 714G,

> ' ... illuminated the existence in contracts of terms which are neither, necessarily, conditions nor warranties, but in terminology which has since been applied to them, intermediate or innominate terms capable of operating, according to the gravity of the breach, as either conditions or warranties.'

21. Lord Wilberforce emphasised, in the words already quoted in paragraph [17] above, that it is still open to the parties to agree that a term is so important to them that it should have that effect. He continued:

> 'It remains true, as Lord Roskill has pointed out in *Cehave NV* v. *Bremer Handelsgesellschaft mbH (The Hansa Nord)* [1976] QB 44, that courts should not be too ready to interpret contractual clauses as conditions. ... But I do not doubt that, in suitable cases, the courts should not be reluctant, if the intentions of the parties as shown by the contract so indicate, to hold that an obligation has the force of a condition.'

22. The problem with the council's argument in this case is that clause 23.2.1 does not characterise any particular term as a condition or indicate which terms are to be considered so important that any breach will justify termination. It appears to visit the same draconian consequences upon any breach, however small, of any obligation, however small. In this it is unlike cases, such as *Bunge*, which concerned an obviously vital time clause that can only be broken in one way, and much closer to the cases, such as *Hong Kong Fir Shipping* and *The Antaios*, concerning multi-faceted obligations, which can be broken in many different ways.

p. 794

23. The comparable term in *The Antaios* provided that 'on any breach of this charterparty, the owners shall be at liberty to withdraw the vessel' ... The owners sought to do so on discovering that inaccurate bills of lading had been issued. As Lord Diplock observed, the dispute:

> 'was a typical case of a shipowner seeking to find an excuse to bring a long term time charter to a premature end in a rising market. Stripped to its essentials the shipowners were seeking to rely upon the charterers breach of an innominate term in the charterparty relating to the charterer's rights ... to issue bills of lading ... as constituting "any other breach of this charterparty" ...'

Lord Diplock agreed entirely with the arbitrators' view that:

> 'the owner's construction is wholly unreasonable, totally uncommercial and in total contradiction to the whole purpose of the NYPE time charter form.'

The contract should not be interpreted in such a way as to defeat its commercial purpose.

24. [Counsel for the defendant] seeks to distinguish clause 23.2.1 from the clause in *The Antaios* on the basis that the latter referred to 'any breach of this charterparty', while clause 23.2.1 refers to the 'breach of any of its obligations under this contract'. While the Antaios term might be limited to a breach defeating the whole contract, the term here might refer to any material or non-trivial breach. The judge characterised this distinction as a semantic one and I agree with him. For the reasons which the judge gave, the notion that this term would entitle the council to terminate a contract such as this at any time for any breach of any term flies in the face of commercial common sense. ...

28. In my view the judge was entirely right to reach the conclusion he did on this aspect of the case and for the reasons he gave.

The second issue

29. The council argued that, in any event, the totality of breaches found by the judge were sufficient to justify it in terminating the contract. ...

35. The question for the court (and indeed the contracting parties) in any case like this is whether the cumulative effect of the breaches of contract complained of is so serious as to justify the innocent party in bringing the contract to a premature end. The technical term is 'repudiatory' but that is just a label to describe the consequence which may flow. It is not always an entirely satisfactory label, if it implies that the conduct itself must always be such as to demonstrate an intention to abandon contractual obligations: while this will sometimes be so it is not an invariable requirement. As the judge indicated, there are in effect three categories: (1) those cases in which the parties have agreed either that the term is so important that any breach will justify termination or that the particular breach is so important that it will justify termination; (2) those contractors who simply walk away from their obligations thus clearly indicating an intention no longer to be bound; and (3) those cases in which the cumulative effect of the breaches which have taken place is sufficiently serious to justify the innocent party in bringing the contract to a premature end.

36. It is clear that the test of what is sufficiently serious to bring the case within the third of these categories is severe. No case has been cited to us which addresses this question in the context of a long running contract to provide public services such as this. There are some parallels with a charterparty, but that is a somewhat less complex undertaking than these. There are also some parallels with building contracts, in the number and variety of the obligations involved and the varying gravity of the breaches which may be committed, some of which may be remediable and some not. ...

p. 795

37. Building contracts differ from these contracts in that there will, it is hoped, be an end product. Defects may or should be remedied during or, in some cases, after completion. Delay in completion can be compensated. These contracts contemplated a multitude of different results at different times, from cricket pitches ready for the summer season, football pitches ready for the autumn, flower beds in full bloom at the appropriate times, properly mown grass on lawns and bowling greens, raked bunkers in a pitch and putt course,

> edged and weeded rose beds, pruned shrubs, cleared litter, and so on and so on. [Counsel for the claimant] accepted that in the case of a four year contract such as this, the court is entitled to look at the contractor's performance over a year, the most important part of which is the spring and summer, but it must still ask itself whether the council was deprived of substantially the whole benefit of what it had contracted for during that period.
>
> 38. These contracts are, however, like building contracts in that the accumulation of past breaches is relevant, not only for its own sake, but also for what it shows about the future. In my view, the judge was right to ask himself whether the cumulative breaches were such as to justify an inference that the contractor would continue to deliver a substandard performance. However, I would agree with [counsel for the claimant] that the inference should be that the council would thereby be deprived of a substantial part of the totality of that which it had contracted for that year, subject to the additional possibility that some aspects of the contract were so important that the parties are to be taken to have intended that depriving the council of that part of the contract would be sufficient in itself. That is not what the judge found in this case.
>
> 39. Once it is accepted that the proven breaches are relevant to show what will happen in the future, it is clear that the judge was entitled to take both the drought and the knock on effect of the council's own behaviour in relation to the summer bedding into account. He examined the facts of this case in great detail over a trial lasting some 13 days. He was well placed to evaluate the true importance of the proven breaches in the context of the contracts as a whole and all the circumstances of the case. He had a judgment to make. If anything, the test which he applied was somewhat more favourable to the council than the test which, in my judgment, he should have applied. He was undoubtedly entitled to reach the conclusion that he did.
>
> 40. I would dismiss this appeal.
>
> ***May LJ*** and ***Peter Gibson LJ*** concurred.

Commentary

Two points of significance emerge from this case. The first is that, in deciding whether or not there has been a repudiatory breach of contract, it is permissible to take a cumulative approach and have regard to the range of breaches committed by the party in breach. The second and much more important point relates to the interpretation of clause 23.2.1 adopted by the Court of Appeal. It held that it gave the council the right to terminate the contract only on the occurrence of a repudiatory breach of contract. There are two substantial
p. 796 objections to this interpretation. First, the council had a right to terminate under the general law ↵ on the occurrence of a repudiatory breach so why insert a clause into the contract if its only effect was to replicate a right that already existed under the general law? Secondly, the Court of Appeal failed to give sufficient weight to the word 'any' in the clause ('if the contractor commits a breach of *any* of its obligations under the contract, the Council may … terminate the Contractor's employment'). The response of the Court of Appeal to this objection was that the notion that this term entitled the council to terminate the contract at any time for any breach of any term flew in the face of commercial common sense. It is difficult to resist the conclusion that

the Court of Appeal allowed its perception of 'commercial common sense' to override the ordinary meaning of the words in the contract (contrast *Looney* v. *Trafigura Beheer BV* [2011] EWHC 125 (Ch), [2011] All ER (D) 17 (Feb), where it was held that the defendants had an unfettered right to terminate provided that they paid the relevant termination fee). Further, the effect of doing so was to expose the council to a claim for substantial damages for wrongful termination.

This decision gives rise to significant drafting difficulties. Termination clauses are regularly used in practice and this decision has caused a degree of consternation among practitioners. Is it possible to draft a clause which gives a right to terminate the contract when the breach is not a repudiatory breach at common law? Many practitioners rely on phrases such as 'material breach' (see *Dalkia Utilities Services plc* v. *Celtech International Ltd* [2006] EWHC 63 (Comm), [2006] 1 Lloyd's Rep 599, [90]–[102]), or 'substantial breach' but it is difficult to see on what basis the insertion of the words 'material' or 'substantial' can improve matters. In many ways it seems rather odd to suggest, as some have done, that a party can be better off by the inclusion of the words 'material' or 'substantial' because the clause in *Great Yarmouth* purported to entitle the council to terminate the contract if the contractor committed a breach of 'any' of its obligations under the contract. A party who wishes to have the benefit of a wide right to terminate might be better advised to stipulate that the right to terminate arises in the event of 'any breach (whether or not that breach is repudiatory)'. *Great Yarmouth* is an important case because it demonstrates the importance of drafting issues and the important role that interpretation of clauses can play in the development of the law. Judges can wield significant power through the process of interpretation. It is difficult to resist the conclusion of the Court of Appeal of Singapore in *Fu Yuan Foodstuff Manufacturer Pte Ltd* v. *Methodist Welfare Services* [2009] SGCA 23, [2009] 3 SLR 925, [36] that the Court of Appeal in *Great Yarmouth* 'read down' the scope of the termination clause in order to control its operation. The legitimacy of this restrictive approach to interpretation is open to question.

One further issue which has given rise to difficulty in recent case-law is the relationship between a contractual right to terminate and the rights which the party wishing to terminate has under the general law of contract. The fact that a contracting party has terminated the contract pursuant to an express term of the contract does not have the automatic effect of preventing that party from relying on such rights as it has under the general law. Thus it is possible for a party to terminate the contract pursuant to an express term of the contract and to recover damages under the general law (see *Stocznia Gdynia SA* v. *Gearbulk Holdings Ltd* [2009] EWCA Civ 75, [2009] BLR 196). The right to recover damages under the general law is a valuable right and a court is unlikely to be satisfied that a contracting party has abandoned such a valuable right arising by operation of law 'unless the terms of the contract make it sufficiently clear that that was intended' (see *Stocznia Gdynia* v. *Gearbulk Holdings*, relying upon *Gilbert-Ash (Northern) Ltd* v. *Modern Engineering (Bristol) Ltd* [1974] AC 689, 717).

p. 797

22.3.6 The Relevance of Good Faith

The point has been made that the existence of a breach of contract is not generally dependent upon a finding that the party said to be in breach has been at fault. Liability for breach of contract is, in principle, strict. But there is a line of cases in which the courts appear to have had regard to the good faith of the party in breach when deciding whether or not the breach of contract was a repudiatory breach which entitled the other party to terminate the contract. The cases are not easy to reconcile. In some cases (such as *Vaswani* v. *Italian Motors*

(Sales and Services) Ltd [1996] 1 WLR 270 and *Woodar Investment Development Ltd* v. *Wimpey Construction UK Ltd* [1980] 1 WLR 277) the courts have demonstrated a certain reluctance to conclude that a party who has acted in good faith has repudiated the contract. While one can understand the reluctance of a court to reach that conclusion, it does not sit easily with the general rule that a breach is a breach whether it is committed in bad faith or in good faith. Thus it is not surprising to find cases in which the courts have concluded that a party who acted in good faith did nevertheless commit a repudiatory breach of contract (see, for example, *Federal Commerce & Navigation Co Ltd* v. *Molena Alpha Inc* [1979] AC 757).

How are these cases to be reconciled? This question does not admit of an easy answer. A recent attempt at an answer has, however, been provided by the Court of Appeal in *Eminence Property Developments Ltd* v. *Heaney* [2010] EWCA Civ 1168, [2011] 2 All ER (Comm) 223. The purchaser of a property failed to complete the purchase on the contractual completion date. The vendors accordingly issued a notice to complete as they were entitled to do under the contract. Unfortunately, the vendors' solicitor made a mistake in calculating the requisite notice period and, consequently, issued a notice which did not give the vendor the required number of days in which to complete. When the purchaser failed to complete in accordance with the notice, the vendors decided to terminate the contract and they issued a notice accordingly. The purchaser immediately responded to the effect that the termination of the contract in these circumstances amounted to a repudiatory breach of contract which the purchaser accepted, thereby bringing the contract between the parties to an end. The vendors acknowledged their mistake and offered to give to the purchaser a further period in which to complete, but the purchaser declined to do so and insisted that the contract between the parties had come to an end on its acceptance of the vendors' repudiatory breach.

The Court of Appeal held that the vendors had not committed a repudiatory breach of contract. After reviewing the case-law (including such apparently conflicting cases as *Woodar Investment Development Ltd* v. *Wimpey Construction UK Ltd* [1980] 1 WLR 277 and *Federal Commerce & Navigation Co Ltd* v. *Molena Alpha Inc* [1979] AC 757), Etherton LJ identified the central question which is to be asked in cases of this type. That question is whether, looking at all the circumstances objectively, that is from the perspective of a reasonable man in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract. The answer given by a court to that question will depend very heavily on the facts of the individual case (and it is this sensitivity to the facts which explains in part why the cases are so difficult to reconcile). A court must therefore pay careful attention to all the facts and circumstances of the individual case in so far as they bear on an objective assessment of the intention of the contract breaker. Thus the motive of the contract breaker may be taken into account if it reflects something of which the innocent party was, or a reasonable person in his position would have been, aware and throws light on the way the alleged repudiatory act would be viewed by such a reasonable person.

p. 798 ↵ In short, the difficulties in this area are said to lie in the application of the agreed test to the facts of the individual case rather than in the formulation of the test itself. On the facts of *Eminence Property Developments Ltd* the Court of Appeal held that the vendors had not committed a repudiatory breach of contract for the following reasons. First, the vendors had been entitled to serve on the defaulting purchaser the notice to complete. Secondly, the vendors had genuinely attempted to operate the notice provision but had made a mistake in doing so, a fact which was obvious to the purchaser. Thirdly, neither the purchaser nor his solicitors had taken the trouble to point out this clerical error to the vendors and, further, they knew that, had they done so, the vendors would have corrected the mistake and issued a notice which complied with the

terms of the contract. Given these factors it could not be said that it was the intention of the vendors to abandon and altogether to refuse to perform the contract, particularly when account was taken of the fact that the contract was highly advantageous to the vendors and was onerous to the purchaser. It therefore followed that the vendors had not committed a repudiatory breach of contract.

22.3.7 Some Comparative Reflections

English law in relation to termination for breach can be said to stand out from other jurisdictions in two respects. First, it appears to place considerable emphasis upon the importance of termination as a remedy. It is a significant remedy in practice (albeit not as important as damages). In this respect it has a more prominent status than in other systems where termination is seen as a secondary remedy or even as a remedy of last resort. There is a difficult policy issue at stake here. What should be the aim of a remedial regime for breach of contract? Should it be to encourage parties to continue their relationship and resolve their difficulties or should it encourage parties to walk away from a deal when things go wrong and seek performance elsewhere? English law appears to tend towards the latter model (although it should be noted that a number of the cases discussed in this chapter are shipping cases or cases of commodity sales where the parties are often speculating on the movement of prices in the marketplace and, in such a case, termination appears to be a more widely used remedy). Secondly, English law places considerable emphasis on freedom of contract in the sense that it gives to contracting parties substantial freedom to decide for themselves when the right to terminate will arise (for example, it is open to the parties to classify any term they like as a condition). Again, this is in contrast with some other systems where it is for the court to decide whether or not the breach justifies termination.

Two instruments have been chosen for comparative purposes. The first is the Vienna Convention on Contracts for the International Sale of Goods and the second is the Principles of European Contract Law. Article 25 of the Vienna Convention provides:

> A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

This provision appears to be similar to an intermediate term (although it is not identical). As such it presents a
p. 799 difficulty for English lawyers because it appears to deny to the parties ↵ the right to agree that any breach of a particular term shall give rise to a right to terminate (in other words it appears not to recognize the existence of conditions, at least party-created conditions). One reason for this may be that termination appears to play a less important role in the remedial structure of the Convention. The remedial regime is much more complex than that found in English law and it appears to give greater emphasis to remedies that enable the parties to maintain their relationship (such as the right to cure the breach and price reduction). It also places much more emphasis on notification obligations before exercising the right to terminate the contract. For example, in the case of non-delivery of the goods by the seller, the buyer is given the right to fix an additional period of time of reasonable length for performance by the seller of his obligations and, in the event that the seller fails to deliver the goods within that additional period of time, the buyer is entitled to

terminate the contract (see Articles 47(1) and 49(1)). The difference between English law and the Convention is, essentially, that English law makes greater provision for immediate termination upon breach, whereas under the Convention a party may have to fix an additional period of time for performance before resorting to the more drastic remedy of termination. The difference between the two regimes is very much an issue of policy: should termination be seen as a primary remedy or as a secondary remedy, only to be resorted to when other remedies are unavailable or will not work?

The provisions of the Principles of European Contract Law appear to be somewhat closer to English law. Article 9:301 deals with the right to terminate the contract and it provides:

> (1) A party may terminate the contract if the other party's non-performance is fundamental.
>
> (2) In the case of delay the aggrieved party may also terminate the contract under Article 8:106(3).

Article 8:103 defines fundamental non-performance in the following terms:

> A non-performance of an obligation is fundamental to the contract if:
>
> (a) strict compliance with the obligation is of the essence of the contract; or
>
> (b) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract, unless the other party did not foresee and could not reasonably have foreseen that result;
>
> (c) the non-performance is intentional and gives the aggrieved party reason to believe that it cannot rely on the other party's future performance.

To English eyes, this provision is very different from the Vienna Convention. The vital difference is paragraph (a) which seems to approximate to a condition. It thus appears to preserve the right of the parties to classify the status of the terms of their contract. Paragraph (b) is much closer to an intermediate term, while paragraph (c) distinguishes between intentional and unintentional non-performance (a distinction which is not generally drawn in English law).

p. 800 ↵ The Principles also contain a number of other provisions on the subject of breach (or non-performance). Articles 8:104–8:106 provide:

8:104 Cure by Non-Performing Party

A party whose tender of performance is not accepted by the other party because it does not conform to the contract may make a new and conforming tender where the time for performance has not yet arrived or the delay would not be such as to constitute fundamental non-performance.

8:105 Assurance of Performance

(1) A party which reasonably believes that there will be a fundamental non-performance by the other party may demand adequate assurance of due performance and meanwhile may withhold performance of its own obligations so long as such reasonable belief continues.

(2) Where this assurance is not provided within a reasonable time, the party demanding it may terminate the contract if it still reasonably believes that there will be a fundamental non-performance by the other party and gives notice of termination without delay.

8:106 Notice Fixing Additional Period for Performance

(1) In any case of non-performance the aggrieved party may by notice to the other party allow an additional period of time for performance.

(2) During the additional period the aggrieved party may withhold performance of its own reciprocal obligations and may claim damages, but it may not resort to any other remedy. If it receives notice from the other party that the latter will not perform within that period, or if upon expiry of that period due performance has not been made, the aggrieved party may resort to any of the remedies that may be available under chapter 9 [namely specific performance, withholding performance, termination of the contract, price reduction, and damages and interest].

(3) If in a case of delay in performance which is not fundamental the aggrieved party has given notice fixing an additional period of time of reasonable length, it may terminate the contract at the end of the period of notice. The aggrieved party may in its notice provide that if the other party does not perform within the period fixed by the notice the contract shall terminate automatically. If the period stated is too short, the aggrieved party may terminate, or, as the case may be, the contract shall terminate automatically, only after a reasonable period from the time of the notice.

Article 8:105 is a helpful provision, which English law could usefully adopt. The right to demand an assurance of performance is a useful right in the not uncommon case where a contracting party has reason to believe that the other party will not perform his contractual obligations.

22.4 Election

Must an innocent party exercise its right to terminate further performance of the contract? The answer is that there is no obligation to exercise the right. A breach of contract, even where it is repudiatory, does not of itself
p. 801 operate to bring the contract to an end (even in the ↵ case of contracts of employment: *Geys* v. *Société Générale, London Branch* [2012] UKSC 63, [2013] 1 AC 513). What it does is to confer on the innocent party a choice. The innocent party can either choose to bring the contract to an end or he can choose to affirm the contract and continue with performance. It is clearly not possible both to affirm and to terminate and, this being the case, the innocent party must decide which option it wishes to pursue. This choice on the part of the innocent party is known as an election.

A party who wishes to exercise his right to terminate further performance of the contract must generally notify the party in breach that he is doing so. This is known as 'acceptance of the repudiation'. In *Vitol SA* v. *Norelf Ltd* [1996] AC 800, 810, Lord Steyn stated:

> An act of acceptance of a repudiation requires no particular form: a communication does not have to be couched in the language of acceptance. It is sufficient that the communication or conduct clearly and unequivocally conveys to the repudiating party that the aggrieved party is treating the contract as at an end.

As a general rule acceptance cannot take the form of silence, unless the only construction that can be put upon the conduct of the parties is that one party has accepted the other's repudiatory breach of contract. For example, a contractor who does not turn up for work after having been told by the employer, in breach of contract, to get off the site is likely to be held to have accepted the employer's repudiatory breach. However, even in such a case, a contractor who sought legal advice would be told to communicate to the employer his acceptance of the latter's repudiatory breach. Given the general rule that silence does not amount to acceptance, a party in the position of the contractor would be advised to avoid any doubt and make his acceptance of the repudiation clear and unequivocal because a failure to do so may persuade a court to conclude that there was no effective acceptance of the breach (*Vitol SA* v. *Beta Renowable Group SA* [2017] EWHC 1734 (Comm), [2017] 2 Lloyd's Rep 338).

Acceptance of a repudiatory breach of contract operates to bring the contract between the parties to an end. Termination operates prospectively, but not retrospectively. Thus termination operates to release both parties from their future obligations to perform their primary obligations under the contract, but it leaves intact rights which have accrued prior to the termination of the contract (*Photo Production Ltd* v. *Securicor Transport Ltd* [1980] AC 827). In this sense termination for breach differs from rescission of the contract for misrepresentation (see 17.4.1). Rescission for misrepresentation sets aside a contract for all purposes (that is to say the contract is set aside both retrospectively and prospectively). Termination for breach, by contrast, does not have retrospective effect: there is no attempt to unwind the contract. Indeed, it is possible for a term in a contract to survive termination. Where the parties intend the clause to survive termination then the courts will generally give effect to that intention. Clauses that generally survive termination are arbitration clauses (see *Heyman* v. *Darwins Ltd* [1942] AC 356) and, possibly, confidentiality clauses (*Campbell* v. *Frisbee* [2002] EWCA Civ 1374, [2003] ICR 141).

22.5 Loss of The Right To Terminate

The right to terminate the contract will generally be lost if the innocent party decides to affirm the contract. When deciding whether conduct amounts to an affirmation, a court is not conducting a 'mechanical exercise' but is exercising a judgment and, in the exercise of ↵ that judgment it should not adopt an unduly technical approach (*White Rosebay Shipping SA* v. *Hong Kong Chain Glory Shipping Ltd (The Fortune Plum)* [2013] EWHC 1355 (Comm), [2013] 2 All ER (Comm) 449, [38]). Affirmation must generally be unequivocal. The mere fact that the innocent party has called on the party in breach to perform his contractual obligations does not necessarily constitute affirmation. As Moore-Bick J stated in *Yukong Line Ltd of Korea* v. *Rendsberg Investments Corpn of Liberia* [1996] 2 Lloyd's Rep 604, 608, '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'. But the innocent party must proceed with great caution because the choice between affirmation and termination, once made, is, in principle, irrevocable. As a general rule a party will not be held to have affirmed the contract unless he had knowledge of the facts giving rise to the breach and he knew of his right to choose between affirmation and termination.

p. 802

It is sometimes said that there is no 'middle way' or 'third choice' open to the innocent party (*Bentsen* v. *Taylor* [1893] 2 QB 274, 279 and *Fercometal SARL* v. *Mediterranean Shipping Co SA* [1989] AC 788, 799–801): he must make his choice between termination and affirmation. 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' (*Fercometal SARL* v. *Mediterranean Shipping Co SA* [1989] AC 788, 801). But the proposition that there is no middle way can be overstated. There is a sense in which there is a middle way open to the innocent party in that it is given a period of time in which to make up its mind whether it is going to affirm the contract or terminate it. The Court of Appeal so concluded in *Stocznia Gdanska SA* v. *Latvian Shipping Company (No 2)* [2002] EWCA Civ 889, [2002] 2 Lloyd's Rep 436.

The decision in *Stocznia Gdanska SA* is a welcome recognition of the fact that a repudiatory breach of contract can often put the innocent party in a difficult position. He may well be reluctant to terminate the contract as a result of the breach given the extent of his commitment to the relationship. On the other hand, he may be reluctant to affirm the contract given that an affirmation, once communicated, is, in principle, irrevocable. The Court of Appeal in *Stocznia Gdanska* recognized that there is, in effect, a third option open to the innocent party in the sense that he has a period of time in which to decide whether to terminate or affirm. Rix LJ stated (at [87]):

> 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.

This is a welcome recognition of commercial reality, namely that parties do require a period of time in which
p. 803 to make up their minds. The length of that period will very much depend ↵ upon the facts of the case and the nature of the contract. Where time is of the essence of the contract or the contract has been entered into in 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] ETMR 10; *Havila Kystruten AS* v. *Abarca Companhia de Seguros SA* [2022] EWHC 3196 (Comm) at [283]).

A party who wishes to call upon the other party to perform but who does not wish such action to be construed as an affirmation of the contract would be well advised expressly to reserve his contractual rights. The innocent party in *Stocznia Gdanska* did not do so and this almost persuaded Rix LJ to conclude that it had affirmed the contract. But, at the end of the day, he was prepared to uphold the finding of the trial judge to the effect that there had been no affirmation.

There is one major exception to the general rule that an election, once made, is irrevocable. This exception arises in the context of continuing repudiatory conduct by the party in breach. In such a case an innocent party who has elected to affirm the contract after the first breach of contract may be able to treat the continued non-performance as a fresh act of repudiation (see *Johnson* v. *Agnew* [1980] AC 367 and *Safehaven* v. *Springbok* (1998) 71 P & CR 59). Once a repudiation is spent there cannot be an acceptance of the breach but if there is a continued refusal to perform by the party in breach and that continued refusal amounts to further repudiatory conduct, the innocent party is entitled to bring the contract to an end notwithstanding the initial affirmation (*White Rosebay Shipping SA* v. *Hong Kong Chain Glory Shipping Ltd (The Fortune Plum)* [2013] EWHC 1355 (Comm), [2013] 2 All ER (Comm) 449, [50]). Were the law otherwise an innocent party would have to continue performing his obligations even in the case where it is clear from the continued refusal to perform that the party in breach would never do so.

22.6 Anticipatory Breach

It sometimes happens that, before the time fixed for performance under the contract, one party informs the other that he will not or cannot perform his obligations under the contract or that he intends to carry out his obligations in a way that is not consistent with the terms of the contract. This is known as an anticipatory breach of contract. What is the effect in law of an anticipatory breach of contract? One response would be to say that it has no effect at all. The time for performance has not yet arisen and one cannot be in breach of contract prior to the time for performance. But such a view presents difficulties for both parties. As far as the innocent party is concerned it leaves him in a state of some uncertainty. Will he receive the promised performance? Should he seek alternative performance elsewhere? The party who has committed the anticipatory breach also has an interest in effect being given to his renunciation. One reason why a party who is unable to perform may inform the other party prior to the time for performance is that he wishes to give the other party the opportunity to find alternative performance elsewhere. The effect of advance notice may well be to reduce the losses of the innocent party and the non-performing party has an obvious interest in reducing his potential exposure to a damages claim. The alternative response is to regard the intimation of the refusal to perform in accordance with the terms of the contract as a breach of contract which immediately gives the innocent party access to the usual array of remedies for breach.

p. 804 ↵ The choice was made by the English courts in *Hochster* v. *De la Tour* (1853) 2 E & B 678. The defendant entered into an agreement with the plaintiff under which he agreed to employ the plaintiff as his courier for three months. The commencement date was agreed as 1 June 1852. On 11 May 1852 the defendant wrote to the plaintiff, informing him that his services were no longer required. On 22 May the plaintiff brought an action for damages against the defendant. The claim succeeded notwithstanding the fact that it was brought before the time fixed for performance under the contract. *Hochster* was followed some years later in *Frost* v. *Knight* (1872) LR 7 Ex 111. The defendant promised to marry the plaintiff on the death of his father (his father objected to the marriage). The defendant broke off the engagement while his father was still alive. The plaintiff brought an action against the defendant for breach of his promise to marry her (at this time promises to marry were legally enforceable). The defendant defended the claim on the ground that no claim for breach of contract could be brought while his father was still alive. The plaintiff succeeded in her claim. Cockburn CJ stated (at p. 114) that:

> [i]t is true … that there can be no actual breach of a contract by reason of non-performance so long as the time for performance has not yet arrived. But, on the other hand, there is—and the decision in *Hochster* v. *De la Tour* proceeds on that assumption—a breach of the contract when the promisor repudiates it and declares he will no longer be bound by it. The promisee has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. In the mean time he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests. His rights acquired under it may be dealt by him in various ways for his benefit and advantage. Of such advantage the repudiation of the contract by the other party, and the announcement that it never will be fulfilled, must of course deprive him. It is therefore quite right to hold that such an announcement amounts to a violation of the contract in omnibus, and that upon it the promisee, if so minded, may at once treat it as a breach of the entire contract, and bring his action accordingly.

It is therefore clear law that an anticipatory breach of contract gives to the innocent party an immediate cause of action; he is not required to wait for the time for performance. The innocent party can seek a remedy immediately or can choose to affirm the contract and wait for the time for performance. The remedies available to the innocent party at the time of the anticipatory breach will depend upon the nature of the breach. If the anticipatory breach is a repudiatory breach of contract then the innocent party can terminate the contract and seek damages to compensate him for the loss of his bargain. Most anticipatory breaches are repudiatory breaches because they take the form of a clear and unequivocal statement that performance will not be forthcoming.

Where the innocent party decides to terminate further performance of the contract on account of the anticipatory breach, he must 'accept' the breach and inform the other party of his decision to terminate. But he need not accept the breach. He can elect to affirm the contract and to wait for the time for performance. In such a case the contract remains alive for the benefit of both parties so that the innocent party must continue with the performance of his own obligations under the contract (see *Fercometal SARL* v. *Mediterranean Shipping Co SA* [1989] AC 788). Similarly, the innocent party has no cause of action where he chooses to affirm the contract and, prior to the time for performance, the contract is frustrated. In such a case the contract remains alive after the anticipatory breach and is terminated not by the breach but by the operation of the doctrine of frustration (*Avery* v. *Bowden* (1855) 5 E & B 714).

p. 805 ↵ The right of the innocent party to affirm the contract and continue with performance is, however, a source of considerable controversy. The source of the controversy can be traced back to the following decision of the House of Lords:

White and Carter (Councils) Ltd v. McGregor
[1962] AC 413, House of Lords

In 1954 the parties entered into a contract under which the appellant advertising contractors agreed to display advertisements on local authority litter bins for the respondent's garage for a three-year period. The contract was renewed for a further three-year period in 1957. On the day that the renewal contract was concluded the respondent wrote to the appellants, seeking to cancel the contract on the ground that his sales manager, who concluded the contract on the respondent's behalf, had no specific authority to make the contract. The appellants refused to accept the respondent's cancellation and continued with performance of the contract and they displayed the advertisements on the litter bins in accordance with the terms of the contract. The respondent refused to pay for the advertisements. The appellants sued for the full sum due under the contract for the period of three years. The claim was brought pursuant to clause 8 of the contract which provided:

> 'In the event of an instalment or part thereof being due for payment, and remaining unpaid for a period of four weeks or in the event of the advertiser being in any way in breach of this contract then the whole amount due for the 156 weeks or such part of the said 156 weeks as the advertiser shall not yet have paid shall immediately become due and payable.'

The respondent maintained that he was not liable to pay the sum alleged to be due on the ground that he had repudiated the contract before anything had been done under it so that the appellants were not entitled to continue with performance and sue for the price.

The House of Lords held by a majority (Lord Morton of Henryton and Lord Keith of Avonholm dissenting) that the appellants were entitled to recover the contract price on the ground that the respondent's unaccepted repudiation of the contract had not operated to terminate the contract between the parties. The appellants were therefore entitled to continue with performance of the contract and recover the contract price.

Lord Reid

[set out the facts and, having set out the terms of clause 8, continued]

A question was debated whether this clause provides a penalty or liquidated damages, but on the view which I take of the case it need not be pursued. The clause merely provides for acceleration of payment of the stipulated price if the advertiser fails to pay an instalment timeously. As the respondent maintained that he was not bound by the contract he did not pay the first instalment within the time allowed. Accordingly, if the appellants were entitled to carry out their part of the contract notwithstanding the respondent's repudiation, it was hardly disputed that this clause entitled them to sue immediately for the whole price and not merely the first instalment.

The general rule cannot be in doubt. It was settled in Scotland at least as early as 1848 and it has been authoritatively stated time and again in both Scotland and England. If one party to a contract repudiates it in the sense of making it clear to the other party that he refuses or will refuse to carry

p. 806

out his part of the contract, the other party, the innocent party, has an option. He may accept that repudiation and sue for damages for breach of contract, whether or not ↵ the time for performance has come; or he may if he chooses disregard or refuse to accept it and then the contract remains in full effect.

[He considered the case of *Howie* v. *Anderson* (1848) 10 D 355 and continued]

I need not refer to the numerous authorities. They are not disputed by the respondent but he points out that in all of them the party who refused to accept the repudiation had no active duties under the contract. The innocent party's option is generally said to be to wait until the date of performance and then to claim damages estimated as at that date. There is no case in which it is said that he may, in face of the repudiation, go on and incur useless expense in performing the contract and then claim the contract price. The option, it is argued, is merely as to the date as at which damages are to be assessed.

Developing this argument, the respondent points out that in most cases the innocent party cannot complete the contract himself without the other party doing, allowing or accepting something, and that it is purely fortuitous that the appellants can do so in this case. In most cases by refusing co-operation the party in breach can compel the innocent party to restrict his claim to damages. Then it was said that, even where the innocent party can complete the contract without such co-operation, it is against the public interest that he should be allowed to do so. An example was developed in argument. A company might engage an expert to go abroad and prepare an elaborate report and then repudiate the contract before anything was done. To allow such an expert then to waste thousands of pounds in preparing the report cannot be right if a much smaller sum of damages would give him full compensation for his loss. It would merely enable the expert to extort a settlement giving him far more than reasonable compensation.

[He then considered the case of *Langford & Co* v. *Dutch*, 1952 SC 15 (a case in which an advertising contractor who had agreed to exhibit a film was held not to be entitled to refuse to accept the repudiation of the contract, exhibit the film and claim the contract price) and continued]

We must now decide whether that case was rightly decided. In my judgment it was not. It could only be supported on one or other of two grounds. It might be said that, because in most cases the circumstances are such that an innocent party is unable to complete the contract and earn the contract price without the assent or co-operation of the other party, therefore in cases where he can do so he should not be allowed to do so. I can see no justification for that.

The other ground would be that there is some general equitable principle or element of public policy which requires this limitation of the contractual rights of the innocent party. It may well be that, if it can be shown that a person has no legitimate interest, financial or otherwise, in performing the contract rather than claiming damages, he ought not to be allowed to saddle the other party with an additional burden with no benefit to himself. If a party has no interest to enforce a stipulation, he cannot in general enforce it: so it might be said that, if a party has no interest to insist on a particular remedy, he ought not to be allowed to insist on it. And, just as a party is not allowed to enforce a penalty, so he ought not to be allowed to penalise the other party by taking one course when another

is equally advantageous to him. If I may revert to the example which I gave of a company engaging an expert to prepare an elaborate report and then repudiating before anything was done, it might be that the company could show that the expert had no substantial or legitimate interest in carrying out the work rather than accepting damages: I would think that the de minimis principle would apply in determining whether his interest was substantial, and that he might have a legitimate interest other than an immediate financial interest. But if the expert had no such interest then that might be regarded as a proper case for the exercise of the general equitable jurisdiction of the court. But that is
p. 807 not this case. Here the respondent did not set out to prove that the ↵ appellants had no legitimate interest in completing the contract and claiming the contract price rather than claiming damages; there is nothing in the findings of fact to support such a case, and it seems improbable that any such case could have been proved. It is, in my judgment, impossible to say that the appellants should be deprived of their right to claim the contract price merely because the benefit to them, as against claiming damages and re-letting their advertising space, might be small in comparison with the loss to the respondent: that is the most that could be said in favour of the respondent. Parliament has on many occasions relieved parties from certain kinds of improvident or oppressive contracts, but the common law can only do that in very limited circumstances. Accordingly, I am unable to avoid the conclusion that this appeal must be allowed and the case remitted so that decree can be pronounced as craved in the initial writ.

Lord Morton of Henryton

[dissenting]

My Lords, I think that this is a case of great importance, although the claim is for a comparatively small sum. If the appellants are right, strange consequences follow in any case in which, under a repudiated contract, services are to be performed by the party who has not repudiated it, so long as he is able to perform these services without the co-operation of the repudiating party. Many examples of such contracts could be given. One, given in the course of the argument and already mentioned by my noble and learned friend, Lord Reid, is the engagement of an expert to go abroad and write a report on some subject for a substantial fee plus his expenses. If the appellants succeed in the present case, it must follow that the expert is entitled to incur the expense of going abroad, to write his unwanted report, and then to recover the fee and expenses, even if the other party has plainly repudiated the contract before any expense has been incurred.

It is well established that repudiation by one party does not put an end to a contract. The other party can say ‘I hold you to your contract, which still remains in force’. What then is his remedy if the repudiating party persists in his repudiation and refuses to carry out his part of the contract? The contract has been broken. The innocent party is entitled to be compensated by damages for any loss which he has suffered by reason of the breach, and in a limited class of cases the court will decree specific implement. The law of Scotland provides no other remedy for a breach of contract and there is no reported case which decides that the innocent party may act as the appellants have acted. The present case is one in which specific implement could not be decreed, since the only obligation of the respondent under the contract was to pay a sum of money for services to be rendered by the

appellants. Yet the appellants are claiming a kind of inverted specific implement of the contract. They first insist on performing their part of the contract, against the will of the other party, and then claim that he must perform his part and pay the contract price for unwanted services. In my opinion, my Lords, the appellants' only remedy was damages, and they were bound to take steps to minimise their loss, according to a well-established rule of law. Far from doing this, having incurred no expense at the date of the repudiation, they made no attempt to procure another advertiser, but deliberately went on to incur expense and perform unwanted services with the intention of creating a money debt which did not exist at the date of the repudiation. ...

In my opinion, the appellants' alternative claim for the same sum of £196 4s. as liquidated damages should be rejected for the reasons which will shortly be given by my noble and learned friend, Lord Keith of Avonholm.

I would dismiss the appeal.

p. 808

Lord Tucker

My Lords, I have had the advantage of reading the opinion prepared by my noble and learned friend, Lord Hodson. I am in complete agreement with the reasons he gives for allowing the appeal.

Lord Keith of Avonholm

[dissenting]

I find the argument advanced for the appellants a somewhat startling one. If it is right it would seem that a man who has contracted to go to Hong Kong at his own expense and make a report, in return for remuneration of £10,000, and who, before the date fixed for the start of the journey and perhaps before he has incurred any expense, is informed by the other contracting party that he has cancelled or repudiates the contract, is entitled to set off for Hong Kong and produce his report in order to claim in debt the stipulated sum. Such a result is not, in my opinion, in accordance with principle or authority, and cuts across the rule that where one party is in breach of contract the other must take steps to minimise the loss sustained by the breach. ...

I would dismiss the appeal.

Lord Hodson

It is settled as a fundamental rule of the law of contract that repudiation by one of the parties to a contract does not itself discharge it. See Viscount Simon's speech in *Heyman* v. *Darwins Ltd* [1942] AC 356, 361, citing with approval the following sentence from a judgment of Scrutton LJ in *Golding* v. *London and Edinburgh Insurance Co Ltd* (1932) 43 Ll L Rep 487, 488: 'I have never been able to understand what effect the repudiation of one party has unless the other party accepts the repudiation'.

> In *Howard* v. *Pickford Tool Co Ltd* [1951] 1 KB 417, 421 Asquith LJ said: 'An unaccepted repudiation is a thing writ in water and of no value to anybody: it confers no legal rights of any sort or kind'. These are English cases but that the law of Scotland is the same is, I think, clear from the authorities, of which I need only refer to one, namely, *Howie* v. *Anderson*, 10 D 355 where language to the same effect is to be found in the opinions of the Lord President and Lord Moncrieff.
>
> It follows that, if, as here, there was no acceptance, the contract remains alive for the benefit of both parties and the party who has repudiated can change his mind but it does not follow that the party at the receiving end of the proffered repudiation is bound to accept it before the time for performance and is left to his remedy in damages for breach.
>
> Counsel for the respondent did not seek to dispute the general proposition of law to which I have referred but sought to argue that if at the date of performance by the innocent party the guilty party maintains his refusal to accept performance and the innocent party does not accept the repudiation, although the contract still survives, it does not survive so far as the right of the innocent party to perform it is concerned but survives only for the purpose of enforcing remedies open to him by way of damages or specific implement. This produces an impossible result; if the innocent party is deprived of some of his rights it involves putting an end to the contract except in cases, unlike this, where, in the exercise of the court's discretion, the remedy of specific implement is available.
>
> The true position is that the contract survives and does so not only where specific implement is
> p. 809 available. When the assistance of the court is not required the innocent party can ↵ choose whether he will accept repudiation and sue for damages for anticipatory breach or await the date of performance by the guilty party. Then, if there is failure in performance, his rights are preserved.
>
> It may be unfortunate that the appellants have saddled themselves with an unwanted contract causing an apparent waste of time and money. No doubt this aspect impressed the Court of Session but there is no equity which can assist the respondent. It is trite that equity will not rewrite an improvident contract where there is no disability on either side. There is no duty laid upon a party to a subsisting contract to vary it at the behest of the other party so as to deprive himself of the benefit given to him by the contract. To hold otherwise would be to introduce a novel equitable doctrine that a party was not to be held to his contract unless the court in a given instance thought it reasonable so to do. In this case it would make an action for debt a claim for a discretionary remedy. This would introduce an uncertainty into the field of contract which appears to be unsupported by authority either in English or Scottish law save for the one case upon which the Court of Session founded its opinion and which must, in my judgment, be taken to have been wrongly decided. ...
>
> I would allow the appeal.

Commentary

A vital key to understanding the issue in *White & Carter* is the distinction between a claim in debt and a claim in damages. A claim in debt is a claim that the debtor owes to the creditor a liquidated sum of money. Such a claim is not subject to the requirement that the creditor must have mitigated his loss. Either the debtor owes the sum of money to the creditor or he does not. A claim in damages, on the other hand, is an unliquidated

claim to be compensated for the loss that the innocent party has suffered as a result of the breach of contract. A claimant who brings a claim for damages is under a 'duty' to mitigate his loss, in the sense that he cannot recover that portion of his loss that is attributable to his failure to mitigate (see further 23.8.2). Thus the classification of the claim, as either a claim in debt or in damages, was important to the outcome of the case. Had it been a claim in damages, the appellants would have been subject to a requirement that they take reasonable steps to mitigate their loss (through seeking to find other people to take over the advertising space vacated by the respondent). But the claim was held to be one in debt. Clause 8 of the contract was critical in reaching the conclusion that the claim was one in debt because the effect of the clause was to declare that the entire price for the three-year period was 'immediately due and payable'. The claim was therefore for a debt that was owed rather than for the loss of an entitlement to an income stream over a period of years. The obligation to mitigate was therefore not in play.

The majority comprised Lord Hodson, Lord Tucker, and Lord Reid. For Lord Hodson this was a claim in debt and a claim in debt could not be turned into a discretionary remedy. It should be noted that Lord Tucker agreed with Lord Hodson and did not express his agreement with the speech of Lord Reid. Lord Reid's speech differed from that of Lord Hodson in that he introduced the 'legitimate interest' test (in that he held that it was open to the respondent to seek to show that the appellants had no legitimate interest in continuing with performance of the contract). The question which then arose was whether or not this was part of the *ratio* of the case. In *Hounslow London Borough Council* v. *Twickenham Garden Developments Ltd* [1971] Ch 233, 254
p. 810 Megarry J stated: 'it seems to me that the ratio of the ↵ *White* case involves acceptance of Lord Reid's limitations, even though Lord Tucker and Lord Hodson said nothing of them: for without Lord Reid there was no majority for the decision of the House. Under the doctrine of precedent, I do not think that it can be said that a majority of a bare majority is itself the majority.'

The decision in *White & Carter* has proved to be extremely controversial (see generally Q Liu, 'The *White & Carter* Principle: A Restatement' (2011) 74 *MLR* 171). It has been attacked on the ground that it was unfair to the respondent in that it saddled him with a performance which he did not want. It has also been argued that it leads to a result which is economically inefficient in that performance was a waste (although on the facts it could be argued that the respondent did derive at least some benefit from the advertisement of his garage on the litter bins). In subsequent cases courts have generally chosen to interpret the case narrowly and they have done so by developing the two exceptions to the rule recognized in the speeches in *White & Carter*. The first exception is that the rule does not apply where the innocent party is dependent upon the co-operation of the party in breach in order to be able to continue with performance. The second exception arises where the innocent party has no legitimate interest in performance of the contract.

First, the rule in *White & Carter* does not apply where the innocent party is dependent upon the co-operation of the party in breach in order to be able to continue with performance. The innocent party cannot get an order of the court requiring the party in breach to co-operate with a performance which he no longer wants. In such a case the innocent party must be content with a claim in damages which, of course, is subject to the mitigation rule. Further, the courts have adopted a broad notion of co-operation so that the innocent party can neither require the active nor the passive co-operation of the party in breach. In *Hounslow London Borough Council* v. *Twickenham Garden Developments Ltd* Megarry J stated (at pp. 253–254):

> Suppose that A, who owns a large and valuable painting, contracts with B, a picture restorer, to restore it over a period of three months. Before the work is begun, A receives a handsome offer from C to purchase the picture, subject to immediate delivery of the picture in its unrestored state, C having grave suspicions of B's competence. If the work of restoration is to be done in A's house, he can effectually exclude B by refusing to admit him to the house; without A's 'co-operation' to this extent B cannot perform his contract. But what if the picture stands in A's locked barn, the key of which he has lent to B so that he may come and go freely, or if the picture has been removed to B's premises? Can B insist in these cases in performing his contract, even though this makes it impossible for A to accept C's offer? In the case of the barn A's co-operation may perhaps be said to be requisite to the extent of not barring B's path to the barn or putting another lock on the door; but if the picture is on B's premises, no active co-operation by A is needed. Nevertheless, the picture is A's property, and I find it difficult to believe that Lord Reid intended to restrict the concept of 'co-operation' to active co-operation. In the *White* case, no co-operation by the proprietor, either active or passive, was required; the contract could be performed by the agent wholly without reference to the proprietor or his property. The case was far removed from that of a property owner being forced to stand impotently aside while a perhaps ill-advised contract is executed on property of his which he has delivered into the possession of the other party, and is powerless to retrieve.

The principle underlying the co-operation exception was further considered by Nicholas Strauss QC, sitting as
p. 811 a Deputy Judge of the High Court, in *Ministry of Sound (Ireland) Ltd* ↵ v. *World Online Ltd* [2003] EWHC 2178 (Ch), [2003] 2 All ER (Comm) 823. He stated (at [49]) that:

> in essence, the principle is that the breach of contract does not convert a dependent obligation into an independent one; if the right to the payment claimed is dependent upon the performance of contractual obligations, the prevention of performance by the other party's breach of contract does not alter the position.

It is therefore crucial to examine the precise scope of the contractual right to payment. Where the right to payment is dependent upon performance by the innocent party of his contractual obligations, and the innocent party has been unable to perform these obligations as a result of the lack of co-operation from the breaching party, the innocent party will not be entitled to claim payment under the contract because the right to payment has not arisen. On the other hand, where the right to payment is not dependent upon performance by the innocent party of his contractual obligations, then the innocent party should be entitled to claim payment in accordance with the contract provided that any conditions which entitle him to payment have been satisfied.

The other exception is the 'legitimate interest' requirement to be found in the speech of Lord Reid in *White & Carter*. Lord Reid stated that the exception was inapplicable on the facts of *White & Carter* on the ground that the respondent had not set out to prove that the appellants had no legitimate interest in completing the contract and claiming the contract price rather than claiming damages. It is hardly surprising that the respondent did not make such an attempt given that he presumably did not know that he had such an option

open to him until Lord Reid told him that he did. But breaching parties in later cases have been quick to seize on the exception and exploit it to the full. They have generally found the courts to be receptive to arguments based on the exception.

In *Attica Sea Carriers Corporation* v. *Ferrostaal Poseidon Bulk Reederei GmbH (The Puerto Buitrago)* [1976] 1 Lloyd's Rep 250 charterers chartered a vessel from shipowners for 17 months. After six months the vessel required substantial repairs. The cost of these repairs was some $2 million. But the vessel was not worth repairing because, even when it was fully repaired, it would be worth only $1 million. In these circumstances the charterers terminated the charter hire and re-delivered the vessel. The charterers admitted liability for $400,000 of the repairs but the shipowners refused to accept the re-delivery of the vessel, contending that the charterers were liable under the contract to pay the hire until the repairs had been carried out. The Court of Appeal rejected the shipowner's argument, holding that the obligation to repair the vessel was not a condition precedent to the entitlement of the charterer to redeliver the vessel. It was therefore not necessary for the Court of Appeal to decide whether or not the shipowners were entitled to recover the hire until such time as the repairs were done. But the court nevertheless gave brief consideration to the issue. It was held that *White & Carter* was distinguishable. Lord Denning MR expressed himself in characteristically robust terms. After noting that the decision in *White & Carter* had been said by one leading textbook writer to give rise to a 'grotesque' result, he continued as follows (at p. 255):

> Even though it was a Scots case, it would appear that the House of Lords, as at present constituted, would expect us to follow it in any case that is precisely on all fours with it. But I would not follow it otherwise. It has no application whatever in a case where the plaintiff ought, in all reason, to accept
> p. 812 the repudiation and sue for damages—provided that ↵ damages would provide an adequate remedy for any loss suffered by him. The reason is because, by suing for the money, the plaintiff is seeking to enforce specific performance of the contract—and he should not be allowed to do so when damages would be an adequate remedy. Take a servant, who has a contract for six months certain, but is dismissed after one month. He cannot sue for his wages for each of the six months by alleging that he was ready and willing to serve. His only remedy is damages. Take a finance company which lets a machine or motor-car on hire purchase, but the hirer refuses to accept it. The finance company cannot sue each month for the instalments. Its only remedy is in damages. … So here, when the charterers tendered redelivery at the end of the period of the charter—in breach of the contract to repair—the shipowners ought in all reason to have accepted it. They cannot sue for specific performance—either of the promise to pay the charter hire, or of the promise to do the repairs—because damages are an adequate remedy for the breach.

Orr LJ was rather more circumspect. He distinguished *White & Carter* on the ground that the shipowners could not fulfil the contract without any co-operation from the charterers and also because the charterers had set out to show that the shipowners had no legitimate interest in continuing with performance of the contract. Browne LJ concurred with both judgments.

In *Gator Shipping Corporation* v. *Trans-Asiatic Oil Ltd SA and Occidental Shipping Establishment (The Odenfield)* [1978] 2 Lloyd's Rep 357, 373–374 Kerr J adopted a less restrictive approach to the scope of *White & Carter*. He considered *The Puerto Buitrago* and stated (at p. 373) that he did not

> regard the case as any authority for a general proposition to the effect that whenever a charterer repudiates a time or demise charter, for whatever reason and in whatever circumstances, the owners are always bound to take the vessel back, because a refusal to do so would be equivalent to seeking an order for specific performance. The consequences of such a proposition would be extremely serious in many cases, and no trace of such a doctrine is to be found in our shipping law. But no such general proposition was laid down. … It follows that any fetter on the innocent party's right of election whether or not to accept a repudiation will only be applied in extreme cases, viz where damages would be an adequate remedy *and* where an election to keep the contract alive would be wholly unreasonable. [Emphasis in the original.]

The next case is the decision of Lloyd J in *Clea Shipping Corporation* v. *Bulk Oil International Ltd (The Alaskan Trader)* [1984] 1 All ER 129. The defendant shipowners chartered a vessel to the plaintiff charterers for approximately twenty-four months. After almost a year of largely trouble-free use, the vessel suffered a serious engine breakdown which necessitated repairs that would take several months to complete. In these circumstances the plaintiffs informed the defendants that they had no further use for the vessel but the defendants nevertheless proceeded to carry out the repairs at a cost of some £800,000. On completion of the repairs the defendants informed the plaintiffs that the vessel was once again at their disposal. However, the plaintiffs were of the view that the charterparty had come to an end and so they refused to give any directions to the master of the vessel. The defendants nevertheless refused to accept that the charter was at an end and kept the vessel, fully manned, at the disposal of the plaintiffs. The plaintiffs, having paid the hire for the entire period, sought to recover the hire paid for the period after the breakdown of the vessel. It was held that the
p. 813 plaintiffs were entitled to recover the hire subject to their liability in damages for the loss ↵ caused by their refusal to take the vessel. On the facts Lloyd J concluded that the owners had no legitimate interest in claiming the hire rather than pursuing a claim for damages. He considered the authorities and concluded (at pp. 136–137):

> Whether one takes Lord Reid's language, which was adopted by Orr and Browne LJJ in *The Puerto Buitrago*, or Lord Denning's language in that case ('in all reason'), or Kerr J's language in *The Odenfield* ('wholly unreasonable … quite unrealistic, unreasonable and untenable') there comes a point at which the court will cease, on general equitable principles, to allow the innocent party to enforce his contract according to its strict legal terms. How one defines that point is obviously a matter of some difficulty, for it involves drawing a line between conduct which is merely unreasonable … and conduct which is *wholly* unreasonable. … But however difficult it may be to define the point, that there is such a point seems to me to have been accepted both by the Court of Appeal in *The Puerto Buitrago* and by Kerr J in *The Odenfield*.

The penultimate case is the decision of Simon J in *Ocean Marine Navigation Ltd* v. *Koch Carbon Inc (The 'Dynamic')* [2003] EWHC 1936 (Comm), [2003] 2 Lloyd's Rep 693. He concluded that the 'qualifying word *wholly* in the expression *wholly unreasonable* in *The Odenfield* properly emphasizes that the rule is general and the exception only applies in extreme cases' and 'adds nothing to the test'. He sought to summarize the current state of the law in the following propositions:

> These cases establish the following exception to the general rule that the innocent party has an option whether or not to accept a repudiation: (i) The burden is on the *contract-breaker* to show that the innocent party has no legitimate interest in performing the contract rather than claiming damages. (ii) This burden is not discharged merely by showing that the benefit to the other party is small in comparison to the loss to the contract breaker. (iii) The exception to the general rule applies only in extreme cases where damages would be an adequate remedy and where an election to keep the contract alive would be unreasonable.

Finally, in *Isabella Shipowner Ltd* v. *Shagang Shipping Co Ltd (The Aquafaith)* [2012] EWHC 1077 (Comm), [2012] 2 Lloyd's Rep 61 Cooke J attempted a further summary of the law when he stated (at [44]) that 'the effect of the authorities is that an innocent party will have no legitimate interest in maintaining the contract if damages are an adequate remedy and his insistence on maintaining the contract can be described as "wholly unreasonable", "extremely unreasonable" or, perhaps, in my words, "perverse"'.

While these summaries represent valiant attempts to provide the courts with signposts that they can use in future cases, it has been argued that the legitimate interest test, as formulated by the House of Lords in *White & Carter*, is 'unintelligible and elusive, and consequently incapable of responding satisfactorily to subsequent cases' (Q Liu, 'The *White & Carter* Principle: A Restatement' (2011) 74 *MLR* 171). In an attempt to bring some order to the case-law, Professor Liu maintains (at pp. 192–193) that it is possible to reformulate the 'wholly unreasonable' test as follows:

p. 814

> (1) The principal test for a legitimate interest is whether, in the particular circumstances of the case, the wastefulness of the victim's continuing performance outweighs its performance interest in earning the contract price. By its nature this test is equitable and confers on the court a discretionary power, which is exercised only in exceptional cases, to hold that the victim has no legitimate interest in continuing to perform and is thus not entitled to the contract price. There must be some 'very cogent reason' for doing so, as the victim would otherwise suffer 'inconvenience and injustice.' (2) In applying the 'wholly unreasonable' test, the courts seem to be looking for a further good reason, in addition to the fact that the victim has a performance interest in earning the contract price, for its continuing performance. The new test recognises more directly and clearly the significance of such a reason. This is not to say that a further good reason is required and without it the victim cannot have a legitimate interest in continuing to perform. Rather, the existence of such a reason may very easily tip the scale in favour of an award of the contract price. A further good reason can be a non-pecuniary interest in the performance of the contract … or a legal liability to a third party consequent on non-performance … It can also be the lack of a real alternative for the victim other than continuing to perform … (3) Since the main countervailing factor for the victim's performance interest in earning the contract price is the wastefulness of its continuing performance, regard must be had not only to the victim's interests, but also to the contract-breaker's interests. It is not sufficient for the contract-breaker to show the mere fact of wastefulness, namely, that the benefits of the victim's continuing performance are small in comparison with its costs. The benefit–cost gap must be 'completely out of proportion'. The excessiveness of the wastefulness is necessary for the victim's claim for the contract price to be resisted.

Further Reading

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