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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,[1]	Case No. 19-34054-sgj11
Reorganized Debtor.	

DECLARATION OF HAYLEY R. WINOGRAD IN SUPPORT OF HIGHLAND CAPITAL MANAGEMENT, L.P.'S MOTION FOR (A) A BAD FAITH FINDING AND (B) AN AWARD OF ATTORNEYS' FEES AGAINST HIGHLAND CLO MANAGEMENT, LTD. AND JAMES DONDERO IN CONNECTION WITH SCHEDULED CLAIMS 3.65 AND 3.66

[1] Highland's last four digits of its taxpayer identification number are (8357). The headquarters and service address for Highland is 100 Crescent Court, Suite 1850, Dallas, TX 75201.

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I, Hayley R. Winograd, pursuant to 28 U.S.C. § 1746, under penalty of perjury, declare as follows:

1. I am an associate in the law firm of Pachulski, Stang, Ziehl & Jones LLP, counsel to Highland Capital Management, L.P. ("Highland"), the reorganized debtor in the above-referenced bankruptcy case. I submit this declaration (the "Declaration") in support of Highland's *Motion for (A) a Bad Faith Finding and (B) an Award of Attorneys' Fees Against Highland CLO Management, Ltd. and James Dondero in Connection with Scheduled Claims 3.65 and 3.66* (the "Motion") being filed simultaneously with this Declaration.[2] This Declaration is based on my personal knowledge and review of the documents listed below.

2. Attached as **Exhibit 1** is a true and correct copy of the *Folkvang Ltd v. Valorte Capital* (unreported, 29 February 2024, FSD 199 of 2023), Parker J., case filed in the Cayman Islands.

3. Attached as **Exhibit 2** is a true and correct copy of the *Blue v. Ashley* [2017] EWHC 1928 (Comm), Leggatt J., case filed in the Cayman Islands.

4. Attached as **Exhibit 3** is a true and correct copy of the *Barclays Bank Plc v. Kenton Capital* [1994-95 CILR 489] case filed in the Grand Court in the Cayman Islands.

5. Attached as **Exhibit 4** is a true and correct copy of the *H.E.B. Enterprises Ltd and Bodden Jr v. Richards [2023] UKPC 7* case filed in the Cayman Islands.

6. Attached as **Exhibit 5** is a true and correct copy of the *Richards v. H.E.B Enterprises Ltd and Bodden Jr* [2018 (2) CILR 84] case filed in the Cayman Islands.

[2] Capitalized terms not defined herein shall have the meanings ascribed to them in the Motion.

7. Attached as **Exhibit 6** is a true and correct copy of the *Beach Club Enterprises Limited v. Horizon Management Limited* [1980-83 CILR 223], Carberry J.A., case filed in the Cayman Islands.

8. Attached as **Exhibit 7** is a true and correct copy of the *Hongkong Fir Shipping Co Ltd v. Kawasaki Kisen Kaisha Ltd* [1962] 2 W.L.R. 474, Lord Diplock, case filed in the Cayman Islands.

9. Attached as **Exhibit 8** is a true and correct copy of the *Golfco Limited v. Borden* [2002 CILR 1], Kellock Ag. J., case filed in the Cayman Islands.

10. Attached as **Exhibit 9** is a true and correct copy of the *In the Matter of Re Indies Suites Ltd* [2004-05 CILR 498], Smellie C.J., case filed in the Cayman Islands.

11. Attached as **Exhibit 10** is a true and correct copy of the *Photo Production Ltd. v. Securicor Transport Ltd.* [1980] A.C. 827 case filed in the Cayman Islands.

12. Attached as **Exhibit 11** is a true and correct copy of the *Tempo Group Ltd and others v. Fortuna Development Corporation* (unreported, 31 March 2015, FSD 125 of 2012), Henderson J., case filed in the Cayman Islands.

13. Attached as **Exhibit 12** is a true and correct copy of CHITTY ON CONTRACTS, 35th Ed., Chapter 28-014.

Dated: November 21, 2024

/s/ Hayley R. Winograd
Hayley R. Winograd

EXHIBIT 1

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

FSD CAUSE NO. 199 of 2023 (RPJ)

BETWEEN:

FOLKVANG LIMITED

Plaintiff/Respondent

and

VALORTE CAPITAL

Defendant/Applicant

Before:	The Hon. Raj Parker
Appearances:	Mr Denis Olarou of Carey Olsen for the Plaintiff / Respondent
	Ms Katie Pearson and Ms Alexia Adda of Claritas Legal and Mr Robert Farrell of Loeb Smith for the Defendant / Applicant
Heard:	24 January 2024
Draft Judgment circulated:	22 February 2024
Judgment delivered:	29 February 2024

HEADNOTE

Strike out-GCR O. 18r19 -summary judgment GCR O 14r12-cryptocurrency trading -loan agreements-FTX collapse-parties dealings-whether claim compromised at 90%-construction of Loan Agreements-belief in consideration waived-estoppel-detrimental reliance -suitability for summary determination without a trial.

Introduction

1. On this application Valorte seeks:

   a) a strike out of Folkvang's claim pursuant to GCR O 18 R 19(1)(a), (b), and (d); or

   b) summary judgment for Valorte under GCR O 14 R 12 on the ground that Folkvang's claim has no prospect of success.

Background

2. Folkvang is a Cayman Islands exempted company. Valorte is also an exempted company incorporated under the laws of the Cayman Islands. Both Valorte and Folkvang trade digital assets, including cryptocurrency. Folkvang alleges that Valorte owes it 10% of the amount of "*USD Coin*" ("*USDC"*) and "*Bitcoin*" ("*BTC"*) outstanding and repayable under Loan Agreements dated 22 and 29 October 2021 (the "Loan Agreements").

The Loan Agreements

3. The Loan Agreements (both are in materially identical terms) provided Valorte with cryptocurrency (i.e. *USDC* and *BTC* tokens) "*for working capital purposes*" (clause 2.2). Valorte used the loaned USDC and BTC in "*active* [cryptocurrency] *trades*" on various cryptocurrency exchanges[1].

[1] *Lazarov 1, at [14]*

4. Valorte traded the borrowed *USDC* and *BTC* on various cryptocurrency exchanges. This impacted its ability to satisfy the Loan Agreements. If Valorte was not trading the *USDC* or *BTC*, then Folkvang's ability to earn interest under the Loan Agreements would be compromised.

Drawdowns/Termination

5. The Loan Agreements contemplated the possibility of partial drawdown (clause 4.2), partial prepayment (clause 5.3), and further drawdowns (clause 4.3).

6. There is a dispute between the parties as to whether repayment under the Loan Agreements is separate from termination of the Loan Agreements. Folkvang's case is that even if full repayment is made that did not necessarily render the Loan Agreements otiose, since further drawdowns might be made.

Events of October and November 2021

7. As of 23 and 29 October 2021, Folkvang advanced 1,001,391 USDC and 10.8763802 BTC, respectively, to Valorte (pursuant to clause 4.1).

8. Valorte was obliged to pay interest on the principal sum advanced by Folkvang in an amount calculated by reference to the net profits and losses from trading activity made by Valorte using the loan (clause 6).

9. Clause 5.1 provided that the principal and interest were repayable "*on the Repayment Date to such bank as the Lender shall designate"*.

10. Clause 1.1 defined the "Repayment Date" as "*the next day after the Lender request[s] Repayment that could be at any time after the Cure Period, or if such day is not a Business Day, the next succeeding Business Day*".

11. Clause 9.1, entitled "Events of Default", provided that:

> *"Upon the occurrence of any of the events set out in this Clause 9.1 below, the Lender at its sole discretion may by notice in writing to the Borrower demand immediate*

repayment of the Loan together with interest, fees and commissions (if any) and thereupon the Borrower shall forthwith repay or pay the same and the Facility shall terminate, that is to say:

[…]

(f) there occurs in the reasonable opinion of the Lender, a material adverse change in the financial condition of the Borrower or any other event occurs or circumstances arise which in the reasonable opinion of the Lender could adversely affect the ability of the Borrower to perform all or any of its obligations under this Agreement"

12. Clause 15.2, entitled *"Termination"*, provided that:

"If the termination of this Agreement is due to any of the Events of Default described in clause 9, the defaulting party shall have three (3) months from the occurrence of a default to cure (the "Cure Period") by providing satisfactory evidence to the other party that it has corrected the default. During the Cure Period the Agreement shall not be terminated without written consent of both parties".

The 13 November 2022 Notice

13. The insolvency of FTX (a leading cryptocurrency exchange) was announced on 9 November 2022.This was a massive 'Black Swan' event for the cryptocurrency market and participants had to adjust quickly to the potential ramifications.

14. The markets and exchanges in which Valorte was operating were fundamentally compromised and it was unclear when the situation might normalise, but it was likely to take more than a year[2]. Folkvang was reported as having "*half of its equity parked on FTX before it collapsed".*[3]

15. Folkvang's evidence is that, aside from concerns about its own business, FTX's collapse led Folkvang to form the view that Valorte may be unable to perform its obligations to repay under

[2] *see generally Van Rossum 1 and Hoath 1*

[3] Exhibit to ZL1, page 13

the Loan Agreements[4]. Valorte's evidence is that Mr Lazarov disputed that there had been an Event of Default, at first.

The communications between the parties

16. Against that background, on 10 November 2022 there was the following exchange between Mr Hoath, a director of Folkvang, and Mr Lazarov of Valorte, via "Telegram", by which Folkvang requested repayment of the sums it had advanced to Valorte.

> …..
>
> *"[Mr Hoath]: We are requesting a full withdrawal (20:53)*
> *[Mr Lazarov]: Yes, its 3 months (20:53)*
> *or a haircut of 10% in the current conditions*
> *[Mr Hoath]: Ok (20:54)*
> *Will revert (20:54)*
> *[Mr Lazarov]: ok, send me an email (20:54)"*

17. On 11 November 2022 FTX filed for bankruptcy.

18. On 13 November 2022, Mr Anderson spoke with Mr Lazarov. The contents of the call are disputed. Mr. Anderson says that Mr Lazarov agreed to repay the loan in full immediately[5].Mr Lazarov disagrees.[6]

19. The conversation was followed by an email from Mr Anderson to Mr Lazarov, with the subject "*Request for Withdrawal*", which "*confirm[ed] [Folkvang's] request for withdrawal of funds from Valorte"*. The email stated the outstanding balance under the Loan Agreements as 1,520,148 USDC and 45.51233 BTC. This email on Folkvang's case, provided Valorte with notice under clause 9.1 of the Loan Agreements to repay the loan.

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[4] §19 of Van Rossum 1"*In the circumstances, we at Folkvang formed a perfectly reasonable view that, quite apart from questions over the immediate financial condition of Valorte, market events could adversely affect Valorte's ability to perform its obligations under the Loan Agreement".*

[5] Anderson 1 §11
[6] Lazarov 3 §16

20. Mr Lazarov asked in response by email: '*Can you confirm also that you agree with 10% fee for the early redemption?"*

21. Mr Anderson's response was *"No, we're not ok with that. Please ping me when you are awake."*

22. There is a response from Mr Lazarov which says *"So on the phone you said you were ok with the fee, but on email you are saying no."*

The Compromise

23. On Folkvang's evidence, there were two further calls between Mr Anderson and Mr Lazarov after 13 November 2022.

24. The first was on 14 November 2022 in which Mr Lazarov is reported by Mr Anderson as "*not say[ing] to me that there was no event of default. On the contrary, Mr Lazarov said that he had three months to cure the default. I told Mr Lazarov that the cure was out of his hands, because he could not change the market dynamics"*. Further, Mr Lazarov repeated later on the same call that "*he had three months to cure the default"*.

25. The second was on 16 November 2022, during which Mr Anderson describes that "*Mr Lazarov put forward a proposal for [Folkvang] to consider"*. It is undisputed that that proposal was not accepted.

26. Mr Lazarov then asks, "*In that case, can you give me formally the basis and the reasons for this early return of funds?"*

27. On 19 November 2022 at 21:31, Mr Anderson emailed Mr Lazarov in the following terms:

> *"We will pay the 10%.*
> *Please send $1,360,608.30 USDC ERC20 ($1,511,787.00 less 10%) to:*
> *0xf92f913685af75ba758a1b40ee1017224b13b0e8*
>
> *Please send 41.9541984 BTC (46.615776 less 10%) to:*
> *1Grm8P2HBJcFmoABJpy3mEF36JzKFUd8C7*

Please confirm that these amounts are correct and that you will send the funds today.

As discussed, our rationale for the withdrawal remains clause 9.1 (f): there occurs in the reasonable opinion of the Lender, a material adverse change in the financial condition of the Borrower or any other event occurs or circumstances arise which in the reasonable opinion of the Lender could adversely affect the ability of the Borrower to perform all or any of its obligations under this Agreement."

28. On 21 November 2023 Valorte sent smaller amounts of USDC 46.8 and 0.0008 BTC to Folkvang as "test amounts" to ensure that Folkvang would receive the full amount, as is recorded in an exchange on Telegram between Mr van Rossum and Mr Lazarov:

"[Mr Lazarov]: @[Mr van Rossum] test amounts were sent.
You can check email
[Mr van Rossum]: checking
yep! test amounts received…"

29. Mr Lazarov sent Mr van Rossum a further message on Telegram asking him "*to give confirmations on email as well please*", which Mr van Rossum replied he had "*done"*.

30. The email to which Mr Lazarov was referring, and to which Mr van Rossum responded was as follows (Mr van Rossum's responses are embedded in Mr Lazarov's email):

"[Mr Lazarov] Can you confirm that you received the two test transactions?
[Mr van Rossum] We have received the two test transactions as following:
46.8 USDC
0.0008 BTC
[Mr Lazarov] Do you otherwise agree that when you receive the next few transactions totalling to 1,360,60.30 USDC and 41.9541984 BTC, all the parties' dealings will be finalized and, neither party will have additional claims against the other, whether legal, financial or otherwise.
[Mr van Rossum] Yes"

31. On 21 November 2022, Valorte transferred 1,360,651.90 USDC and 41.9547984 BTC to Folkvang's cryptocurrency wallet, as Mr Anderson had requested in his email of 19 November 2022.

32. This on Valorte's case fully and finally compromised the claim.

Valorte's case

33. Katie Pearson appeared for Valorte. She argued as follows.

34. Folkvang promised to (and did) accept 90% of the amount outstanding under the Loan Agreements in satisfaction for Valorte's indebtedness. That agreement is recorded in an exchange of emails on 21 November 2022 in which Folkvang expressly agreed that, as a result of Valorte's payment of said amount, "*all the parties' dealings will be finalized and, neither party will have additional claims against the other, whether legal, financial or otherwise".*

35. Folkvang's promise is binding because Valorte gave good consideration for it, which consisted in a promise to waive its claim to insist upon paying after lapse of a three-month "Cure Period", which resulted in Folkvang receiving 90% the outstanding amount three months earlier than it was otherwise entitled.

36. Ms Pearson submitted that Folkvang is now seeking a second bite at the cherry to recover the additional 10%, that was worth $224,000 on the 21st of November 2022 when the repayment was made. At the date of Mr Lazarov's second affidavit, which was 13th of November 2023, it was worth some $322,000 due to a rise in the value of *BTC*.

37. Ms Pearson submitted that Folkvang's position that the right which Valorte claims to have had was "illusory" and therefore waiver of it cannot have amounted to valid consideration, is wrong as a matter of law. It does not matter whether Valorte actually had such a right, what matters is whether it had a valid claim to that right; *"surrendering of the claim is sufficient consideration even if it is later found that the claim would not have been upheld"*[7]. Valorte's claim to the right will be valid unless it can be shown Valorte believed it not to be at the time it agreed the compromise[8].

38. In fact, she argued, in this regard it is clear that Valorte is correct in its construction of the effect of clause 15.2 of the Loan Agreements on the repayment obligation under clause 9.1 applying

[7] *Furmston, infra*, paragraph [11.89]
[8] *Simantob*, *infra*.

the principles of construction set down by the Privy Council[9]. To construe the Loan Agreement in a manner which requires repayment three months prior to termination of the agreement would denude clause 15.2 of any purpose, which the Court should strive to avoid. She argued that as a matter of common sense Valorte did not have to repay before the 'Cure Period' was up. There was no point in having a 'Cure Period' if the borrower had to repay before it expired. In addition, clause 9.1 says that "*The borrower shall forthwith repay and the facility shall terminate* …" which implies that repayment and termination will be simultaneous.

39. Even if this construction is wrong, Ms Pearson pointed out that Folkvang does not allege in: (i) its pleaded case or (ii) its evidence in response to Valorte's summons that Valorte had no belief that it was entitled to the benefit of the Cure Period, nor does it advance any other basis for avoiding the compromise.

40. It follows that, in surrendering its claim to the Cure Period, Valorte gave good consideration and the agreed compromise is binding. Ms Pearson pointed out that Mr Lazarov confirms that he believed in the Cure Period point when he raised it[10]. None of Folkvang's witnesses allege that Valorte knew or even believed that the Cure Period point was a bad one.

41. There is also, she argued, the general public policy "in favour of holding people to their commercial bargains".[11]

42. This was a bargain struck against the backdrop of market turmoil caused by FTX's collapse, and it would be contrary to public policy to entertain arguments that bargains made in such circumstances could simply be undone with the benefit of hindsight. In fact, from the timing of the Claim and the sharp increase in the value of BTC, it is a ready inference that the Claim is motivated by the desire to escape what Folkvang perceive as a bad bargain, which should not be permitted.

43. Alternatively, if Valorte is wrong about consideration, Ms Pearson argued that Folkvang is nevertheless estopped from enforcing any strict legal right to payment under the Loan Agreements in circumstances where: (i) Folkvang represented it would accept 90% of the amount outstanding, (ii) Valorte relied on that representation to its detriment by (a) going to lengths and expense to raise the money to repay Folkvang and (b) actually transferring the 90%

[9] *Ennismore Fund Management Ltd v Fenris Consulting Ltd [2016] UKPC 9*
[10] *ZL2,§§22 to 24*
[11] *Simantob, paragraph [50].*

to Folkvang, such that (c) it would now be inequitable for Folkvang to enforce any right to payment under the Loan Agreements.

44. Ms Pearson submitted that Mr van Rossum clearly represented in his email to Mr Lazarov on 21 November 2022 that, if Valorte paid 90% of the sums outstanding under the loan agreement *"neither party will have additional claims against the other, whether legal, financial or otherwise"*.

45. Valorte relied on that representation by actually transferring to Folkvang 90% of the amount outstanding under the Loan Agreements and incurring the cost of doing so immediately.

46. It would be inequitable for Folkvang to enforce its strict legal rights given the lengths to which Valorte went to make payment to Folkvang. Valorte incurred "*a large amount of collateral expenditure that was secured until the end of 2022"*. [12]

47. Mr Lazarov says[13]:

> *"More importantly, however, the Defendant also had to pay USD 1.5m into a margin account with 42 BTC borrowed against it, which was used to make the immediate repayment to the Plaintiff. From that amount, the Defendant withdrew USD 400,000 so as to leave USD 1.1m as collateral, which was the amount of collateral required for the BTC borrowing, noting that this was almost double the value of the borrowed 42 BTC. This collateral remained tied up and unavailable for the Defendant to use to generate profits, until the end of the year when the Defendant repaid the borrowing. As the Plaintiff would have been well aware, this type of business makes the most profit during volatile periods of trading and typically, those weeks in November 2022 would have provided the best opportunity for a company to make most of its profit for the whole year. This is why the size and timing of the collateral was so costly for the Defendant.'*

48. It follows, she submitted that Valorte has a complete defence to the Claim and its summons should succeed.

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[12] *§30 of Mr Lazarov's Second Affidavit,*
[13] *§31 ibid.*

Folkvang's case

49. Mr Denis Olarou appeared for Folkvang.

50. He argued that this is a case in which the debtor, Valorte, forced the creditor, Folkvang, to take part-payment of a debt as purported settlement of the full amount through commercial pressure, effectively holding Folkvang to ransom. It is well settled that, in such circumstances, the creditor is not bound by any purported promise to accept a lesser sum and retains the right to claim for the balance[14].

51. He submitted that instead of complying with its contractual obligations, Valorte took the view that possession is nine-tenths of the law, and attempted to leverage the fact that Folkvang's capital was at risk of being destroyed by a new exchange collapse (on a daily basis) in order to extract a discount on its debt obligations.

52. Instead of repaying "*forthwith*" pursuant to clause 9.1, Valorte made it clear that it would hold the funds ransom for three months unless Folkvang agreed to a 10% discount.

53. During those three months Folkvang's funds could have disappeared altogether if one of the (non-FTX) exchanges Valorte was trading with went down. As Mr Van Rossum and Mr Hoath explain in their affidavit evidence, the choice offered to them by Valorte was no choice at all and they had no practical alternative but to agree. Contrary to what Valorte has asserted, Folkvang did not receive any additional benefit beyond what it was already contractually entitled to (less 10%).

54. Valorte now brings its Strike-Out Summons seeking to prevent Folkvang's claim for the balance from going to trial, on the basis of an argument that there has been a valid and binding variation of the debt obligation such that the balance is not due.

55. Mr Olarou argued that there were numerous factual and legal controversies raised by Valorte's arguments requiring resolution through cross-examination, discovery, and full argument on complex points of law. They are not suitable for summary determination on the Strike-Out

[14] *D. & C. Builders Ltd v Rees* [1966] 2 Q.B. 617, at [625]

Summons, but must be properly tried. Accordingly, the Strike-Out Summons should be dismissed.

56. Rather than being mired in interlocutory battles, this claim, which is concisely pleaded, should proceed to trial expeditiously. There is no reason why full trial cannot come on foot reasonably soon, obviating any perceived benefit from curtailing this claim by summary determination.

57. On the proper construction of the Loan Agreements, he argued, the Cure Period in clause 15.2 only deferred the termination of the Loan Agreements. Nothing is said about deferral of the repayment obligation. The 3-month Cure Period in clause 15.2 of the Loan Agreements relates solely to the termination of the Loan Agreements as a whole. Clause 15.2 does not deal with repayment at all and did not confer any right on Mr Lazarov to defer repayment for 3 months.

58. This he submitted was consistent with clause 9.1, which provided that repayment on the occurrence of the Event of Default shall be "*forthwith*" but did not specify the timing of "*termination*". Clause 15.2 dovetails with clause 9.1 by supplying a timing for termination (after the Cure Period). It does not disturb or displace the requirement in clause 9.1 for repayment to be made "*forthwith*".

59. Clause 9.1 of the Loan Agreements unequivocally obliged Mr Lazarov to repay the Total Loan Amount immediately. Clause 15.2 did not modify or suspend this obligation in any way.

60. Mr Olarou argued that this does not make the Loan Agreements otiose. The Loan Agreements contemplated the possibility of periodic drawdowns, repayments, and further drawdowns up to the borrowing limit. Full repayment "*forthwith*" under clause 9.1 did not necessarily, in and of itself, mean the end of the borrowing relationship.

61. Further, in principle, if the Event of Default were cured within the Cure Period, the Loan Agreements could remain in force and further drawdowns could occur.

62. Valorte rests its 'merits' strike-out application and its summary judgment application on the contention that the parties reached a binding agreement to reduce Valorte's liability under the Loan Agreements to repay the Total Loan Amount by 10%.

63. To succeed in this argument, Valorte must show:

a) First, that the circumstances are such that there could be a true accord and satisfaction between the parties in respect of the purported 'settlement'. A debtor who exploits a tactical advantage to force the creditor to accept part payment in full settlement does not achieve 'accord and satisfaction'. There is authority which states that there is no equity in such debtor to prevent the creditor from claiming the balance, and the debtor remains liable for the balance. This is exactly what happened in the present case, with Valorte holding Folkvang to ransom.

b) Second, assuming true accord and satisfaction was possible, the purported 'settlement' involved something more than part-payment of a debt in purported settlement of a full debt, since part-payment of a debt is no consideration. A debt can only be released for additional valuable consideration.

64. In this regard, Valorte claims that it provided additional benefits to Folkvang (in the form of allegedly early repayment) and supposedly agreed to waive a defence. However, Mr Olarou argued, these arguments cannot be determined against Folkvang summarily without the benefit of discovery, cross-examination, and consideration of complex points of law.

65. Even if Valorte succeeds on the first two points, Valorte must also show that the purported agreement to reduce Valorte's liability under the Loan Agreements to repay the Total Loan Amount by 10% is valid and not contrary to clause 18 of the Loan Agreements, which provides that no variation shall be effective unless signed for or on behalf of all the parties. Valorte cannot show this, certainly not on the present state of the evidence.

66. Folkvang was entitled to immediate repayment of the Total Loan Amount and Valorte offered nothing other than the performance of its existing contractual obligations 'in exchange' for a 10% reduction of its obligations under the Loan Agreements. In effect, Folkvang bowed to Valorte's threat to retain its money unlawfully unless a 10% ransom was paid, accepting the 'offer' under duress.

67. Mr Olarou made a number of specific points which he argued showed that Valorte has not proved Folkvang's case was 'fanciful, improbable or bound to fail'.

True Accord Issue

68. This involves an examination of whether the circumstances were such that there could be a true accord between the parties or whether agreement was procured by illegitimate means. There was no true accord and satisfaction between the creditor and the debtor, because the debtor "*held the creditor to ransom*", exploiting a commercial advantage.

69. He also pointed to parallels with economic duress cases where agreements are procured by illegitimate pressure, leaving a party no practical choice but to agree to the proposed settlement or variation of contract.

70. In the present case, Folkvang's evidence is that it only agreed to the 10% haircut, because the alternative was that Valorte would, in breach of contract, hold its capital hostage on cryptocurrency exchanges that could go bust at any moment, potentially resulting in a total loss of the capital, which was not a reasonable alternative.

71. Indeed, Mr Lazarov's own evidence is effectively that he considered Folkvang to be in a vulnerable commercial position: "*... the Plaintiff itself was heavily exposed to FTX and needed to realise assets as quickly as possible in November 2022*".

72. Far from supporting Valorte's 'consideration' argument, this tends to support Folkvang's case that the purported 'settlement' agreement was extorted from it. In any event, the truth of the matter cannot be established without cross-examination of Mr Lazarov, Mr van Rossum, Mr Hoath, and Mr Anderson.

Event of default issue

73. This involves an assessment of whether or not an Event of Default occurred under clause 9.1(f) of the Loan Agreements ("Event of Default Issue"). The resolution of this issue requires the Court to determine whether the opinion formed by Folkvang as to the consequences of the FTX collapse for Valorte was "*reasonable*". The Event of Default Issue clearly cannot be resolved without discovery and cross-examination. It is not appropriate to hold a summary mini-trial on this issue.

Loan agreement issue

74. This involves whether clause 15.2 of the Loan Agreements creates an entitlement to defer *repayment* for 3 months or only an entitlement to defer *termination* for 3 months and, if the former, how it interacts with clause 9.1 of the Loan Agreements.

75. If there was no entitlement to defer payment by 3 months, then Folkvang received no additional benefit from receiving part-payment when it did, and the purported settlement agreement would not be supported by consideration.

76. Mr Olarou submitted that the plain language of clause 15.2 makes no reference to any deferral of repayment obligations or any modification of the obligation to repay immediately in clause 9.1. Therefore, the starting point for the analysis will always be that clause 15.2 does no more than what it says 'on the tin', and that does not include any right for Valorte to defer payment by 3 months.

77. He submitted that it is for Valorte to persuade the Court that the natural meaning of the words in clause 15.2 should be displaced in favour of something else. Any such argument, even if it can be made, will require the Court to engage in consideration of complex issues of contractual construction and associated law. To the extent Valorte wishes to pray in aid surrounding circumstances, this is likely to bring in factual controversies as to what information was reasonably available to the parties when the contract was made.

78. Therefore, while Folkvang can rest its case on the plain language of the clauses, Valorte would have to resort to witness evidence (yet to be produced). All these factors make the Loan Agreement Issue unsuitable for summary determination on a strike-out / summary judgment application.

Defence waiver issue

79. This involves what exactly Valorte offered to Folkvang and, in particular, whether the offer purportedly made by Mr Lazarov (on behalf of Valorte) to Mr Anderson (on behalf of Folkvang) in various phone conversations included an offer that Valorte would forego a defence based on the Event of Default Issue.

80. The relevant question is not what defences Valorte is running now, but whether this particular defence was raised at the time of the purported settlement and its waiver actually tendered as consideration for the 10% haircut.

81. Therefore, the Defence Waiver Issue is entirely a matter of witness evidence between Mr Lazarov and Mr Anderson. Lazarov 2 and 3 claim that the occurrence of the Event of Default was disputed in phone conversations and that an offer was made in those phone conversations to waive the dispute.

82. Anderson 1 denies that Mr Lazarov ever disputed the occurrence of the Event of Default or offered to waive any such purported dispute in exchange for a 10% haircut. That alone disqualifies the Defence Waiver Issue from being decided at the present strike-out/summary judgment hearing, without the benefit of cross-examination of Mr Lazarov and Mr Anderson.

83. Lazarov 2 and 3 contradict Lazarov 1 and Valorte's Defence on this point. Lazarov 1 (at [12]) and Valorte's Defence (at [13]) both describe the purported 'settlement terms' (defined there as "Repayment Terms") by claiming that the 10% 'haircut' was in consideration of Valorte waiving its supposed entitlement to defer payment by 3 months (the purported 'Cure Period'), which on Valorte's case was a benefit which Folkvang was not entitled to.

84. Neither Lazarov 1 nor the Defence include the Defence Waiver Issue as part of the consideration under the supposed Repayment Terms. Indeed, Lazarov 1 at [6] puts the supposed deal this way: "*The choice for Folkvang was therefore a simple one; did it want 100% of the Total Loan Amount after expiry of the Cure Period, or did it want 90% of it in short order.*" Mr Olarou argued that no suggestion is made that, at the time, Mr Lazarov also offered to forego some purported defence as part of the supposed bargain – on the contrary, the express premise of the bargain was that, save for the issue of timing, Folkvang was entitled to 100% of the Total Loan Amount.

85. Mr Olarou argued it is only in Lazarov 2 and 3 that Mr Lazarov (tentatively) started to suggest that this supposed further consideration was offered as part of the overall package. Even then his argument appears to be that it was offered by implication rather than expressly (see e.g. Lazarov 2 at [29]). This clearly calls for a careful factual enquiry unsuited to a strike-out hearing.

Mr Lazarov's state of mind

86. This issue involves whether Mr Lazarov, acting on behalf of Valorte, believed such defences as he was (purportedly) asserting in telephone conversations with Mr Anderson to be valid. A compromise of a claim or defence which is not believed by the party offering to compromise it to be valid is not contractually binding. The key issue in all cases is not the validity of the claim or the defence as such but whether the party (allegedly) offering to forego such claim or defence (i) believed in good faith that it had a fair chance of success; and (ii) seriously intended to pursue the claim. This cannot be resolved without cross-examining Mr Lazarov and without disclosure of documents by Mr Lazarov. It is not suitable for summary determination.

Variation issue

87. This covered whether the purported 'settlement' agreement, which Mr Olarou argued had the sole effect of varying the obligation to make payment of the Total Loan Amount, by substituting an obligation to pay less, is valid. Clause 18 of the Loan Agreement expressly states, in this regard, that the Loan Agreement "*sets forth the entire agreement and understanding between the parties… [and] no variation of this Agreement shall be effective unless signed for or on behalf of all the parties*".[15]

88. In the present case Valorte has not put forward any evidence that the purported 'settlement' agreement has complied with the requirements set out in clause 18 of the Loan Agreements. In the absence of such evidence, this point cannot be resolved in Valorte's favour.

Estoppel issue

89. Valorte's Defence also attempts to set up an estoppel argument. This raises at least the additional issue of whether there was in fact detrimental reliance. This is obviously something that would have to be tested through cross-examination and discovery.

[15] In *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] UKSC 24, at [17] it was held that a purported oral variation of such an agreement would be invalid, for want of writing and signatures as prescribed in an entire agreement clause.

The law

90. *Whether the claim is frivolous, or vexatious, or an abuse of process (GCR O 18 R 19(1)(b) and (d)) or has "no prospect of success" (GCR O 14 R 12).*

91. Order 18, r.19 of the Grand Court Rules provides, so far as is relevant, as follows:

> *"(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that –*
> *(a) it discloses no reasonable cause of action or defence, as the case may be; or*
> *(b) it is scandalous, frivolous or vexatious; or*
> *(c) it may prejudice, embarrass or delay the fair trial of the action; or*
> *(d) it is otherwise an abuse of the process of the court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be."*

92. Order 14, r.12 of the Grand Court rules provides, so far as is relevant, as follows:

> *"Where in an action to which this rule applies a defence has been served by any defendant, that defendant may, on the ground that the whole or part of the plaintiff's claim has no prospect of success or that the plaintiff has no prospect of recovering more than nominal damages, apply to the Court for the plaintiff's claim to be dismissed and judgment entered for the defendant on the whole or part of the claim".*

93. Applications to strike out and for summary judgment are not lightly granted and are discretionary remedies. The pleaded case must be untenable and the jurisdiction is to be exercised sparingly and only in clear cases[16].

94. The applicant has to show that the claim does not merit a trial. A part of the exercise of the Court's discretion is whether the Overriding Objective is met so that bringing these proceedings to an end would result in material time and cost advantages compared to allowing it to proceed to trial.

[16] *Murphy and Slutsky v Hacet and Montgomery* [2020 (1) CILR 47], at [20]

95. The fact that the Court takes the view that the case is weak and not likely to succeed is not sufficient[17].

96. The following general propositions derived from Cayman Islands authority apply to an application to strike-out:

a) "*jurisdiction to strike out must be sparingly used, as its exercise deprives the party of the normal procedure for establishing rights by way of trial with the discovery and oral evidence tested by cross-examination*";[18]

b) "*the court's function is to decide whether the case is so plainly unarguable that there is no point in having a trial*";[19]

c) where the Defendant relies on several grounds of strike-out "*the court must take a broad brush approach and simply ask whether the case was a plain and obvious one for striking out rather than considering each ground in detail*";[20] and

d) the fact that a case is weak on the documents does not mean it is unarguable and it must be "*plainly and obviously unarguable*" for strike-out to succeed.[21] The Defendant has to show that the claim is bound to fail.

e) the court should not perform a mini trial without the benefit of discovery and the cross examination of witnesses, to decide the case on written material alone. Applications should not be granted when there is any serious conflict as to the material facts or any real difficulty as to the law.

f) the facts as pleaded must generally be assumed to be true unless there are good reasons against this assumption.

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[17] *(Moore v. Lawson* (1915) 31 T.L.R. 418, CA*; Wenlock v. Moloney* [1965] 1 W.L.R. 1238; [1965] 2 All E.R. 871, CA

[18] *Southdown Regency Development Ltd v Cayman National Bank Ltd.* (unreported, Cause No. 249 of 2005 (Levers J), 12 March 2007), at [11:2-5]

[19] *Ibid*., at [11:5-7].

[20] *Ibid*., at [11:5-7].

[21] *Ibid*., at [15:7-9]. and *AHAB v SAAD* [2011] (2) CILR 434

97. Similarly in relation to summary judgment applications the Court must be satisfied that the Plaintiff's claim has no prospect of success[22]. The Defendant has to prove that there is no real prospect of success. Although the test is somewhat lighter than in an application to strike out, the burden is still on the Defendant to show that the Plaintiff's case is 'worse than improbable' and even then the Court has a discretion as to whether summary judgement should be entered[23].

98. In *Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch),* Lewison J summarised the approach to an application for summary judgment at paragraph [15]:

i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman [2001] 2 All ER 91;*

ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8];*

iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*;

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents*: ED & F Man Liquid Products v Patel at [10];*

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;*

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate

[22] *GCR O 14 R 12(1).*
[23] *Simamba v Health Services authority* [2019 (2) CILR 213], at [51]

about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case*: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;*

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction*: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725."*

Compromise – Relevant Law

99. A compromise like any agreement, must be supported by consideration and while questions of adequacy of consideration do not concern the Court[24] the consideration must be real and not "illusory"[25].

100. Performance of a pre-existing contractual duty will generally not amount to good consideration[26].

[24] *Chitty, paragraph [6-015]*
[25] *Chitty, paragraph [6-026].*
[26] *Chitty, paragraph [6-060].*

101. In *Pinnel's Case (1601) 5 Coke Reports 117a 237* and *238*, it was held that "*payment of a lesser sum on the day in satisfaction of a greater, cannot be any satisfaction of a greater, cannot be any satisfaction for the whole"* (known as the "*Rule in Foakes v Beer*" after Lord Blackburn's judgment in in *Foakes v Beer (1884) 9 App Cas 605).*

102. However, variation in performance of such a duty will amount to good consideration where it is of benefit to the creditor. Thus, in *Pinnel's Case* itself, payment by Cole of 5 pounds, 2 shillings and 2 pence "*before the said day [on which it was due"* was held to be "*a good satisfaction in regard of circumstances of time."*

103. As further explained in Chitty at paragraph [6-105] by reference to *Pinnel's* Case:

> "*payment of a smaller sum at the creditor's request before the due day is good consideration for a promise to forgo the balance, since it is a benefit to the creditor to be paid before they were entitled to payment, and a corresponding detriment to the debtor to pay early."*

104. In the context of agreements to compromise, consideration consists in the promisee surrendering their claim to the relevant legal right and not the legal right itself. In *Callisher v Bischoffsheim (1870) LR 5 QB 449,* Cockburn CJ said at p 452:

> "*Every day a compromise is effected on the ground that the party making it has a chance of succeeding in it, and if he bona fide believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to sue will constitute a good consideration. When such a person forbears to sue he gives up what he believes to be a right of action, and the other party gets an advantage, and, instead of being annoyed with an action, he escapes from the vexations incident to it."*

105. In Foskett on Compromise (9th Ed., 2019) ("Foskett"), paragraph [3-11] where the claimant does not bona fide believe he has a chance of success:

> *"It would seem that a forbearance from pursuing a claim (a) known by the claimant to be baseless or (b) which is vexatious or frivolous would constitute no consideration for a compromise based upon it. Equally, a forbearance to pursue an illegal claim, for example, one made illegal by statute, would represent no consideration. So too a*

forbearance which itself is prohibited by law or is contrary to public policy is no consideration.

106. Furmston and Tolhurst on Contract Formation: Law and Practice (3rd Ed., 2023) ("Furmston"), at §11.89 explain further as follows:

"*in both a forbearance and compromise the relevant party (typically a creditor) only surrenders their claim to the relevant legal right, they do not surrender the right itself. The surrendering of the claim is sufficient consideration even if it is later found that the claim would not have been upheld. A forbearance to sue is distinct from the notion of abandoning a claim. However, in both compromises and forbearances it is necessary that the claim be honestly made; thus, it is no consideration for a party to forbear to take action on a claim they believe to be invalid, nor can they conceal from the other party facts that would negatively impact on the validity of the claim. It may also be a requirement that the claim be reasonable and not vexatious or frivolous."*

107. Furmston further provides at § 11.86:

"A compromise might occur over a bona fide dispute as to the construction of a contract. For example, party A under a contract may construe the contract and take the view that its obligation is to do X, while party B may construe the same obligation and believe that A must do Y. They can compromise that dispute, for example, by agreeing that A will do Z (and assume that it is something less than Y) and agreeing to abandon their claims. That agreement is enforceable even if later it is determined that one of the parties was correct in their interpretation and even if the correct interpretation was that of B, so that A has now agreed to do less than he or she was originally contractually obliged to do."

108. In *Simantob v Shavleyan* [2019] EWCA Civ 1105 ("Simantob") English CA it was held per Simon LJ*:*

49. Mr Ramsden's public policy point was somewhat different from that suggested by Chitty. It is one thing for a person to threaten a claim or defence in which that person has no confidence at all. It is a quite different thing for a person to intimate a claim or defence which, whilst the person recognises that it raises a doubtful or undecided point, he or she also believes in and intends to pursue it in court if necessary. On the Judge's findings, this case fell squarely into the second category. The respondent had raised

his concerns about the $1,000 per day clause, had intimated the penalty defence and plainly intended to raise it in any proceedings brought by the appellant. By entering into the April/May 2014 variation agreement, he agreed that he would no longer be able to raise that defence and the debt would be consolidated at $800,000. The fact that the appellant subsequently sued for the whole amount allegedly due under the Settlement Agreement, denying the existence of the April/May 2014 variation agreement in the process, can have no effect on the legal position at the time that when that agreement was made in April/May 2014; and the fact that the respondent then pleaded and relied on the penalty defence, having agreed to compromise the point is equally irrelevant.

50. Furthermore, there is another countervailing public policy that must also be taken into account in this context: namely, the public policy in favour of holding people to their commercial bargains. This element of public policy provides a limitation on the public policy discouraging parties from threatening unreasonable claims or defences. There cannot be any sensible public policy against encouraging parties to raise claims or defences that they reasonably believe may succeed, even if they eventually turn out to fail. It may be noted that the suggestion that the $1,000 per day clause was a penalty was made at a time when there was considerable uncertainty in the law, and before the Supreme Court ruled in Cavendish Square Holding BV v. Makdessi , ParkingEye Ltd v. Beavis (see above).

51. See, also, Cheshire and Fifoot (above) at p.115:
"In the modern law, the consideration in [cases where the promise is not to pursue a claim or defence] is said to be the surrender, not of a legal right, which may or may not exist and whose existence, at the time of the compromise remains untested, but of the claim to such a right."
This attitude is sensible. It is true that if the claim is baseless, the claimant may appear to have got something for nothing, or that contrariwise, if a claimant settles a good claim for less than its true value, he may appear to have given up something for nothing but this is to ignore the cost, both monetary and psychic, of litigation. It is in the public interest to encourage reasonable settlements

52. It is in the light of these considerations that the decision of Master McCloud must be seen. In our view, whether she was right or wrong is immaterial. The question of the

validity of the consideration for the April/May 2014 variation agreement must be judged at the time that it was made."

Determination

109. Valorte has not persuaded the Court that Folkvang's claim should be struck out. It is not plainly and obviously unarguable. The high bar to a strike-out succeeding has not been met. Neither has Valorte persuaded the Court that summary judgment is appropriate on the basis that Folkvang's claim has no real prospect of succeeding.

110. As to the proper construction of the material clauses in the Loan Agreements the Court does not express a concluded view on the basis that the matter will now proceed to a trial. The Court has understood the helpful arguments of Counsel on Clauses 15.2 and Clause 9.1 in particular.

111. The essential issue is whether termination and payment are to occur at the same time, which is an issue that can be investigated and argued further at trial. It is essentially a matter of construction, but the way in which the working capital facility operated that allowed Valorte to make trades may inform whether the Loan Agreements provided for drawdowns and repayments separately from termination under clause 15.2.

Defence waiver issue

112. Ms Pearson submitted that the Event of Default defence initially run by Valorte was not to be resolved on this application, but if the case went forward would be a matter for the trial. The Court agrees that it is not in a position to decide that issue as it involves resolving contested facts.

113. As to the defence that the 10% 'haircut' was in consideration of Valorte waiving its supposed entitlement to defer payment by 3 months (the purported 'Cure Period') Mr Olarou wishes to cross examine Mr Lazarov on his evidence in Lazarov 2 and 3 where he suggests that this supposed further consideration was offered as part of the overall package. The Court agrees that a factual enquiry into that issue is fair and appropriate and a summary determination of the issue is not appropriate.

114. The Court accepts that Mr Lazarov's evidence as to his belief is not challenged or put in issue on the pleadings as they presently stand. Nor is there a case of fraud pleaded. However, it seems to the Court that Folkvang is entitled to test Mr Lazarov's state of mind as to his belief in the 'Cure Period' defence at a trial[27]. Mr Olarou is entitled to test why Mr Lazarov believed that clause 15.2 entitled him to a three month period to delay payment, rather than only to delay termination of the Agreement.

True accord issue

115. The Court considers that Folkvang's case of economic duress, exploitation or threat looks somewhat unpromising on the written material. However, Mr Anderson's evidence is that in making Folkvang wait three months for repayment Mr Lazarov was intent on holding their money hostage and it was against that backdrop that he e-mailed Mr Lazarov on 19 November 2023 saying that they would pay the 10% fee.[28] Whether or not Folkvang was put in an impossible position, or held to ransom, and had no effective choice but to accept the payment of 90% of the debt, or whether this was just commercial bargaining in the moment of a 'Black Swan' event, can be best resolved at a trial.

Variation issue

116. The validity of the purported 'settlement', and whether it varied the obligation to make payment of the Total Loan Amount, by substituting an obligation to pay less, is a matter which should also be tried having regard to clause 18 of the Loan Agreements. Valorte contends it was not a variation at all but a settlement on terms. The oral evidence of the parties to the various communications will be important in this regard as the documentary record is not clear cut with regard to any legal consequences which should follow the exchange of communications.

Estoppel issue

117. It seems to the Court that the 'detrimental reliance " issue should also be tested through cross-examination and discovery, and it would not be appropriate to determine it on the basis of affidavit evidence alone. Folkvang says the costs and expenses incurred by Valorte would have

[27] *Lazarov 2 §§22-24 and Lazarov 3 §13*
[28] *Anderson 1 §29*

had to have been incurred in complying with its contractual obligations. This is also a matter which should be tried.

118. These arguments individually and collectively cannot be safely discarded or resolved in Valorte's favour on this application without the benefit of discovery and cross examination at a trial.

119. The pleaded cases are in a fairly confined state (subject to any amendment) and the scope of the evidence and arguments is fairly contained. There is no reason why the claim cannot come on for a hearing in accordance with the Overriding Objective in relatively short order.

120. The summons to strike out is dismissed and the application for summary judgment is refused.

121. Costs should follow the event and Folkvang's costs are to be taxed on the standard basis if they cannot be agreed.

THE HON. MR. JUSTICE RAJ PARKER
JUDGE OF THE GRAND COURT

EXHIBIT 2

Mr Jeffrey Ross Blue v Mr Michael James Wallace Ashley

Positive/Neutral Judicial Consideration

Court
Queen's Bench Division (Commercial Court)

Judgment Date
26 July 2017

Case No: CL/2015/000691

High Court of Justice Queen's Bench Division Commercial Court

[2017] EWHC 1928 (Comm), 2017 WL 03129053

Before: The Hon. Mr. Justice Leggatt

Date: 26/07/2017

Hearing dates: 3 – 6, 10 and 12 July 2017

Representation

Mr Jeffrey Chapman QC and Mr Simon Atrill (instructed by Mishcon de Reya LLP) for the Claimant.
Mr David Cavender QC and Ms Tamara Kagan (instructed by Reynolds Porter Chamberlain LLP) for the Defendant.

Approved Judgment

Mr Justice Leggatt:

1. The question in this case is whether, as a result of a conversation in the Horse & Groom public house in Great Portland Street, London W1, on the evening of 24 January 2013, a contract was made between the claimant, Mr Jeffrey Blue, and the defendant, Mr Michael Ashley, under which Mr Ashley owes Mr Blue £14 million.

2. This judgment follows the trial of Mr Blue's claim and is arranged as follows:

I. Overview of the Evidence

Background

3. Mr Blue's background is in investment banking. From January 2001 until March 2007 he worked for Merrill Lynch specialising in corporate finance. At the end of that period he worked on an Initial Public Offering ("IPO") of shares in Sports Direct International Plc, a company which is the UK's largest retailer of sporting goods. Mr Ashley is the founder of Sports Direct and still owns more than 60% of its shares. Mr Blue first met Mr Ashley, and had regular contact with him, when he worked on the IPO. As part of that process, Mr Blue travelled with Mr Ashley and the then Chief Executive of Sports Direct, Mr David Forsey, on a management "roadshow" for two weeks to present the business to potential investors.

4. In March 2007 Mr Blue left Merrill Lynch and joined a group of Icelandic investors. However, that business collapsed in the financial crisis. In August 2009 Mr Blue established Aspiring Capital Partners LLP as a vehicle through which to provide his services as a consultant. In March 2010, he acted as an advisor to Sports Direct in connection with a proposed acquisition of Blacks Leisure Group, which ultimately did not proceed. In May 2011 Mr Blue joined DC Advisory, a firm which provided corporate finance advice. In December 2011, in that capacity, he again assisted Sports Direct in connection with a potential bid to acquire Blacks Leisure Group. Also in late 2011 and early 2012, Mr Blue was involved in a joint venture project to open Sports Direct stores in Iceland and Denmark.

The Management Services Agreement

5. Following discussions with Mr Forsey, on 25 October 2012 Mr Blue entered into a Management Services Agreement with Sportsdirect.com Retail Limited (a wholly owned subsidiary of Sports Direct) on behalf of Aspiring Capital Partners, which agreed to provide Mr Blue's services as a consultant for a minimum of three days per week at a fee of £12,500 plus VAT per month. In the event that Mr Blue worked for any additional days, the fee was to be increased *pro rata* . The agreement was to continue for an initial period of two years after which it could be terminated by either party giving three months' written notice.

6. Mr Blue started working for Sports Direct on 19 November 2012. From the outset, he spent at least four days a week working for Sports Direct and Aspiring Capital Partners was paid under the Management Services Agreement on that basis. From April 2014 this increased to five days a week.

7. I accept Mr Blue's evidence that his discussions with Mr Forsey before the agreement was signed envisaged that his role would be focussed on looking at potential strategic opportunities and acquisitions in the UK and Europe. This is reflected in a draft announcement which Mr Blue prepared in relation to his appointment and also in the terms of the Management Services Agreement itself, which described the services to be provided as "consultancy and advisory services on strategic development opportunities and related matters, as requested by the Company from time to time." In practice, however, the work that Mr Blue did for Sports Direct went well beyond this. An area in which he became involved almost immediately was investor relations, although this was not an area of which Mr Blue had any previous direct experience.

Finding a corporate broker

8. As soon as he started work, Mr Blue learnt from the Finance Director of Sports Direct, Mr Bob Mellors, that, although it had not yet been formally announced, Bank of America Merrill Lynch had resigned as Sports Direct's corporate broker. This left a much smaller firm, Oriel Securities Limited, as the only corporate broker retained by Sports Direct. Mr Blue was asked by Mr Mellors to assist in identifying and retaining a new corporate broker to replace Merrill Lynch. To that end Mr Blue drew up a shortlist and contacted a number of institutions to invite them to pitch for the role. However, none of them was

interested in doing so. Some of them expressed concerns that, because of Sports Direct's poor reputation in the City, acting as a corporate broker for Sports Direct would risk damaging their own reputation.

9. One of Mr Blue's former colleagues at Merrill Lynch was Mr Peter Tracey. Mr Tracey had led the corporate broking team that worked on the IPO for Sports Direct and he therefore already knew Mr Ashley, Mr Forsey and Mr Mellors. Mr Tracey was now the Head of Corporate Broking at Espirito Santo Investment Bank ("ESIB") and Mr Blue approached him to find out if ESIB would be interested in acting as Sports Direct's corporate broker. Mr Blue and Mr Tracey met at a café at Waterloo Station on their way into work on 7 December 2012 to discuss this proposal. Mr Tracey was keen to work with Sports Direct and in an email sent to Mr Blue after their meeting suggested some other services that ESIB could offer Sports Direct as well as corporate broking. Mr Tracey proposed that, to cement the relationship and as part of what he called the "bonding process", it would be a good idea to arrange an informal meeting between Mr Ashley and the senior members of ESIB's capital markets team. They worked closely with ESIB's corporate brokers in seeking to interest investors in buying shares in companies which the corporate brokers represented, and Mr Tracey regarded their support on the trading floor as important to the success of the relationship with Sports Direct. He thought the best way to get them to "buy in" to the relationship was to arrange for ESIB's Head of Market Making, Mr Simon McEvoy, and Head of Sales Trading, Mr Russell Clifton, to meet Mr Ashley. As Mr Tracey explained in evidence:

> "I didn't want [Sports Direct] to just be a faceless client to Mr McEvoy and Mr Clifton, I wanted them to feel like they were working for 'someone' rather than 'a PLC'."

On that basis, Mr Tracey asked Mr Blue to arrange for Mr McEvoy and Mr Clifton to meet Mr Ashley for a drink. This was the genesis of the meeting on 24 January 2013 at the Horse & Groom. All five individuals who were present on that occasion – that is to say, Mr Blue, Mr Ashley and the three representatives of ESIB – gave evidence at the trial.

The 24 January 2013 meeting

10. On 24 January 2013, Mr Tracey, Mr McEvoy and Mr Clifton came to Sports Direct's London offices in New Cavendish Street at around 6pm. Mr Ashley and Mr Blue met them in the ground floor lobby area. After making introductions, the group walked to the nearby Horse & Groom public house around the corner in Great Portland Street. The plan was to meet for half an hour or an hour for a chat. In the event the occasion lasted much longer and turned into an evening of drinking. Mr Blue left the pub at around 8:30pm and some time around 9pm the others moved on to a bar in Soho. The gathering broke up after midnight. Mr Clifton then went home, but Mr Tracey and Mr McEvoy left Mr Ashley talking to some other people he knew and went on by themselves to another bar in the same street, where they stayed until two or three o'clock in the morning. Mr Clifton estimated that over the course of the evening he drank at least 8 to 10 pints of beer and it is likely that Mr Ashley drank a similar amount of alcohol. Mr McEvoy probably drank somewhat less. Mr Blue accepted that he drank at least two or three pints of lager before he went home. Mr Tracey was the sole member of the party who did not drink alcohol that evening.

11. From Mr Tracey's point of view the evening was a fantastic success. Mr Clifton and Mr McEvoy had a really good time and enjoyed meeting Mr Ashley. There was a lot of conversation about football and in particular about Newcastle United Football Club, which Mr Ashley owns. Mr Tracey also remembers that, while Mr Blue was present, Mr Ashley was talking enthusiastically about Mr Blue, praising him a lot to Mr Clifton and Mr McEvoy. Mr Tracey thought that Mr Ashley was doing this to make Mr Clifton and Mr McEvoy see Mr Blue as important because he wanted Mr Blue to be the main point of contact for ESIB at Sports Direct.

The alleged oral agreement

12. At one point in the evening, probably around an hour to an hour and a half after the group had started drinking at the Horse & Groom, there was discussion of Sports Direct's share price and what level it might reach if the company continued to perform well. Mr McEvoy recalls that it was Mr Tracey who initiated this discussion. I think that he is likely to be right about this, as bringing up this topic would have fitted in with Mr Tracey's game plan for the meeting. At the time, shares in Sports Direct were trading at around £4 per share. Mr Ashley, Mr McEvoy and Mr Clifton all recall discussing how high the Sports Direct share price might go and what the market capitalisation of the company and consequent value of Mr Ashley's shares would be if the share price reached various levels. Mr Clifton and Mr Blue both remember Mr Ashley pointing out

that, if Sports Direct's share price were to double to £8 per share, the company would have the same market capitalisation as Marks & Spencer.

13. In the course of this discussion, the topic came up of offering Mr Blue an incentive based on the Sports Direct share price. Mr Blue's evidence was that Mr Ashley said words to the following effect:

> "What should I do to incentivise Jeff? If he can get the stock to £8 per share why should I give a fuck how much I have to pay him, as I will have made so much money it doesn't matter. So let's say if Jeff can get the stock to £8 per share in the next three years, I'll pay him £10 million. Jeff: what do you think?"

Mr Blue gave evidence that he was taken by surprise when this was said, as he had not previously discussed any incentive or been expecting any such discussion. However, he stated that he did some quick mental calculations and came back with a proposal that he should get the £10 million if the share price reached £7.20 per share. According to Mr Blue, Mr Ashley then asked Mr Tracey what he thought and Mr Tracey expressed the view that £10 million would be immaterial compared with the increase in the value of Mr Ashley's shares if the share price doubled – a view with which Mr Clifton and Mr McEvoy concurred.

14. Mr Blue stated that, not long after the initial discussion, either Mr Clifton or Mr McEvoy returned from the toilet and said words to the effect of:

> "Look Mike, I've given this some more thought and given how much money you stand to make if Jeff can get the stock to £8 per share, you should really pay him £20 million."

Mr Blue stated that, in response, Mr Ashley said something like: "Now that's more like it, but I'll tell you what let's split the difference and call it £15 million if the stock gets to £8 per share in the next three years." According to Mr Blue, he agreed to this proposal by saying words to the effect of: "Yes, that sounds fair."

15. Mr Ashley gave evidence that he recalls talking about the Sports Direct share price and how much he would be worth at different hypothetical share prices but does not recall any discussion of paying Mr Blue a sum of money if the Sports Direct share price reached £8 per share. Mr Ashley accepted that such a conversation may have taken place but said that, if it did, it would have been in the context of the general banter that he was having with Mr McEvoy and Mr Clifton about the share price and it would have been obvious that he was joking. Mr Ashley also claimed that he was trying to get drunk that evening, that Mr McEvoy stood at the bar and "kept the pints coming like machine guns", that they must have had four or five rounds in the first hour and that he (Mr Ashley) was making Mr Blue keep up with the others. I reject most of these claims as a flight of fancy but I do accept, based on the evidence of the three investment bankers as well as Mr Ashley, that the drinks were flowing freely and that, by the time when the discussion of incentivising Mr Blue took place, Mr Ashley had probably consumed four or five pints. It is also evident that the atmosphere at that stage was extremely jovial.

16. Mr Tracey said in evidence that he remembers Mr Ashley, Mr Clifton and Mr McEvoy talking about what Mr Ashley should do to incentivise Mr Blue and whether Mr Ashley should pay Mr Blue an amount of money if the share price hit a certain level. Mr Tracey thinks that they settled on a figure of £8 million as a good incentive for Mr Blue if he got the Sports Direct price to £8 per share within 18 months or two years. He recalled Mr Ashley asking everyone whether they thought he should be giving Mr Blue such an incentive. They all agreed that he should and were all laughing about it. Mr Tracey also recalled that during the conversation Mr Blue had a big grin on his face and was looking "over the moon."

17. Mr McEvoy's recollection was that Mr Blue suggested a bonus payment for himself if a particular share price could be achieved and talked about targeting £7 per share. Then someone suggested £8 per share and Mr Ashley said words to the effect of: "If the shares go to £8, I'll give you £10 million myself". Mr McEvoy said that everyone was laughing at this.

Mr Blue then shook Mr Ashley's hand and said something like, "I'll hold you to that" and everyone continued laughing. When cross-examined, Mr McEvoy said that he also recalled Mr Clifton returning from the toilet and suggesting doubling the amount to be paid to Mr Blue, and Mr Ashley then splitting the difference.

18. Mr Clifton's evidence was that he instigated the discussion of a bonus for Mr Blue linked to the Sports Direct share price by saying to Mr Ashley in a mischievous spirit something along the lines of: "Well, how are you going to reward Jeff for doing well?" Everyone then started making suggestions. Mr Clifton said that he left the bar to go to the toilet and thinks that, when he came back, they were talking about £5 million for Mr Blue if the share price reached £8 per share. According to Mr Clifton, he was a bit boisterous and said to Mr Ashley something like:

> "Hang on a minute, if it reaches £8 you'll have made something like a billion quid yourself, that seems a bit cheap – you should double it up."

Mr Clifton's recollection was that the figure was then doubled to £10 million, which was the number they settled on. He said that he thought the conversation was no more than banter or "pub chat."

Mr Blue's later conversations with Mr Tracey

19. Mr Blue did not make any written record of the conversation in the Horse & Groom. Nor in the following days and weeks (or months) did he raise the topic of an incentive payment and what Mr Ashley had said in the pub again with Mr Ashley. He did, however, discuss it several times with Mr Tracey. Mr Tracey's recollection is that on the second or third time that the subject came up it became clear to him that, although he did not think that Mr Ashley had been serious about paying Mr Blue an incentive payment, Mr Blue was taking the conversation very seriously. Mr Tracey recalled one particular occasion when he was invited to Mr Blue's house for a barbecue and was standing outside smoking a cigarette and talking to Mr Blue. Mr Blue made a reference to wanting to buy the next door house and join it up with his own (or something like that) and said that he hoped to be able to do so if his payment from Mr Ashley came through. Mr Tracey said that, once he realised that Mr Blue was taking Mr Ashley seriously, he wanted to help Mr Blue if possible and introduced the idea of aiming to keep the share price above the £8 target for more than 30 consecutive days. This was mentioned in an exchange of text messages between Mr Tracey and Mr Blue on 7 August 2013. In one of the texts, Mr Tracey also referred to seeing Mr Blue on Saturday (10 August 2013) and asked: "What time? What can we bring?" It is agreed that this was the occasion of the barbecue that Mr Tracey recalls.

20. The Sports Direct share price, which at the time of the 24 January 2013 meeting in the Horse & Groom had been around £4 per share, rose by £1 in late April and early May. It then climbed further in July. When Mr Blue was exchanging text messages with Mr Tracey on 7 August 2013, the share price was standing at £6.55. By then, a price of £8 per share, which on 24 January 2013 might have seemed a remote prospect, had started to look a real possibility.

Alleged discussion with Mr Forsey

21. Mr Blue stated that on one occasion during 2013 (which he cannot date any more precisely), when he was working at Sports Direct's head office in Shirebrook and was travelling to the office one morning with Mr Forsey, Mr Forsey, completely unprompted, asked him: "So Jeff, what is your deal with Mike?" Mr Blue said that he was taken by surprise at this, as he had not mentioned to Mr Forsey any arrangement with Mr Ashley. He inferred that Mr Forsey's knowledge of such an arrangement must have come directly from Mr Ashley. Mr Blue said that he then referred to the evening at the Horse & Groom and told Mr Forsey that Mr Ashley had agreed to pay him "a sum of money" (thinking it tactful not to specify the amount) if he could help get the Sports Direct share price above £8 per share within three years.

Alleged December 2013 conversation with Mr Ashley

22. Mr Blue claims that he first raised with Mr Ashley the subject of what he considered to be their agreement on around 19 or 20 December 2013. On 11 December the Sports Direct share price had reached an all time high of £7.71 per share and on 20 December 2013 the closing price was £7.18 per share. Mr Blue's evidence was that he approached Mr Ashley towards the end of the day in Sports Direct's London offices after Mr Ashley had finished a meeting and said something like: "Mike, can I have a word? … I just want to make sure that we are still on with our agreement." According to Mr Blue, Mr Ashley

replied with words along the lines of: "Jeffis, I've got it, I've got it. We're cool, we're cool." Mr Blue said that he understood this to mean that Mr Ashley was acknowledging the existence of their agreement and confirming that he would honour it. Mr Blue made no record of this conversation.

The Lion Hotel: 14 January 2014

23. On the evening of 14 January 2014, a meeting of the Sports Direct Brands Division took place at the Lion Hotel in Worksop to receive an update on performance. As well as Mr Ashley and Mr Blue, two other people who were present at the meeting were called as witnesses by Mr Ashley at the trial. They were Mr Barry Leach, who at the time was the head of the Sports Direct Brands Division, and his colleague, Mr Peter Wood, who gave the main presentation that evening. On the day before the meeting it had been announced that Sports Direct had acquired 4.6% of the shares in Debenhams Plc. Mr Blue had been working on that acquisition and gave a short presentation on it. Mr Ashley and Mr Wood said in evidence that the only conversation that they recall from that evening was about the Debenhams transaction. But Mr Blue gave evidence that at one point when he and Mr Ashley were walking back from the toilets to the bar at the same time Mr Ashley began a conversation by saying something like: "I can't believe how quickly the share price has reached almost £8." Mr Blue said that he then explained to Mr Ashley how much time and effort he had invested in improving Sports Direct's relationship with the City.

24. Again, Mr Blue made no record of this conversation but some support for his claim that such a conversation took place comes from the evidence of Mr Leach. Mr Leach recalled seeing Mr Ashley and Mr Blue come out of the toilets and walk over towards the bar where the others were standing. He remembered Mr Ashley "talking with his hands", as he often does, and saying to Mr Blue: "If we can move the share price from here to here [gesturing], why wouldn't I pay?"

25. When Mr Leach spoke to Mr Blue's solicitors in January 2016, he also recalled a conversation with Mr Blue in a car the following Tuesday, on the way to the next week's management meeting, in which he mentioned having overheard Mr Blue's conversation with Mr Ashley and said to Mr Blue words to the effect of: "If you've got any sort of deal like that with Ashley, you should get it in writing." Mr Leach said that Mr Blue responded with a look which he interpreted as "easier said than done."

Mr Leach's evidence

26. In a witness statement given to Mr Ashley's solicitors in July 2016, Mr Leach referred to the meeting at the Lion Hotel but made no mention of either of these conversations. In his oral evidence at the trial, Mr Leach confirmed what he had told Mr Blue's solicitors about what he had witnessed at the Lion Hotel but said that he assumed that Mr Ashley had been talking about the Debenhams transaction. Mr Leach was unable to explain how the words that he recalled Mr Ashley saying could have related to that transaction. He also said that he recalled the subsequent conversation in the car but (in contradiction to what he had previously told Mr Blue's solicitors) said that it was Mr Blue who brought up the subject of a deal with Mr Ashley. I had the impression that Mr Leach wished to row back from things he had previously said to Mr Blue's solicitors which were unhelpful to Mr Ashley's case.

27. Mr Leach also gave evidence that he remembered an occasion at the Sports Direct offices in Shirebrook at around the end of January 2014 when Mr Ashley and Mr Blue walked in together and were talking about the next employee bonus share scheme. He recalled Mr Ashley saying to Mr Blue words to the effect that: "You would be on the million shares, same as the rest of them."

The share price reaches £8

28. At around 1:04pm on 25 February 2014, Sports Direct's share price rose above £8. Mr Blue was monitoring the share price closely on the Bloomberg terminal in the office that he shared with other Sports Direct managers and saw that the share price had reached this level. According to Mr Blue, when Mr Ashley entered the office a few minutes later, he asked Mr Ashley whether he had seen that the share price had hit £8, and Mr Ashley replied that he had seen it. Mr Blue then made a note in a Moleskine notebook that he kept, which reads:

> "25/2
>
> 801.0p Acknowledged
>
> 13:13"

Mr Blue said that this was a record of Mr Ashley's acknowledgment that the share price had reached £8 per share and – by implication, as he saw it – that Mr Blue had become entitled to a payment of £15 million.

29. Mr Blue's wife had also been watching the Sports Direct share price keenly as it approached £8 and exchanging text messages with her husband which showed mounting excitement. At 1:32pm she sent a message to say: "It's hit 8!!!!!" At 2:07pm Mr Blue texted to say: "Yes. Mr Ashley acknowledged as much just now." His wife replied: "bingo is our nameo!!!" She went on to say: "…but he needs to send you an email today to back this up." Mr Blue did not follow his wife's suggestion. His explanation in evidence was that she did not have his experience of dealing with Mr Ashley and he needed to be cautious in finding the most appropriate opportunity to discuss the matter with him.

Conversation with Mr Hellawell

30. Two days later on 27 February 2014, Mr Keith Hellawell, the Chairman of Sports Direct, and Mr Blue were due to meet representatives of Goldman Sachs at Claridge's Hotel. The Goldman Sachs representatives did not show up and Mr Hellawell and Mr Blue spent some time talking before they left for their next meeting, which was with Citi Group in St James's. Mr Hellawell gave evidence that he recalled Mr Blue telling him that he had an agreement with Mr Ashley to be paid £1 million if he could get the Sports Direct share price to £8 per share. Mr Hellawell recalled Mr Blue expressing concern that, although the share price had reached £8, Mr Ashley was being slow in paying him the £1 million which he thought might be because he had hit the £8 share price target more quickly than Mr Ashley had anticipated. When it was pointed out to Mr Hellawell in cross-examination that the share price had only reached £8 two days earlier, he revised his evidence to say that Mr Blue might have been expressing concern that Mr Ashley might not pay rather than that he was being slow in paying. Mr Blue did not recall this conversation and said that he would not have mentioned the figure of £1 million to Mr Hellawell as that was not the figure which had been agreed on 24 January 2013 and it is very unlikely in any case that he would have told Mr Hellawell the amount of money that Mr Ashley had agreed to pay him.

The Manicomio Café: 7 March 2014

31. Mr Blue says that he discussed the subject of his bonus payment in a conversation with Mr Ashley in March 2014. In his evidence at the trial he identified the place and time of this conversation as the Manicomio Café in Gutter Lane on the morning of 7 March 2014. At that time Mr Ashley and Mr Blue were spending two days visiting shareholders of Sports Direct to seek to generate support for a new executive bonus share scheme (along similar lines to the scheme previously proposed in September 2012) under which Mr Ashley would have the right to receive eight million additional shares in Sports Direct if certain performance targets were achieved. Mr Blue gave evidence that he and Mr Ashley went to the Café to pass time in between meetings and that in their conversation Mr Ashley acknowledged that the £8 per share price target had been achieved and that £10 million was payable to Mr Blue. Mr Blue said that he reminded Mr Ashley that the figure ultimately agreed had been £15 million and not £10 million. He said that Mr Ashley then sought to re-negotiate their deal and said something like:

> "It doesn't matter anyway as what I am going to do is make you Finance Director of Sports Direct so that you can get one million shares under the current executive bonus share scheme, which, based on a share price of £8.50, is worth plus or minus £10 million, and besides you will also then roll into the next executive share scheme."

32. Mr Blue said that he pointed out that, as the salary of the Finance Director was £150,000 a year, which was less than his income under the Management Services Agreement, he would have some cash flow issues until he received his bonus shares and could sell them. Mr Ashley's response was to suggest that he could lend Mr Blue £1.5 million in two tranches – £750,000 on his appointment as Finance Director and another £750,000 in April 2015 when shares were awarded under the executive bonus share scheme.

33. Mr Blue said that his conversation with Mr Ashley was reflected in text messages that he exchanged with Mr Tracey on 27 March 2014. In a message sent that day Mr Blue told Mr Tracey: "I have news but Sandy Lane may be slightly postponed."

Mr Tracey replied: "What news?" Three minutes later Mr Tracey texted Mr Blue again to say: "You got the CFO role which means you have to roll into LTIP [long term incentive plan]." In this last message Mr Tracey was anticipating that Mr Blue had learnt that he was to be made Chief Financial Officer – which was a role that Mr Blue had previously told Mr Tracey that he was hoping to get. The reference to "Sandy Lane" was to a resort in Barbados where Mr Blue had often said to Mr Tracey that he would go to celebrate with his family, and would take Mr Tracey and his family with them, when he received his bonus payment from Mr Ashley. According to Mr Tracey, this was something of a running joke between them.

The £1 million payment

34. A major plank in Mr Blue's case is the undisputed fact that on 27 May 2014 Mr Ashley transferred £1 million to Mr Blue's bank account. Mr Blue says that he understood this payment to be a sign of Mr Ashley's commitment to their agreement.

35. Mr Blue's evidence was that this payment was made following a conversation with Mr Ashley at the Sports Direct London offices on 23 May 2014 in which Mr Blue expressed frustration that nothing had happened and said that his wife was also becoming increasingly annoyed and concerned that Mr Ashley might not honour their agreement. According to Mr Blue, Mr Ashley replied that he still intended to honour it. Mr Blue then asked for a sign that he remained committed to doing so and Mr Ashley agreed to pay Mr Blue £1 million as a sign of his commitment. Mr Blue said that, while he was texting Mr Ashley his personal bank account details, Mr Ashley asked whether he wanted anything in writing. Mr Blue replied that it would not be necessary – at which point Mr Ashley commented that Mr Barnes (who also worked as a consultant to Sports Direct) insisted on having everything in writing.

36. The explanation given by Mr Ashley in his witness statement for why he paid £1 million to Mr Blue was that the payment was to reward Mr Blue for his contribution in helping to get shareholder approval for the inclusion of Mr Ashley in the Sports Direct employee bonus share scheme. By the beginning of April 2014 it had become apparent that the executive bonus share scheme for Mr Ashley was not going to get the support of a majority of Sports Direct's shareholders (excluding Mr Ashley, who could not vote on the scheme). An announcement made on 2 April 2014 indicated that the proposal would not be pursued and instead the 2015 employee bonus share scheme, to be voted on at the Annual General Meeting, would include Mr Ashley. Mr Ashley was very unhappy with this, as he believed that there should be a separate scheme for him based on achieving much higher profit targets than the employee scheme. He was forced to accept, however, that such an arrangement for him was not going to receive shareholder approval and that he would have to settle for inclusion in the employee share bonus scheme instead.

37. Mr Ashley stated that Mr Blue asked him for a discretionary bonus of £1.5 million to reflect his efforts in gaining approval for Mr Ashley's inclusion in the employee share bonus scheme. Mr Ashley's evidence was that he thought the amount too high and offered Mr Blue £1 million as a lump sum, which Mr Blue accepted and Mr Ashley paid. In his oral evidence at the trial, Mr Ashley asserted that the payment also took account of other work that Mr Blue had done for him in his personal capacity, including a property transaction in which Mr Ashley had invested around £8 million to receive 50% of the ground rent in a portfolio of 400-500 properties. Mr Ashley said that the £1 million payment was intended to reward Mr Blue for everything that he had done or was in the process of doing for Mr Ashley personally by wrapping it all up in a single payment.

Mr Blue resigns

38. After receiving the £1 million payment, Mr Blue made no further approach to Mr Ashley for several months. Mr Blue was still hoping to be appointed the Group Finance Director. To clear the way for this by removing a potential conflict of interest, Mr Blue – at the suggestion of Mr Forsey – transferred to Sports Direct some shares that he owned in the Icelandic joint venture in which he had been involved before joining Sports Direct. Mr Blue asked for and received only the cost price of the shares, which was £50,000. By the autumn of 2014, however, nothing further had happened about Mr Blue's appointment. It seems that, while Mr Ashley favoured appointing Mr Blue to succeed Mr Mellors as Finance Director, Mr Forsey was blocking the appointment and a stalemate had developed.

39. On 28 November 2014 Mr Blue raised the issue in a conversation with Mr Ashley, of which he made a more or less verbatim note at the time in his Moleskine notebook. According to Mr Blue's note, Mr Blue told Mr Ashley that he was "frustrated by the lack of clarity" and asked: "How are you getting on with Mr Forsey?" Mr Ashley replied that he had "heard nothing". Mr Blue then said that he was "not happy if it's a game or we are kicking the can down the road". The rest of the conversation, as noted by Mr Blue, went as follows:

> "MA: If I say I am going to sort it out that's what I am going to do.
>
> JB: I can't sit in front of investors without knowing where I stand.
>
> MA: You want me to bring it on with Dave, then I'll bring it on … and I don't give a fuck which way it goes … have a good weekend – goodbye."

40. It appears that following this conversation Mr Blue still heard nothing further about whether he would be made Finance Director and came to the conclusion that it was not going to happen. To add to his frustrations, Mr Blue had sent a new consultancy agreement to Sports Direct on 26 September 2014 (as the two year initial period of the Management Services Agreement was approaching its end) but the new agreement had not been signed. He also found that strategic development work which had been his responsibility was increasingly being done by Mr Barnes. On 24 December 2014 Mr Blue wrote a letter on behalf of Aspiring Capital Partners, addressed to Mr Ashley, giving notice of termination of the Management Services Agreement. In the letter he explained his decision by saying:

> "Recent changes in role and responsibilities, combined with a complete lack of clarity in regards to my position going forward make the current situation untenable."

The tape-recorded conversation and the letter of claim

41. During his three months' notice period, Mr Blue attempted to arrange a meeting with Mr Ashley in London. On two occasions in February 2015 meetings were arranged but Mr Ashley did not show up. On 13 March 2015 Mr Ashley was in the London office and Mr Blue accosted him. Mr Blue secretly tape-recorded the conversation. Mr Blue had written a letter which he handed to Mr Ashley and asked him to read. The letter began as follows:

> "As you know, we agreed an incentive bonus arrangement in January 2013. The terms of our agreement were clear: you agreed to pay me £15 million if the Sports Direct share price reached £8 per share.
>
> This arrangement was subsequently discussed between us on numerous occasions as the share price increased towards and eventually above the £8 per share target, including March 27th, 2014 (where you proposed that I become Finance Director at Sports Direct) and May 28th, 2014 (where you made an interim payment to show your ongoing commitment to our agreement). It was originally agreed that, once the target had been achieved, you would pay me personally in cash. In March 2014 you raised the possibility of settling the amount due to me via the Sports Direct Executive Bonus Share Scheme. However, that never came to fruition."

The letter went on to say that Mr Blue wanted to find "a mutually agreeable solution in terms of the outstanding payment."

42. Mr Ashley scanned the letter and said that he would have to take it away and read it slowly and properly and then think about it. Mr Blue emphasised that he did not want to fall out with Mr Ashley and the conversation ended.

These proceedings

43. Mr Ashley did not respond to Mr Blue's letter. On 7 April and again on 29 May 2015 solicitors instructed by Mr Blue wrote to Mr Ashley. The second of these letters was a formal letter of claim. In June Mr Ashley also instructed solicitors but still no substantive response was provided on his behalf. During this period Mr Blue had a conversation (on 12 May 2015) with Mr Peter Cowgill of JD Sports Fashion plc in which he mentioned his claim against Mr Ashley. Mr Cowgill was called by Mr Ashley as a witness and gave evidence about this conversation at the trial. Mr Cowgill recalled Mr Blue saying that he had a deal linked to increasing the Sports Direct share price under which Mr Ashley should have paid him a sum of £8 million. In addition, in August 2015 representatives of Mr Blue's solicitors spoke on the telephone to each of Mr Tracey, Mr McEvoy and Mr Clifton, to ask them about their recollections of the meeting in the Horse & Groom. Mr McEvoy and Mr Clifton were not prepared to assist but Mr Tracey answered questions asked by Mr Blue's solicitors. The attendance notes of these telephone conversations were put in evidence by Mr Blue. No challenge was made by counsel for Mr Ashley to the accuracy of these notes as a record of what was said.

44. Mr Blue commenced this action in the High Court on 23 September 2015.

II. The Dispute

45. Mr Blue's claim is simple. He claims that in the conversation in the Horse & Groom on 24 January 2013 to which I have referred Mr Ashley made an oral agreement with him – the essence of which was that, if Mr Blue deployed his experience, skills and contacts in relation to corporate finance to get the Sports Direct share price above £8 per share within three years, Mr Ashley would pay Mr Blue £15 million. Mr Blue contends that this agreement was legally binding, that he duly deployed his skills and contacts and undertook various initiatives in reliance on the agreement and that, pursuant to it, Mr Ashley became obliged to pay him £15 million when the share price closed above £8 on 25 February 2014. He says that Mr Ashley acknowledged this obligation by paying him a sum of £1 million on 27 May 2014 as an interim payment, but that Mr Ashley has since reneged on the deal.

46. Although (as mentioned) Mr Ashley says that he does not remember it, he does not positively deny that there a discussion in the Horse & Groom of incentivising Mr Blue and of Mr Ashley paying him a large sum of money if he could get the share price to £8. But Mr Ashley's case is that, if did say anything to that effect, it was just banter which was not meant seriously and was not capable of giving rise to a legally binding contract; nor was there the necessary certainty of terms to create a contract. He also argues that, even if there was a binding contract on the terms alleged, to qualify for the payment Mr Blue would have to show that his actions caused the share price to rise above £8 per share, which he cannot do.

47. In short, whether Mr Blue is entitled to be paid the money that he is claiming from Mr Ashley depends on the answers to three questions:

i) What was said in the Horse & Groom on 24 January 2013?
ii) Did what was said create a legally binding contract?
iii) If so, what had to happen for Mr Blue to become entitled to payment under the contract and did that event occur?

48. Before addressing these questions, I will first outline the legal requirements which have to be satisfied in order to establish that a contract was created.

III. The Requirements for a Contract

49. Generally speaking, it is possible under English law to make a contract without any formality, simply by word of mouth. Of course, the absence of a written record may make the existence and terms of a contract harder to prove. Furthermore, because the value of a written record is understood by anyone with business experience, its absence may – depending on the circumstances – tend to suggest that no contract was in fact concluded. But those are matters of proof: they are not legal requirements. The basic requirements of a contract are that: (i) the parties have reached an agreement, which (ii) is intended to be legally binding, (iii) is supported by consideration, and (iv) is sufficiently certain and complete to be enforceable: see

e.g. Burrows, " *A Restatement of the English Law of Contract* " (2016) section 2. Points have been taken by Mr Ashley in relation to each of these requirements.

(i) Agreement

50. In general, the agreement necessary for a contract is reached either by the parties signing a document containing agreed terms or by one party making an offer which the other accepts. Acceptance may be by words or conduct. Typically, acceptance involves promising to do something but in one kind of contract known as a "unilateral contract", where the offer made by A is to reward someone for doing something, a contract is established when the recipient of the offer (B) starts to perform the action required to earn the reward, even though B does not promise A to do anything. The example of a "unilateral contract" taught to all first year law students is an offer by A to pay B £100 if B walks from London to York. [1] B is not obliged to walk to York, but if B sets out on the journey, A's offer becomes contractually binding.

51. Counsel for Mr Blue submitted that the most accurate legal characterisation of the offer which they say was made by Mr Ashley in this case is that it was a unilateral offer: Mr Blue did not undertake on 24 January 2013 to do any work directed towards increasing the share price of Sports Direct, but the offer became binding once Mr Blue began to undertake such work.

52. For the purpose of the law of contract, an offer is an expression, by words or conduct, of a willingness to be bound by specified terms as soon as there is acceptance by the person to whom the offer is made: see e.g. Burrows, " *A Restatement of the English Law of Contract* " (2016) section 7.3; and *Chitty on Contracts* (32nd Edn, 2015), vol 1, para 2-003. There can be circumstances in which a person uses the language of offer without expressing a genuine willingness to be bound. For example, if someone says at a party "I will give you a million pounds, if you can speak for a minute on [a random subject] without hesitation, deviation or repetition", this is unlikely to be interpreted as an offer despite the literal words used. That is because it is unlikely that anyone would reasonably have thought that the words were meant seriously. In such circumstances the words uttered would not be capable of creating any obligation, even a purely moral obligation, let alone one that is legally enforceable.

53. This point can be illustrated by Carlill v Carbolic Smoke Ball Co [1892] 1 QB 256 , another case which all law students learn. In that case the defendant company published an advertisement offering to pay £100 to anyone who contracted influenza despite having used one of the company's smoke balls three times daily for two weeks according to the printed directions supplied with each ball. The plaintiff dutifully followed the instructions but nevertheless contracted influenza. She claimed the sum of £100, which the company refused to pay. One of the company's defences was that the statement made in the advertisement was not intended to be a promise or offer at all, as it could not reasonably be supposed that the company seriously meant to promise to pay money to anyone who contracted influenza at any time after using one of its smoke balls. That argument failed on the facts, not least because the advertisement stated that the company had deposited a sum of £1,000 with a bank to show its sincerity in the matter. But it is clear that on different facts such an "offer" might be regarded as a mere "puff."

54. A key question in this case is whether what Mr Ashley said in the conversation on 24 January 2013 was a serious offer which expressed a willingness to be bound.

(ii) Intention to make a legally binding contract

55. Even when a person makes a real offer which is accepted, it does not necessarily follow that a legally enforceable contract is created. It is a further requirement of such a contract that the offer, and the agreement resulting from its acceptance, must be intended to create legal rights and obligations which are enforceable in the courts, and not merely moral obligations. Not every agreement that people make with each other, even if there is consideration for it and the terms are certain, is reasonably intended to be enforceable in the courts. For example, if two people agree to meet for a drink at an appointed place and time and one does not turn up, no one supposes that the other could sue to recover his wasted travel expenses. Examples of agreements which have been held not to amount to contracts for this reason include an agreement to give a prize to the winner of a golf competition where "no one concerned with that competition ever intended that there should be any legal results flowing from the conditions posted and the acceptance by the competitor of those conditions": Lens v Devonshire Club, The Times, 4 December 1914 , referred to in *Wyatt v Kreglinger & Fernau [1933] 1 KB 793* , 806. The same conclusion was reached in relation to an agreement between members of a band who were also friends to share publishing income from

songs credited to one of the band members: *Hadley v Kemp [1999] EMLR 589* , 623. Many other examples can be found but it is not helpful to multiply them as each case depends on its own facts.

56. Factors which may tend to show that an agreement was not intended to be legally binding include the fact that it was made in a social context, the fact that it was expressed in vague language and the fact that the promissory statement was made in anger or jest: see *Chitty on Contracts* (32nd Edn, 2015), vol 1, paras 2-177, 2-194 and 2-195.

57. Again, it is in issue in this case whether, if any genuine agreement was made as a result of anything said by Mr Ashley on 24 January 2013, that agreement was intended to be legally binding.

(iii) Consideration

58. It is traditionally said that, to be legally binding, an agreement (unless made by deed) must be supported by consideration. The basic idea is that English law will not enforce a promise for which nothing at all has to be done in return. Thus, an offer to pay Mr Blue £15 million if the Sports Direct share price reached £8 per share which Mr Blue merely said that he was accepting without doing or promising to do anything at all on his part could not give rise to a legally binding contract. On any view of what was discussed, however, Mr Blue had to "get" the Sports Direct share price to £8, or at least to do work which was aimed at increasing the share price to that level, in order to qualify for the payment. The requirement of consideration therefore does not cause a problem. It would be unusual if it did, as I am not aware of any case in the twenty-first century in which a claim founded on an agreement has failed for want of consideration.

59. In Mr Ashley's statement of case a defence was put forward that there was no consideration for his alleged offer of payment because the services which Mr Blue says that he provided in reliance on it were services that he was already obliged to provide under the Management Services Agreement. There used to be a rule that a promise to perform, or actual performance of, a pre-existing duty could not constitute consideration. That rule may sometimes have helped to protect contracting parties against exploitation through the other party refusing to do what it had contracted to do unless some extra payment or other benefit was provided. But it is now recognised that this mischief is better addressed by other doctrines such as economic duress and public policy. The decision of the Court of Appeal in Williams v Roffey Bros & Nicholls (Contractors) Ltd [1999] 1 QB 1 effectively rendered the rule obsolete by accepting that performance or a promise to perform an existing duty can satisfy the requirement of consideration by providing a practical benefit to the other party, which it will invariably do. In any event, the purported rule could not have applied in this case as the duties under the Management Services Agreement were owed by Aspiring Capital Partners to Sportsdirect.com Retail Limited, whereas any duty to provide services under the alleged oral agreement would have been owed by Mr Blue to Mr Ashley.

60. The defence of lack of consideration was accordingly hopeless and was quite rightly not pursued by counsel for Mr Ashley at the trial.

(iv) Certainty and completeness of terms

61. Vagueness in what is said or omission of important terms may be a ground for concluding that no agreement has been reached at all or for concluding that, although an agreement has been reached, it is not intended to be legally binding. But certainty and completeness of terms is also an independent requirement of a contract. Thus, even where it is apparent that the parties have made an agreement which is intended to be legally binding, the court may conclude that the agreement is too uncertain or incomplete to be enforceable – for example, because it lacks an essential term which the court cannot supply for the parties. The courts are, however, reluctant to conclude that what the parties intended to be a legally binding agreement is too uncertain to be of contractual effect and such a conclusion is very much a last resort. As Toulson LJ observed in *Durham Tees Valley Airport v bmibaby [2010] EWCA Civ 485, [2011] 1 Lloyd's Rep 68* , at para 88:

> "Where parties intend to create a contractual obligation, the court will try to give it legal effect. The court will only hold that the contract, or some part of it, is void for uncertainty if it is legally or practically impossible to give to the agreement (or that part of it) any sensible content." (citing *Scammell v Dicker [2005] EWCA Civ 405* , para 30, Rix LJ)."

62. It has nevertheless been argued on behalf of Mr Ashley that the alleged oral agreement on which Mr Blue's claim is based was so vague and uncertain that, even if it was intended to create a contractual obligation, it cannot be given any sensible content and is unenforceable for that reason.

The objective test and evidence of subjective belief

63. In determining whether an agreement has been made, what its terms are and whether it is intended to be legally binding, English law applies an objective test. As stated by Lord Clarke in *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH and Co KG [2010] UKSC 14; [2010] 1 WLR 753* :

> "The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations."

As with all questions of meaning in the law of contract, the touchstone is how the words used, in their context, would be understood by a reasonable person. For this purpose the context includes all relevant matters of background fact known to both parties.

64. There is, at least arguably, a limitation on the objective nature of the test where one party's subjective intention is actually known to the other: see *Novus Aviation Ltd v Alubaf Arab International Bank BSC(c) [2016] EWHC 1575 (Comm); [2017] 1 BCLC 414* , para 56. But no reliance has been placed on any such principle in this case. What is accepted by counsel on both sides is that where, as here, the court is concerned with an oral agreement, the test remains objective but evidence of the subjective understanding of the parties is admissible in so far as it tends to show whether, objectively, an agreement was reached and, if so, what its terms were and whether it was intended to be legally binding. Evidence of subsequent conduct is admissible on the same basis. In the case of an oral agreement, unless a recording was made, the court cannot know the exact words spoken nor the tone in which they were spoken, nor the facial expressions and body language of those involved. In these circumstances, the parties' subjective understanding may be a good guide to how, in their context, the words used would reasonably have been understood. It is for that reason that the House of Lords in *Carmichael v National Power Plc [1999] 1 WLR 2042* held that evidence of the subjective understanding of the parties is admissible in deciding what obligations were established by an oral agreement.

IV. Evidence Based on Memory

65. It is rare in modern commercial litigation to encounter a claim, particularly a claim for millions of pounds, based on an agreement which is not only said to have been made purely by word of mouth but of which there is no contemporaneous documentary record of any kind. In the twenty-first century the prevalence of emails, text messages and other forms of electronic communication is such that most agreements or discussions which are of legal significance, even if not embodied in writing, leave some form of electronic footprint. In the present case, however, such a footprint is entirely absent. The only sources of evidence of what was said in the conversation on which Mr Blue's claim is based are the recollections reported by the people who were present in the Horse & Groom on 24 January 2013 and any inferences that can be drawn from what Mr Blue and Mr Ashley later said and did. The evidential difficulty is compounded by the fact that most of the later conversations relied on by Mr Blue were also not recorded or referred to in any contemporaneous document.

66. I have no reason to think that (with the possible exception of Mr Leach when he retreated from what he had said to Mr Blue's solicitors) any of the witnesses were doing anything other than stating their honest belief based on their recollection of what was said in relevant conversations. But evidence based on recollection of what was said in undocumented conversations which occurred several years ago is problematic. In *Gestmin SGPS SA v Credit Suisse (UK) Limited [2013] EWHC 3560*

(Comm) , at paras 16-20, I made some observations about the unreliability of human memory which I take the liberty of repeating in view of their particular relevance in this case:

> "16. While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.
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> 17. Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).
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> 18. Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.
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> 19. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.
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> 20. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been 'refreshed' by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events."

67. In the light of these considerations, I expressed the opinion in the *Gestmin* case (at para 22) that the best approach for a judge to adopt in the trial of a commercial case is to place little if any reliance on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts.

68. A long list of cases was cited by counsel for Mr Blue showing that my observations in the *Gestmin* case about the unreliability of memory evidence have commended themselves to a number of other judges. In some of these cases they were also supported by the evidence of psychologists or psychiatrists who were expert witnesses: see e.g. *AB v Catholic Child Welfare Society [2016] EWHC 3334 (QB)* , paras 23-24, and related cases. My observations have also been specifically endorsed by two academic psychologists in a published paper: see Howe and Knott, " *The fallibility of memory in judicial processes: Lessons from the past and their modern consequences* " (2015) Memory, 23, 633 at 651-3. In the introduction to that paper the authors also summarised succinctly the scientific reasons why memory does not provide a veridical representation of events as experienced. They explained:

> "… what gets *encoded* into memory is determined by what a person attends to, what they already have stored in memory, their expectations, needs and emotional state. This information is subsequently integrated (*consolidated*) with other information that has already been stored in a person's long-term, autobiographical memory. What gets *retrieved* later from that memory is determined by that same multitude of factors that contributed to encoding as well as what drives the recollection of the event. Specifically, what gets retold about an experience depends on whom one is talking to and what the purpose is of remembering that particular event (e.g., telling a friend, relaying an experience to a therapist, telling the police about an event). Moreover, what gets remembered is reconstructed from the remnants of what was originally stored; that is, what we remember is constructed from whatever remains in memory following any forgetting or interference from new experiences that may have occurred across the interval between storing and retrieving a particular experience. Because the contents of our memories for experiences involve the active manipulation (during encoding), integration with pre-existing information (during consolidation), and reconstruction (during retrieval) of that information, memory is, by definition, fallible at best and unreliable at worst."

69. In addition to the points that I noted in the *Gestmin* case, two other findings of psychological research seem to me of assistance in the present case. First, numerous experiments have shown that, when new information is encoded which is related to the self, subsequent memory for that information is improved compared with the encoding of other information. Second, there is a powerful tendency for people to remember past events concerning themselves in a self-enhancing light. [2]

70. Mindful of the weaknesses of evidence based on recollection, I will make such findings as I can about what was said in the conversations on which Mr Blue relies and in particular in the crucial conversation on 24 January 2013 on which his claim is founded.

V. What was Said on 24 January 2013?

71. Everyone present at the drinks in the Horse & Groom on 24 January 2013 recalls that there was some talk about the Sports Direct share price and how much Mr Ashley's shares would be worth if the share price reached various levels. I think it likely that this conversation was mostly between Mr Ashley, Mr McEvoy and Mr Clifton, as they and Mr Tracey all recall. That would have been natural both because the object of the drinks was for Mr Ashley to "bond" with Mr McEvoy and Mr Clifton and because, as traders, share prices are their bread and butter. It was probably Mr Clifton who introduced the question of how Mr Ashley was going to reward or incentivise Mr Blue on the basis of the share price, as Mr Clifton recalls himself doing. No doubt various different numbers were suggested and Mr Blue may well have proposed a target for himself of £7.20, as he says he did. All the participants (except for Mr Ashley, who remembers none of this part of the conversation) remember the group settling on a target of £8 per share. It is inherently probable that they are right about this, as a target of £8 had an obvious logic to it, being approximately double the then current price of Sports Direct's shares.

72. I think it likely that in this conversation Mr Ashley did say something along the lines recalled by Mr Blue to the effect that, if Mr Blue could get the stock to £8 per share, why should he (Mr Ashley) care how much he paid Mr Blue, as he would have made so much money that it would not matter. No doubt others concurred with this sentiment. It is in keeping with what seems to have been the general tone of the conversation, including the comparison which Mr Clifton as well as Mr Blue recalled that, if the Sports Direct share price were to reach £8 per share, its market capitalisation would be the same as that of Marks & Spencer.

73. Recollections of particular numbers mentioned are much more problematic. It is apparent, however, that this conversation meant much more to Mr Blue, who was the subject of it, than it did to the others – or at any rate than it did to the ESIB representatives for whom it could have been no more than some amusement. I am prepared in the circumstances to accept as more likely than not to be correct Mr Blue's recollection of the discussion first settling on a figure of £10 million and of this figure then being increased to £15 million. Mr Blue's recollection that either Mr Clifton or Mr McEvoy, on returning from the toilets, suggested doubling the number in view of how much money Mr Ashley would make if Mr Blue could get the stock to £8 a share is supported by Mr Clifton's independent recollection of saying something exactly along these lines when he re-joined the group after a visit to the toilets. I note too that, although when his witness statement was prepared Mr Blue could not remember whether it was Mr Clifton or Mr McEvoy who came back from the toilets and suggested doubling the amount, an email sent by Mr Blue's solicitors in June 2015 shows that Mr Blue's recollection at that time was that it was Mr Clifton.

74. Mr Clifton thought that £10 million was the final number, arrived at by adopting his suggestion of doubling the amount, and did not recall Mr Ashley saying that he would split the difference. Mr McEvoy also thought that the final number was £10 million and Mr Tracey thought that it might have been £8 million. However, as I have indicated, I consider that they are less likely than Mr Blue to remember accurately how the conversation ended and what the final figure was. The fact that Mr McEvoy said in evidence that he recalled Mr Clifton suggesting that the amount should be doubled and Mr Ashley then splitting the difference provides some additional support for Mr Blue's recollection of the process by which the final figure was reached. No one has ever suggested that the final figure might have been £7.5 million and it is impossible using round numbers to arrive at £10 million by first doubling a figure and then splitting the difference. [3] I therefore think it most likely that the final number was £15 million, as Mr Blue recalls, and that the £10 million recalled by Mr Clifton was the number arrived at before it was increased after Mr Clifton's return from the toilets.

75. Mr McEvoy may well be right in recalling that, when the final number was settled by Mr Ashley, Mr Ashley and Mr Blue shook hands. I see no reason to doubt the evidence of Mr Tracey and Mr McEvoy that everyone was laughing during the conversation, nor the evidence of Mr Tracey that during the conversation Mr Blue had a big grin on his face and was looking "over the moon".

76. I am not, however, prepared to place reliance on Mr Blue's evidence that a period of three years in which to reach the share price target was specified. As with the final figure of £15 million, Mr Blue is the only person who recalls this. (As mentioned earlier, Mr Tracey recalled a period of 18 months or two years, while neither Mr Clifton nor Mr McEvoy recalled any period of time being discussed.) However, whereas the sum of £15 million is mentioned in the timeline that Mr Blue prepared in January 2015 and in the letter that he handed to Mr Ashley on 13 March 2015, there is no reference in either document to a three year timescale for achieving the £8 target and I think it likely that this is a later reconstruction on his part.

77. In accepting Mr Blue's evidence that the figure of £15 million was settled on, I have not overlooked the evidence of those witnesses who recalled Mr Blue mentioning different figures to them in subsequent conversations. Referring first to Mr Hellawell, none of the participants in the conversation on 24 January 2013 recalled a figure anywhere near as low as £1 million being discussed – which is the number that Mr Hellawell recalls Mr Blue mentioning in a conversation which he believes took place on 27 February 2014 (see paragraph 30 above). If a figure of one million was indeed mentioned to Mr Hellawell it is likely to have been the million shares that Mr Blue stood to receive if he joined the employee share scheme. Mr Leach remembered overhearing a conversation between Mr Ashley and Mr Blue at around the end of January 2014 in which Mr Ashley said that Mr Blue would be "on the million shares, same as the rest of them" – which Mr Leach took to be referring to what would happen if Mr Blue became the Finance Director – and Mr Blue might well have mentioned this to Mr Hellawell.

78. As for Mr Cowgill, the conversation that he recollects occurred on 12 May 2015, some two months after Mr Blue had written to Mr Ashley maintaining that there was an agreement to pay him £15 million and only around two weeks before this allegation was repeated and amplified by Mr Blue's solicitors in a formal letter of claim. Mr Cowgill gave evidence that Mr Blue told him that Mr Ashley should have paid him £8 million. But I am sure that Mr Blue would not have mentioned a different amount of money to Mr Cowgill from the amount that he was in fact already claiming. Indeed, I think it unlikely that Mr Blue would have mentioned a specific amount of money to Mr Cowgill at all. Mr Cowgill may well have confused a reference to the share price target of £8 per share.

79. I accordingly find that the substance of the "agreement" made between Mr Ashley and Mr Blue at the Horse & Groom on 24 January 2013 was that, if Mr Blue could get the Sports Direct share price to £8 per share (within an unspecified time), Mr Ashley would pay him £15 million.

VI. Was a Binding Contract Made?

80. The next question is whether what was said on 24 January 2013 gave rise to a binding contract. In answering this question, the key issue is whether, when Mr Ashley said that he would pay Mr Blue £15 million if he could get the Sports Direct share price to £8 per share, this would reasonably have been understood as a serious offer capable of creating a legally binding contract. Having heard the evidence, I am quite sure that it would not. I have reached this conclusion for eight main reasons.

The setting

81. The first is the setting. As described by Mr Tracey, it was "five guys and a barman in a pub". A fair amount of alcohol had been consumed. Those circumstances by themselves do not prevent a contract from being made – any more than did the fact that in *MacInnes v Gross [2017] EWHC 46 (QB)* the relevant discussion took place over dinner in a smart restaurant. As Coulson J said in that case (at para 81), a contract can be made anywhere in any circumstances. But an evening of drinking in a pub with three investment bankers is an unlikely setting in which to negotiate a contractual bonus arrangement with a consultant who was meeting them on behalf of the company.

82. It was argued on behalf of Mr Blue that, while this might be true in the case of an ordinary businessman, Mr Ashley is not an ordinary businessman but is someone who adopts an "unorthodox approach to taking business decisions in informal settings while consuming substantial amounts of alcohol". In particular, Mr Blue relied on the fact that, at Sports Direct's weekly

senior management meetings he had witnessed Mr Ashley (and others) drinking alcohol, sometimes allegedly in copious quantities. When Mr Blue was working at Sports Direct such meetings were held at the Lion Hotel in Worksop. Between 10 and 20 members of Sports Direct's senior management would typically attend and Mr Blue attended these meetings regularly. The meetings would begin by, at latest, 8pm with people first congegrating in the bar area. There is a conference facility at the hotel where the main part of the meeting would take place and where food would be served at around 9:30pm. The purpose of the meetings was for senior managers to update each other on the performance of the business and current developments. The meetings were divided into two parts, each around an hour long. One part would consist of a presentation from someone on a particular topic. Topics that featured regularly included: (i) retail operations, (ii) online strategy, (iii) IT and infrastructure, (iv) international expansion, (v) brand management, and (vi) property. The other part of the meeting consisted of going through a "management pack" of information and receiving a weekly update on each area of the business.

83. Mr Ashley agreed that at these meetings alcohol was frequently consumed and said that, at a typical meeting, he might drink four pints of beer followed by wine with the food or, if he stayed with beer, say six pints of beer during the evening. Mr Blue said that he thought Mr Ashley made alcohol freely available at these meetings as a deliberate strategy to encourage his senior managers to speak more openly than might otherwise be the case in a more formal meeting environment. He described this approach as typical of Mr Ashley's personality and business style. He may well be right about this but the evidence about these meetings does not seem to me to carry Mr Blue's case very far. The Sports Direct senior management meetings certainly show that Mr Ashley is happy to combine discussion of business matters with the consumption of alcohol. But there is no evidence to suggest that Mr Ashley has ever negotiated or concluded a contract at one of these meetings. The evening at the Horse & Groom was, in any event, a considerably less formal occasion than the senior management meetings, as there was no agenda or structure for the occasion and the conversation was largely social or general chat, rather than being specifically directed to any business subject.

(ii) The purpose of the occasion

84. In addition to its setting, a second significant feature of the context in which the conversation on 24 January 2013 took place is the purpose of the occasion. Counsel for Mr Blue are plainly right in saying that the meeting with the ESIB traders was not merely social and that it had a business purpose. But that purpose was not to discuss Mr Blue's work for Sports Direct or terms for his remuneration. It was an outward-facing occasion in which Mr Ashley and Mr Blue were both representing Sports Direct in meeting the representatives of a prospective service provider. In particular, the aim was to enable the senior people on the trading side of ESIB to meet Mr Ashley in an informal setting in order to build a commercial relationship with Mr Ashley / Sports Direct. I accept Mr Blue's evidence that, given the demands on his time, Mr Ashley would not have agreed to attend the meeting, let alone have invested the time and energy in it that he did, had he not believed that securing the services and enthusiastic support of ESIB as the company's new corporate broker was important for Sports Direct. But that very fact is inconsistent with the notion that it was an occasion to agree with Mr Blue a personal incentive bonus plan. Not only is it inherently unlikely that a matter personal to Mr Blue would have been the subject of serious discussion in the presence of strangers, but such a discussion would have been completely extraneous to the serious purpose which the meeting had.

(iii) The nature and tone of the conversation

85. The third feature of the occasion which is inconsistent with an intention to make a serious contractual offer to Mr Blue is the nature and tone of the conversation. Before the topic of the Sports Direct share price came up, there had been talk about football in which Mr Ashley had been impressing and flattering the ESIB traders by talking about potential purchases of players in the transfer market and making them feel they were getting an inside track on Mr Ashley's role as the owner of a Premier League club. When the conversation turned to the Sports Direct share price, it was obviously jocular, with some joshing about just how wealthy Mr Ashley would be if the share price were to reach various levels. It was, as I have found, probably not Mr Ashley who introduced the idea of a payment to incentivise Mr Blue, but rather Mr Clifton who was (in his own description) "feeling a bit mischievous". Mr Ashley took up the idea but, apart from asking Mr Blue what he thought an appropriate share price target might be, carried on the conversation primarily with the ESIB traders, who made their own obviously facetious suggestions about how Mr Blue should be incentivised or rewarded. I have found, based partly on Mr Blue's own recollection, that the final figure was arrived at after Mr Clifton proposed doubling the number on his return from a visit to the gents. Mr Ashley then said that he would split the difference between the new number (of £20 million) and the previous figure (of £10 million) and Mr Blue said that he thought this sounded fair.

86. No skilled businessman in Mr Ashley's position would have fixed the amount of a contractual bonus payment for a consultant on the basis of numbers being bandied about by some City traders who had no knowledge of or particular interest in how much Mr Blue was paid – all the more so when it must have been obvious that Mr Clifton's proposal to double up was being made with tongue in cheek. The tone of the discussion is also apparent from the evidence of the ESIB witnesses, which

I accept, that everyone was laughing throughout. No one could reasonably have understood this to be a serious business discussion.

87. I do accept that "banter", as the ESIB witnesses all described it, can have a more serious underlying intent. Mr Tracey's perception was that Mr Ashley was using the discussion about how high the Sports Direct share price might go and how to incentivise Mr Blue as a way of conveying to the traders his faith in the company and the potential for its shares to increase in price. Mr Tracey also thought that Mr Ashley was trying to make Mr Clifton and Mr McEvoy view Mr Blue as important and assumed that he was doing this because he wanted Mr Blue rather than himself to be the main point of contact for ESIB. I see no reason to doubt Mr Tracey's reading of the situation. It reinforces the point that Mr Ashley was not interested in making a deal with Mr Blue but was focussed on cultivating the relationship with ESIB.

(iv) Lack of commercial sense

88. The fourth reason why no reasonable business person would have thought that a serious contractual offer was being made is that Mr Ashley had no commercial reason to offer to pay Mr Blue £15 million as an incentive to do work aimed at increasing the Sports Direct share price. I do not accept the submission made on Mr Blue's behalf that he was at that stage "a trusted and close business associate of Mr Ashley". He had only been working as a consultant for Sports Direct for around two months and Mr Ashley did not know Mr Blue particularly well. Their only period of close contact had been two weeks spent making "roadshow" presentations to investors during the Sports Direct IPO some six years earlier. Mr Blue's main point of contact when he did some work for Sports Direct in connection with the Debenhams bids had been Mr Mellors. It was Mr Forsey who had engaged Mr Blue's services as a consultant under the Management Services Agreement: Mr Ashley was not involved in the discussions. And in the two months since he had started work most of Mr Blue's dealings had been with Mr Forsey and Mr Mellors. There is no suggestion that Mr Blue had expressed any dissatisfaction with the remuneration that Sports Direct had agreed to pay for his services or had asked for any kind of bonus or incentive. Nor is there any evidence that Mr Ashley has ever offered anyone at Sports Direct – even those at the heart of the business – an incentive payment or bonus of anything like as much as £15 million.

89. Counsel for Mr Blue argued that promising to pay Mr Blue £15 million if he could get the share price above £8 made "obvious" or "perfect" commercial sense for Mr Ashley. Their argument was that, if Mr Blue managed to achieve the £8 share price target, Mr Ashley would personally be worth an additional £1.6 billion – or around a hundred times what he would have to pay Mr Blue. If, on the other hand, the share price did not reach £8 per share, Mr Ashley would still benefit from Mr Blue's efforts without them costing him anything at all.

90. It seems to me that there are two major flaws in this argument. The first is that, had Mr Ashley been having a serious business discussion about paying Mr Blue an incentive bonus, I am sure that he would not have approached it by remarking how enormously the value of his shares in Sports Direct would increase if the share price were to double to £8 per share. No entrepreneur who has built up a successful business decides whether or how much money to pay for something purely on the basis of what they might gain: they are also concerned not to incur an unnecessary cost. My impression from the evidence accords with the submission of Mr Blue's counsel (made in the context of the £1 million payment) that Mr Ashley is "clearly a person who understands the value of money … He is simply not the kind of person to throw one million pounds at Mr Blue …" The same applies with all the more force to a sum of £15 million. Had Mr Ashley thought that Mr Blue's efforts could make a significant difference to the share price and that it was desirable to offer Mr Blue a bonus to incentivise him, I am sure that he would have assessed how much he would need to offer in order to provide such an incentive. For that purpose he would have looked at how much Mr Blue was being paid by Sports Direct – which amounted to £250,000 per year if Mr Blue were to work a five day week. It would plainly have provided a massive incentive to Mr Blue to offer him a bonus of, say, £2.5 million (that is, ten times his annual earnings). A sum of £10 million or £15 million was on any view far more than Mr Ashley could possibly have thought it necessary or sensible to offer: it would simply have involved throwing money at Mr Blue. Nor in any serious business discussion would Mr Ashley, having arrived at a figure which itself would have far exceeded Mr Blue's wildest hopes or expectations, then have increased it by a further 50% through an arbitrary process of splitting the difference between the figure first arrived at and a figure which was double that amount.

91. In short, it is plain from the way in which big numbers were being tossed around that the conversation in the Horse & Groom was not a serious discussion about creating an incentive bonus arrangement for Mr Blue but was banter in which Mr Ashley was displaying his wealth and the scale of his ambitions.

92. A second flaw in the argument made by Mr Blue's counsel is that it assumes that Mr Blue's efforts had the potential to increase the Sports Direct share price by a substantial amount. I see no reason to make any such assumption, nor to suppose that Mr Ashley would have made such an assumption, having regard to Mr Blue's role at Sports Direct.

93. Plainly, there is room for many different opinions about the relative importance of different factors in influencing a company's share price. No expert evidence was adduced by Mr Blue to support his assertion that the kind of work that he did is likely to have had a significant impact on the share price of Sports Direct. In the absence of such evidence, I see no reason to suppose that it did. As discussed in section VII below, I do not doubt that Mr Blue did useful work in supporting the corporate brokers in their efforts to improve relations with investors and potential investors. But I see no *a priori* reason to assume that such steps would have a significant effect on the investment decisions made by experienced fund managers.

(v) Incongruity with Mr Blue's role

94. This point goes further than merely showing the absence of a good commercial reason to offer Mr Blue a £15 million incentive. Mr Blue's evidence – which I have accepted as probably accurate – is that Mr Ashley said he would pay the £15 million to Mr Blue if Mr Blue could "get" the Sports Direct share price above £8 per share. However, on even the most generous view of the value of Mr Blue's services, the idea that he could somehow, through his skills and contacts in corporate finance, "get" the share price to double its then level seems plainly fanciful. No one would seriously suppose that any human being has such powers, let alone someone performing a role which, as Mr Blue agreed, would typically command remuneration of no more than, say, £300,000 to £400,000 per year (and was also a role of which Mr Blue had no previous direct experience). I think it would have been obvious to anyone with any experience of investment and financial markets that such an offer could not be meant seriously. That was certainly the perception of Mr McEvoy who said in evidence:

> "Being a trader, for me, for the share price to double based on Jeff's role I just thought that was – obviously it was a joke."

95. Mr Blue's response to this point was to suggest that Mr Ashley did not actually mean what he said and that what he must in fact have meant, or should reasonably be understood to have meant, is that he would pay Mr Blue £15 million if (a) Mr Blue did work with the aim of increasing Sports Direct's share price and (b) the share price in fact rose above £8 per share – without it being necessary to show any connection between the work done by Mr Blue and the increase in the share price. It seems to me that the fact that Mr Blue is seeking to re-cast Mr Ashley's "offer" in this way only serves to underline the point that it could not have been seriously meant.

96. Furthermore, if the offer made by Mr Ashley had been the version suggested by Mr Blue, it would no doubt have seemed less humorous to the City traders but would not have been any less absurd. To pay Mr Blue £15 million if the share price – for reasons which may have had nothing whatever to do with him – subsequently reached £8 on condition only that Mr Blue could show he had done some work (the nature and extent of which were left completely unspecified) with the aim in mind of increasing the share price, would be an utterly unbusinesslike arrangement. It is unrealistic to suppose that anyone with business experience – let alone someone with the business acumen of Mr Ashley – would seriously entertain it. Thus, the fifth reason for my conclusion that no reasonable person would have understood Mr Ashley to be making a serious offer is that a contract made on the terms discussed would have been inherently absurd.

(vi) Vagueness of the "offer"

97. This leads to the sixth reason why no reasonable person would have understood Mr Ashley to be making a contractual offer, which is that the "offer" was far too vague to have been seriously meant. Any serious discussion of a £15 million payment to incentivise Mr Blue would have required consideration of exactly what work Mr Blue was going to do to earn this bonanza and how the utility or effect of his work was going to be measured. It is not suggested by Mr Blue that such matters came into the conversation in the pub at all (or were ever mentioned afterwards). An essential element of any contract would also have been a specified period within which the share price target would have to be achieved. As indicated earlier, I am not satisfied that any timescale was agreed. Furthermore, if, as suggested by Mr Blue, the potential benefit to Mr Ashley would be the increased value of his shares (at least on paper), it would be reasonable to expect discussion of a period of time for which the share price would need to stay above the target price in order for the bonus payment to accrue. For the share

price to peak above £8 for a day or an hour or a minute before falling precipitously would defeat the suggested object of the incentive. Precisely for that reason, when Mr Tracey realised that Mr Blue was taking Mr Ashley seriously, he suggested that Mr Blue should aim at trying to keep the share price above £8 for at least 30 days. But no such discussion ever took place with Mr Ashley. That is yet another indication that no binding agreement between Mr Ashley and Mr Blue was ever seriously contemplated.

(vii) Perceptions of the ESIB witnesses

98. The seventh reason why I am confident that no reasonable person would have understood Mr Ashley to be making a contractual offer is that none of the three witnesses from ESIB who took part in the conversation thought that he was being serious.

99. I have noted that, although the test of whether an offer was made and intended to be legally binding is objective, in a case such as this where the relevant statements were oral, evidence of how they were understood by the parties themselves is admissible. That logic applies equally to the subjective understanding of other people who witnessed or took part in a conversation. It is therefore telling that all three of the ESIB representatives – Mr Tracey, Mr McEvoy and Mr Clifton – perceived the conversation about incentivising Mr Blue as no more than banter.

100. Counsel for Mr Blue did not suggest that the evidence given by these witnesses of their understanding was untruthful. But it was argued that what may have seemed like banter to them would not have seemed so if they had had the same prior knowledge as Mr Blue of Mr Ashley and his "unorthodox" business practices. This comes back to the contention that Mr Ashley was not an ordinary businessman but was, extraordinarily, the sort of person who would be willing to make a legally binding deal through what would seem to those who did not know him like banter in a pub. For reasons already given, the evidence relied on by Mr Blue does not bear out that contention.

101. It may be added that Mr Tracey did have a previous acquaintance with Mr Ashley, having been head of the team at Merrill Lynch that worked on the Sports Direct IPO. He was also a friend of Mr Blue and discussed with Mr Blue on several occasions in the following months what had been said by Mr Ashley in the Horse & Groom. An additional advantage enjoyed by Mr Tracey as an observer is that he was the only person present who was not drinking alcohol. It is clear – and Mr Blue did not dispute – that Mr Tracey's perception was that Mr Ashley was not being serious when he said that he would pay Mr Blue a bonus if Mr Blue got the share price to £8. Mr Tracey was in a much better position to take an objective view than Mr Blue, who had not only drunk two or three pints of lager on an empty stomach by the time the conversation took place, but whose judgment may have been impaired by the excitement of hearing his name mentioned in connection with very large sums of money.

(viii) Mr Blue's perception

102. My eighth and last main reason for concluding that, objectively, there was no intention to make a contract is that I am satisfied that Mr Blue himself did not understand there to be such an intention at the time when the conversation in the Horse & Groom took place or in the period immediately afterwards. That is indicated by Mr Tracey's evidence that he did not understand Mr Blue to be taking the conversation seriously when they first spoke about the evening (probably within the next day or so) but only gained this impression some months later at or around the time of the barbecue at Mr Blue's house on 10 August 2013. This conclusion is also demonstrated by the objective facts. It is improbable that a person with as much business experience as Mr Blue, had he truly believed when the conversation in the Horse & Groom took place that Mr Ashley had agreed to pay him £15 million if he got the Sports Direct share price to £8 (or if the Sports Direct share price got to £8) would have thought it unnecessary to make any written record of what had been agreed. It is even more improbable – indeed, in my view, wholly incredible – that, if Mr Blue had believed there to be a binding oral agreement, he would have waited nearly a year – as on his own case he did – before ever mentioning what had been said in the Horse & Groom to Mr Ashley.

103. Mr Blue's explanation for why he did not mention the subject to Mr Ashley until, on his evidence, late December 2013 is that he saw no need to do so because their agreement was clear and he trusted Mr Ashley to honour it. But that explanation does not stand a moment's scrutiny. Even if Mr Blue had believed that Mr Ashley was being serious, the circumstances in which the conversation took place – an informal meeting with Sports Direct's new corporate brokers in a pub in which the drinks were flowing, people were laughing, and when Mr Blue (on his own admission) had been surprised when the idea of offering him an incentive had been discussed – would at the very least have signalled the need to get Mr Ashley's confirmation of the arrangement in the light of day. The ambiguity about what Mr Blue had to do in order to become entitled to the payment would also have cried out for some clarification. Moreover, if, as Mr Blue claims, he did work of various

kinds on the strength of what Mr Ashley had said, I find it unbelievable that he would not have mentioned to Mr Ashley that he was embarking on such work.

104. Furthermore, it was not just a matter of clarity and trust. There was a need to make sure that Mr Ashley remembered what had been said and had the same recollection as Mr Blue. Even if Mr Blue is right that Mr Ashley was not at all drunk when the conversation took place, he must have learnt (from Mr Tracey, if not from Mr Ashley himself) that after he had left the pub at around 8.30pm the drinking session carried on late into the night. Given the well known fact that alcohol consumption impairs memory, I cannot believe that, if Mr Blue had thought at the time that he had made a contract with Mr Ashley under which he stood potentially to receive £15 million, he would have regarded it as unnecessary for months afterwards ever to check that Mr Ashley recalled what had been said.

105. All these points would have force enough if it had been expected on 24 January 2013 that the Sports Direct share price might double within the next few weeks or months. But, realistically, no one present in the Horse & Groom could have thought it likely that the share price would double within that sort of time frame. As mentioned, Mr Blue's evidence is that a period of three years was specified. I have not found this proved. But on any view, Mr Blue must have contemplated that it might be a matter of years rather than months before the £8 target was reached, if it was ever reached at all. However much Mr Blue trusted Mr Ashley, he could not sensibly count on Mr Ashley remembering what might be a year or more later an arrangement agreed in a conversation in a pub, if the arrangement had never been put in writing or ever mentioned again in the meantime. In my view, the irresistible inference from the fact that Mr Blue did not, on his own evidence, make any reference at all in any conversation with Mr Ashley to what had been said in the Horse & Groom (let alone any written record of it) for the next 11 months is that Mr Blue did not believe at the time of that conversation that he and Mr Ashley had made an agreement.

106. I think it likely that Mr Blue started to attach more significance to the conversation and invested it with more weight in hindsight when the Sports Direct share price climbed rapidly in around June and July 2014. At that point, as mentioned earlier, the possibility of the share price reaching £8, which may have seemed remote in January, no doubt started to seem realistic. It was then that Mr Blue made it clear to Mr Tracey that he was taking what Mr Ashley had said seriously and began to dream of holidays in Barbados and buying the next door house.

107. Mr Tracey said that, when he realised that Mr Blue was taking Mr Ashley seriously, he advised Mr Blue to get their agreement put in writing. It was obvious advice to give and advice which I am sure that Mr Blue would himself have given if someone else in such a situation had spoken to him. Not only did Mr Blue not follow Mr Tracey's advice, he still even then did not raise the subject of the potential bonus payment in conversation with Mr Ashley. The reason why he did not, as it seems to me, must have been that, although he was by now convinced (or had convinced himself) that Mr Ashley had been serious when he had said that he would pay Mr Blue £15 million if he got the share price to £8 per share, Mr Blue still did not believe that Mr Ashley had intended to make a legally binding agreement. Rather, Mr Blue's silence only seems to me explicable on the basis that he was regarding what Mr Ashley had said as a statement of intention which he hoped that Mr Ashley would adhere to but which might at most have given rise to a moral obligation rather than a legally binding contract.

Work done by Mr Blue

108. Mr Blue has claimed that, although he did not mention the conversation in the Horse & Groom to Mr Ashley for the next eleven months, he was nevertheless doing a lot of work during that time in reliance on what Mr Ashley had said which was outside the scope of his consultancy agreement with Sports Direct. Mr Blue has said that such work fell into the following four categories:

i) The appointment of corporate brokers;
ii) Expanding the range and quality of equity research coverage;
iii) Improving investor relations; and
iv) Improving the liquidity of Sports Direct shares by arranging the sale of blocks of Mr Ashley's shares, thereby increasing the "free float."

109. More particularly, as regards the second and third of these categories, Mr Blue gave evidence that his work included meeting and arranging visits to the Sports Direct headquarters in Shirebrook for equity research analysts, attending over one hundred meetings with shareholders or potential investors, preparing and frequently updating a presentation to investors and financial model, launching a new corporate website and drafting announcements for Sports Direct and the company's interim and annual reports.

110. I agree that this work is outside the scope of the Management Services Agreement, as that agreement had been drafted, but I do not accept that Mr Blue did the work as a result of anything said by Mr Ashley in the Horse & Groom. I noted earlier that, although the services specified in the Management Services Agreement were services on "strategic development opportunities and related matters", from the moment he started working for Sports Direct Mr Blue became involved in other areas which could not fairly be described as related to strategic development opportunities, including work concerned with improving investor relations. Mr Blue was asked by Mr Forsey to do this work because, although Mr Blue had never done it before, he had general familiarity with such work through his experience in the City and, by taking it on, helped to reduce the heavy burden on Mr Forsey. This did not occur, however, as a result of anything said by Mr Ashley in the Horse & Groom. It occurred at the request of Mr Forsey and Mr Mellors, and Mr Blue was already engaged in such work by the time of the meeting with the ESIB brokers on 24 January 2013. Indeed, that meeting was part of it. As well as looking for a new corporate broker, other work in the field of investor relations on which Mr Blue had by that time already embarked included the preparation of the investor presentation and financial model, which he undertook at Mr Forsey's request.

111. Moreover, although the wording of the Management Services Agreement was not apt to cover investor relations work and some of the other work that Mr Blue did, it is clear that no one in practice paid any attention to that fact or saw any need to amend the agreement. The work was simply treated as part of Mr Blue's role as it evolved and was counted as part of the four days – and later five days – per week for which his firm, Aspiring Capital Partners, charged and was paid for his services by Sportsdirect.com Retail Limited. Thus, the monthly invoices which he submitted on behalf of Aspiring Capital Partners contained descriptions of work done which included frequent references to "corporate broking", "IR presentation", "IR materials", "investor meetings", "corporate website" and other matters which Mr Blue now says were not part of his role because they were not covered by the wording of the agreement. The itemised work even included work for MASH Holdings Limited, the company through which Mr Ashley owned his shares in Sports Direct. It is plain that all this work was treated, without distinction, as part and parcel of the services that Mr Blue (through Aspiring Capital Partners) was providing and being paid for under the Management Services Agreement.

112. Despite this, Mr Blue in his oral evidence denied that he had billed Sports Direct for items relating to corporate broking and investor relations, maintaining that he had included such references in the invoices that he submitted only so that "Mr Forsey had complete oversight in terms of the work I was doing". This piece of sophistry did Mr Blue no credit and showed the extent to which his evidence has been shaped by the claim he is making in these proceedings rather than the other way around.

Mr Blue's evidence of later conversations

113. In reaching a conclusion about whether Mr Ashley made a contractual offer, I have considered Mr Blue's evidence of conversations which he allegedly had with Mr Ashley from December 2013 onwards, in which he claims that Mr Ashley acknowledged an obligation to pay him a bonus arising from what had been said in the Horse & Groom. I have also taken account of the payment of £1 million made by Mr Ashley on 27 May 2014 which has been put at the forefront of Mr Blue's case. It is important to note, however, the limited extent to which this evidence is relevant. Mr Blue has not advanced any case that, if what Mr Ashley said on 24 January 2013 did not give rise to a contract, a contract nevertheless arose from something that Mr Ashley said or did afterwards. The later conversations and the payment of £1 million are relevant and are relied on by Mr Blue only in so far as they shed any light on what the state of mind of Mr Ashley (and that of Mr Blue) was on 24 January 2013 at the moment when Mr Ashley said that he would pay Mr Blue £15 million if Mr Blue could get the Sports Direct share price to £8 per share. Their states of mind at that time are in turn relevant only in so far as they tend to show how a reasonable person would have understood what Mr Ashley was saying. There are, however, a number of difficulties in relying on the evidence of later events to reason backwards in this way.

114. One difficulty is that, as already mentioned, apart from the note that Mr Blue made in his Moleskine notebook on 25 February 2014 (quoted at paragraph 28 above), there is no written record or reference in any contemporaneous document to any of the later conversations on which Mr Blue relies. In addition, apart from a snippet of conversation which Mr Leach overheard at the Lion Hotel on 14 January 2014, there was no independent witness to any of these later conversations. Moreover, from having heard and seen him give evidence, I think it plain that Mr Ashley has no recollection of any of them. That is unsurprising given that any mention of a bonus for Mr Blue was a matter of far more significance to Mr Blue than it was to Mr Ashley. With very limited exceptions, therefore, the only evidence of the alleged conversations consists of Mr Blue's testimony based on his memory. I do not regard that without more as a reliable basis on which to make factual findings.

115. Second, the fact that by late 2013 Mr Blue had, as I have found, come to believe that Mr Ashley had been serious about paying him a bonus if the share price rose to £8 per share created ample scope for Mr Blue to over-interpret casual remarks in a way that reinforced his belief by reading much more into them than was warranted. The very brief exchange with Mr

Ashley on 25 February 2014 which Mr Blue noted in his Moleskine notebook is a case in point. On Mr Blue's own account of this conversation, it involved no more than Mr Blue asking Mr Ashley whether Mr Ashley had seen that the share price had reached £8 and Mr Ashley replying that he had seen it. It is possible to conceive how Mr Blue could have interpreted a response which, from Mr Ashley's point of view, was no more than an acknowledgment that the share price had reached £8 as a sign that Mr Ashley recalled the conversation in the pub thirteen months earlier and was willing to pay Mr Blue a bonus on the strength of it. Such an interpretation, however, seems irrationally optimistic.

116. Mr Blue's earlier conversation with Mr Ashley in December 2013, assuming that there was such a conversation, could well have been along similar lines. I do not find it credible that Mr Blue, without ever having mentioned what was said in the Horse & Groom again to Mr Ashley in the meantime, had only to say "Mike, can I have a word? … I just want to make sure that we're still on with our agreement", in order for Mr Ashley immediately to recall – without any need for any further reminder – exactly what had been said on 24 January 2014 and to tell Mr Blue that he had "got it" and was "cool" with it. I am sure that, if Mr Blue made any allusion at around that time in any brief exchange with Mr Ashley to his hope of a bonus, it would have been expressed in different – although no doubt equally oblique – terms and that he would not have referred to "our agreement."

117. The question that Mr Blue recalls being asked on some unspecified occasion by Mr Forsey may also be an instance of over-interpretation by Mr Blue. According to Mr Blue, Mr Forsey unexpectedly asked him: "So what's your deal with Mike, then?" Mr Blue has not suggested that Mr Forsey told him that he (Mr Forsey) had been told by Mr Ashley of any deal with Mr Blue. The hypothesis that there had been such a prior conversation between Mr Ashley and Mr Forsey which prompted Mr Forsey's question is unfounded speculation on Mr Blue's part. If Mr Forsey did indeed ask Mr Blue such a question (an assertion first made in Mr Blue's witness statement), it seems to me most likely to have been prompted by something that Mr Blue had previously said – either to Mr Forsey or to someone else such as Mr Leach or Mr Hellawell who had spoken to Mr Forsey – to suggest that he might have some deal with Mr Ashley.

118. Counsel for Mr Blue submitted that the court ought to draw an adverse inference from the failure of Mr Ashley to call Mr Forsey as a witness to address this point in Mr Blue's evidence. Such an inference could only be appropriate, however, if Mr Blue's evidence about the question Mr Forsey allegedly asked would, if not rebutted, found the edifice that Mr Blue has sought to build on it regarding a putative prior discussion between Mr Ashley and Mr Forsey. In my view, it does not begin to do so.

119. In the same vein, counsel for Mr Blue submitted that the court should infer from the refusal of Sports Direct in June 2016 to conduct a voluntary search for potentially relevant documents, in circumstances where Sports Direct had previously given Mr Ashley's solicitors access to Mr Blue's archived emails, that such a search would have revealed evidence supporting Mr Blue's case. I do not accept this. An inference of that kind may be legitimate where, for example, a party who has a duty to disclose relevant documents is found to have deliberately destroyed or concealed such documents. However, it has not been argued on behalf of Mr Blue that Sports Direct had a duty to provide documents to Mr Ashley for the purpose of disclosure in these proceedings, nor that Mr Ashley had the power or duty to obtain and disclose documents in the custody of Sports Direct. If any such argument was to be made, it would need to have been made much earlier in the proceedings at a case management conference. In these circumstances, although the request made by Mr Ashley's solicitors to the in-house lawyer at Sports Direct for the company's agreement to search for documents may be described as, at best, perfunctory, I do not consider that any adverse inference of the kind suggested can properly be drawn from the response.

120. I attach somewhat greater weight to Mr Blue's evidence that the subject of a prospective bonus was mentioned at the Lion Hotel on 14 January 2013 (see paragraph 23 above). The conversation must again have been extremely brief because it is said to have occurred in whatever short time it took for Mr Ashley and Mr Blue to walk from the men's toilets to the bar. But Mr Blue's evidence that the rise in the Sports Direct share price was mentioned on that occasion is supported by the evidence of Mr Leach. The remark that Mr Leach remembers overhearing is consistent at least with Mr Blue having claimed credit for initiatives which he believed had helped to boost the Sports Direct share price and asking whether Mr Ashley was willing to pay him a bonus. I therefore think it possible that Mr Ashley did say something on that occasion which encouraged Mr Blue's hopes.

Change in Mr Blue's standing

121. A further relevant factor in evaluating Mr Blue's evidence about his conversations with Mr Ashley in 2014 is that there had, as I perceive, been a change in their relationship since the time of the meeting in the Horse & Groom. Although I have rejected the suggestion that Mr Blue was "a trusted and close business associate of Mr Ashley" in January 2013, I think this much nearer to the mark as a description of their relationship a year later. During that year Mr Blue had had regular contact with Mr Ashley and had gained his trust and confidence. This is apparent from, among other things, Mr Ashley's evidence

that he asked Mr Blue to assist him with personal investments. It is also apparent from the fact that Mr Ashley wanted Mr Blue to become the Chief Financial Officer of Sports Direct in succession to Mr Mellors. Mr Blue and Mr Ashley both confirmed that this possibility was first discussed in late 2013. Another conversation which Mr Leach partly overheard indicates that it was being mentioned by Mr Ashley again at around the end of January 2014 (see paragraph 27 above). It is against that background that a conversation took place between Mr Ashley and Mr Blue in March 2014 in which Mr Blue says that the issue of Mr Ashley paying him a bonus was raised.

The conversation in March 2014

122. I think it inherently probable that there was such a conversation some time in March 2014. I very much doubt that Mr Ashley initiated the conversation, as Mr Blue has claimed. It is much more likely to have been Mr Blue who raised the subject of his being paid a bonus. But the likelihood that Mr Blue did indeed raise this subject with Mr Ashley is supported by the text messages exchanged with his wife on 25 February 2014, which show that Mr Blue hoped or expected – and had led his wife to expect – that he would be paid a bonus by Mr Ashley if the share price reached £8 per share. I see no reason to doubt Mr Blue's evidence that his wife afterwards pressed him to pursue the matter with Mr Ashley – which fits with her insistence already in one of the text messages sent on 25 February 2014 that Mr Ashley needed to send an email "to back this up."

123. I am not convinced that the conversation in which the subject was raised necessarily took place on 7 March 2014 at the Manicomio Café, as Mr Blue now believes. That is evidently a pure piece of reconstruction on his part, as in the timeline that he prepared in January 2015, and when he wrote the letter that he handed to Mr Ashley on 13 March 2015, he thought that the conversation had taken place on 27 March 2014. The latter date fits with the text messages that Mr Blue exchanged with Mr Tracey on 27 March 2015, telling Mr Tracey that he had news. It is unclear why Mr Blue would have waited 20 days before sending a text to Mr Tracey to tell him news which, from the tone of the message, Mr Blue had only just learnt. Be that as it may, it is apparent that, whenever the conversation did take place, it led Mr Blue to believe that the role of Finance Director would now be his.

124. I reject as improbable Mr Blue's evidence that Mr Ashley said that he was going to "re-negotiate their deal", although this is no doubt how Mr Blue now perceives the effect of their discussion. On the other hand, I find it plausible that, when Mr Blue raised the question of a bonus based on the share price exceeding £8, Mr Ashley brushed this aside by saying that it did not matter as Mr Ashley wanted Mr Blue to become Finance Director, which would result in him being handsomely rewarded through the executive bonus share scheme. I do not doubt that Mr Ashley genuinely regarded Mr Blue at that time as the most suitable person to take on the role of Finance Director following the retirement of Mr Mellors. It makes sense that in these circumstances Mr Ashley would have wanted to keep Mr Blue happy by deflecting the discussion onto the benefits that he would receive as Finance Director rather than directly addressing his expectation or hope of a bonus on account of what had been said in January 2013 in the Horse & Groom.

125. It also makes sense that, as part of the discussion of Mr Blue becoming Finance Director, Mr Blue would – as he says he did – have pointed out that the annual salary for the job (of £150,000) would be less than his annual income under the Management Services Agreement (of £250,000) and that this would cause him some cash flow issues until he received shares under the executive share bonus scheme and was able to sell them. I accept as probably accurate Mr Blue's evidence that Mr Ashley responded to this point by indicating that he would personally be willing to advance £1.5 million on account of the bonus shares that he expected to receive.

The £1 million payment

126. I also accept Mr Blue's evidence that he had a further conversation with Mr Ashley in late May 2014, shortly before Mr Ashley paid him £1 million on 27 May 2014, in which Mr Blue expressed frustration that nothing had happened and mentioned that his wife was also very unhappy. The frustration that Mr Blue expressed, however, could not have been at Mr Ashley's failure to "honour their agreement" to pay him a £15 million bonus, as Mr Blue implied in his witness statement. Nor does it make sense that Mr Blue would have asked Mr Ashley for "a sign of his commitment" to their "agreement", nor that Mr Ashley would have agreed to pay £1 million to Mr Blue as a sign of such a commitment. That is because, on Mr Blue's own evidence, Mr Ashley had made it clear to him in their discussion in March that the only form of bonus that he could expect to receive would be by way of shares issued to him under the executive share bonus scheme which he would join on becoming Finance Director. Against that background, Mr Blue's frustration must have been that nothing had happened since March to implement the discussion of him becoming Finance Director and therefore joining the executive share bonus scheme for which approval was going to be sought from shareholders in the near future at a General Meeting. This finding is supported by Mr Blue's note of this conversation in the timeline that he prepared in January 2015.

127. Mr Ashley struggled in his evidence to explain why he agreed to pay Mr Blue £1 million and transferred this sum to Mr Blue's bank account. Having listened to Mr Ashley's evidence, I think the reality is that he has no real recollection now of his reasons for making the payment but has tried to think of things that would explain why he did so. Neither of the suggestions that he made, however, credibly accounts for the payment for reasons which were pointed out by Mr Blue's counsel. Mr Ashley's first suggestion was that he was rewarding Mr Blue for his work in getting Mr Ashley included in the employee share bonus scheme. However, as mentioned earlier, Mr Ashley believed strongly that he should not be part of the employee scheme but should have his own separate scheme with much more demanding performance targets. That objective had not been achieved. Nor at the end of May 2014 had Mr Ashley's inclusion in the employee scheme yet been approved by shareholders, even if such approval seemed assured. It does not make sense to suppose that Mr Ashley would pay Mr Blue £1 million to reward him for his efforts in helping to secure Mr Ashley's inclusion in a scheme which had not yet been approved and which Mr Ashley did not want to be in (and in fact withdrew from just two weeks after it was approved by the shareholders).

128. Mr Ashley's second suggestion was that the payment was also referable to work done by Mr Blue in arranging an £8 million property investment for Mr Ashley and advising him on other investment proposals, which were rejected. It was clear that this suggestion was an afterthought which Mr Ashley came up with for the first time in the witness box. It was not convincing. Whilst such assistance with investments may well have contributed to the confidence with which Mr Ashley evidently reposed in Mr Blue at the time and to his desire to keep Mr Blue happy, some other factor is needed to explain why Mr Ashley paid him £1 million.

129. In my view, the best explanation of how the payment came about is provided by the timeline which Mr Blue prepared in January 2015. This contains the following entry for 23 May 2014:

> "MA insisted on a delay to JB's appointment as Group FD.
>
> JB frustrated by delay and requested that MA demonstrate commitment to previous arrangement.
>
> MA agrees to pay JB £1.0m."

Although Mr Blue did not accept this in his oral evidence, I think it reasonably clear – both from the document itself and for the reasons stated at paragraph 126 above – that the "previous arrangement" referred to in this note was the arrangement made in March 2014 when Mr Ashley had indicated that Mr Blue could expect to become the Group Finance Director and join the employee bonus share scheme. I have accepted Mr Blue's evidence that, as part of that discussion, Mr Ashley had agreed to advance Mr Blue £1.5 million. I think it likely that, as his note suggests, Mr Blue asked Mr Ashley to demonstrate his commitment to this arrangement by paying Mr Blue all or part of the £1.5 million that Mr Ashley had previously agreed to advance to Mr Blue on account of the proceeds that Mr Blue could expect to receive from his joining the employee bonus share scheme. This may also explain Mr Ashley's recollection that Mr Blue requested £1.5 million but that he (Mr Ashley) thought this too high and agreed to pay £1 million.

130. Whatever was or was not discussed between Mr Ashley and Mr Blue in late May 2014, however, and whatever Mr Ashley's reasons were for agreeing to pay Mr Blue the sum of £1 million, I am sure that Mr Ashley did not say anything at that time to suggest – and that Mr Blue did not understand – that in making the payment Mr Ashley was acknowledging an obligation arising from the conversation in the Horse & Groom in January 2013 to pay Mr Blue £15 million, of which the payment of £1 million was intended to be a first instalment. Had that been Mr Blue's understanding, I cannot conceive that he would have turned down Mr Ashley's offer – which he said that he specifically recalls – to have the arrangement recorded in writing. I also cannot conceive that, if that had been his understanding, Mr Blue would have sat on his hands in the following months without making any request for a further payment and without even asking Mr Ashley when he could expect to receive another payment. Yet Mr Blue did not make any such request. After he received the payment of £1 million Mr Blue said nothing to Mr Ashley (or to anyone else) to suggest that Mr Ashley owed him any money until after he had resigned from Sports Direct, in the letter that he handed to Mr Ashley on 13 March 2015.

131. I infer that, after he had received the payment of £1 million, Mr Blue was not expecting to be paid any more money by Mr Ashley. What he was expecting was to be made Finance Director of Sports Direct, an expectation which Mr Ashley had encouraged. When he heard nothing further about this, Mr Blue became increasingly frustrated and disappointed. His frustration finally boiled over at the end of November 2014 when he raised the issue with Mr Ashley in a conversation of which he made a contemporaneous note (quoted in paragraph 39 above). It is telling that the only issue raised in that conversation was the issue of Mr Blue becoming Finance Director and that no suggestion was made by Mr Blue that Mr Ashley owed him any money. It is even more telling that no such suggestion was made in Mr Blue's resignation letter dated 24 December 2014, even though the letter was addressed to Mr Ashley personally. The complaints made in that letter referred to recent changes in Mr Blue's role and responsibilities and "a complete lack of clarity in regards to my position going forward". There was no suggestion that Mr Blue was discontented because Mr Ashley had promised to pay him a £15 million bonus of which only £1 million had been paid. It was only after Mr Blue had resigned that, as I interpret the sequence of events, he looked back and formed the belief that, in circumstances where he had not been given the Finance Director role which he had seen (with some encouragement from Mr Ashley) as replacing the bonus that he had expected, he had an entitlement to be paid more money by Mr Ashley.

Conclusion

132. I conclude that the events after the conversation in the Horse & Groom, including the payment of £1 million in May 2014, do not support the suggestion that Mr Ashley believed that he had promised to pay Mr Blue a bonus if the share price reached £8. Nor does the evidence of those events show that Mr Blue believed that he had a right to such a payment before he advanced such a claim after he resigned. Still less does the evidence of subsequent events provide grounds for inferring that, at the time when the conversation in the Horse & Groom took place, Mr Ashley or Mr Blue thought that the talk of a bonus for Mr Blue was a serious contractual offer. I am sure that neither of them had any such understanding at the time, any more than did Mr Tracey, Mr McEvoy or Mr Clifton. I am also satisfied, for the all reasons given earlier, that no reasonable person present on 24 January 2013 would have had such an understanding.

Was the arrangement sufficiently certain to be enforceable?

133. I mentioned earlier that it has also been argued on behalf of Mr Ashley that what he said in the Horse & Groom was too vague and incomplete to give rise to a legally binding agreement.

134. There is, as I have indicated already, substantial difficulty in giving the statement of what Mr Blue had to do in order to qualify for the £15 million bonus any sensible content. On the one hand, to interpret what was said literally as meaning that Mr Blue had to show that he had caused the share price to reach £8 per share would make the payment condition in practice impossible to satisfy. On the other hand, it is difficult to interpret what was said as meaning that Mr Blue merely had to show that he had done work aimed at increasing the share price and that the share price had in fact risen to £8, since that is also an uncommercial intention to attribute to the parties, particularly when the work that Mr Blue had to do was left entirely undefined. Those are reasons (amongst others) for inferring that no contract was intended.

135. It does not follow, however, that if a clear intention had been shown to make a contract on terms that Mr Ashley promised to pay Mr Blue £15 million in the event that Mr Blue could get the Sports Direct share price to £8 a share, such an agreement would have been regarded as too vague to be enforceable. Suppose, for example, that a formal document had been signed by both parties recording an agreement in such terms. As indicated earlier, a court would in such circumstances do to its utmost to give a meaning to what had been agreed.

136. What, in my view, would defeat such an attempt, even if an intention to make a contract had been shown, is Mr Blue's failure to prove that a particular period was agreed within which the share price had to reach £8. That gap is not one which the court can fill. There are many situations in which an agreement is silent about the time within which something must be done and the court can give content to it by implying a term that the obligation will be performed within a reasonable time. But that is only possible when a court can apply some yardstick of what is reasonable. For example, in a contract for the carriage of goods when no date for delivery is specified, the court can assess what constitutes a reasonable period within which to expect delivery in the light of any past dealings and ordinary commercial usage, and imply a term on that basis. This does not seem to me, however, to be an approach which is available in the present case. There is no objective standard which the court can invoke to identify a period within which Mr Blue would need to get the share price to £8 in order to be paid £15 million. That is a matter which could only be decided by express agreement between the parties themselves. As Mr

Blue has failed to prove that a specific period was agreed, I conclude that the "offer" made by Mr Ashley could not create a contract for the further reason that it lacked an essential term.

VII. Was Payment Triggered?

137. I also referred earlier to Mr Ashley's alternative defence that, if there was a binding contract made, Mr Blue is not entitled to payment under it unless he can show that his actions caused the Sports Direct share price to reach £8 per share, which he cannot do. To decide whether this defence is well founded, it would first be necessary to decide whether the condition which had to be fulfilled in order to trigger payment can be given a sensible meaning and, if so, what that meaning is. In circumstances where I have concluded that there was no intention to create any contract, I do not consider this a fruitful exercise to attempt. I will, however, record my finding that Mr Blue has not proved that he caused the Sports Direct share price to increase to £8 per share.

138. I have referred (at paragraph 108 above) to the four categories of work which Mr Blue says he undertook in reliance on his "agreement" with Mr Ashley and have rejected his claim that he did this work as a result of anything said by Mr Ashley on 24 January 2013. Mr Blue also maintains that this work had a material, positive impact on the Sports Direct share price. Even if that is true, however, it is not the same as saying, let alone showing, that Mr Blue's actions caused the share price to rise to the level of £8 per share reached on 25 February 2014. Generally speaking, in order to show for a legal purpose that a person's conduct has caused a particular outcome, it is necessary (though not sufficient) to prove that, but for the conduct concerned, the outcome would not have arisen. It cannot be said that the 'but for' test is satisfied in this case. No evidence has been adduced from which a court could possibly conclude that the Sports Direct share price would not have reached £8 but for Mr Blue's actions. The same is true even if the 'but for' test is not applied and it is treated as sufficient to show that Mr Blue's actions made a substantial contribution to the doubling of the share price. Again, no evidence has been adduced from which a court could properly draw that conclusion.

139. The first three categories of work identified by Mr Blue all fall into the general area of marketing the company to investors. Everyone agrees that two factors which affect share prices are a company's financial performance and the general economic climate. I would accept without the need for expert evidence that these are not the only relevant factors and that investor sentiment about a company which is not based solely on the company's results can have a positive or negative influence on its share price. The very fact that companies retain corporate brokers to provide advice and support with investor relations and seek to stimulate demand for the company's shares shows that such activities are perceived to be capable of having some impact. The same applies to the fact – which I am prepared to accept on the basis of Mr Blue's evidence – that companies the size of Sports Direct typically employ at least one person to deal with investor relations. But without expert evidence – which would, as it seems to me, need to include statistical analysis – it is impossible to gauge the potential or likely extent of such impact, either generally or in the specific case of the investor relations work that Mr Blue undertook as part of his role at Sports Direct. Indeed, it seems to me that the latter question may be intrinsically unanswerable as there is no means of running a counterfactual experiment to see what would have happened to the Sports Direct share price if Mr Blue had not been retained as a consultant during the relevant period.

140. Counsel for Mr Blue suggested that the court could form a view about the likely impact of Mr Blue's actions on the Sports Direct share price based on the "inherent probabilities" and "economic common sense". I cannot accept that those concepts provide a basis on which anyone, whatever their expertise in capital markets, can make a rational judgment on this question. They certainly do not enable a judge, who is a lawyer and not an economist or financial analyst, to do so without evidence. If required to express an untutored view about what the "inherent probabilities" and "economic common sense" suggest, however, mine would be that Mr Blue's actions are unlikely to have had more than a marginal effect on the market price of Sports Direct shares. At any rate there is no evidence that indicates otherwise.

141. The fourth category of work identified by Mr Blue is "improving trading liquidity". This refers to the fact that between January 2013 and February 2014 (when the share price reached £8) two large blocks of shares beneficially owned by Mr Ashley were sold. The transactions were: (i) the sale of 25 million shares on 25 February 2013 at a price of £4 a share; and

(ii) the sale of 16 million shares on 23 October 2013 at a price of £6.625 a share. These sales significantly increased the "free float", i.e. the pool of shares not controlled by Mr Ashley, whose holding was reduced in consequence from 68.6% to 61.7% of the issued share capital. The point made by Mr Blue, which was endorsed by the ESIB witnesses and which I accept, is that increasing the liquidity of Sports Direct shares by this means is likely to have had a positive impact on the share price. In cross-examination, however, Mr Blue acknowledged that it was Mr Ashley's decision to sell these shares. Nor is it true that (as Mr Blue claimed in his witness statement) he "arranged, negotiated and executed" the trades. That was done by the placing brokers, Goldman Sachs. Mr Blue's role was a merely administrative one of liaising with the brokers. For Mr Blue to claim credit on the strength of this role for improving trading liquidity seems to me a piece of grandiosity on his part.

VIII. Conclusion

142. In the course of a jocular conversation with three investment bankers in a pub on the evening of 24 January 2013, Mr Ashley said that he would pay Mr Blue £15 million if Mr Blue could get the price of Sports Direct shares (then trading at around £4 per share) to £8. Mr Blue expressed his agreement to that proposal and everyone laughed. Thirteen months later the Sports Direct share price did reach £8. But no reasonable person present in the Horse & Groom on 24 January 2013 would have thought that the offer to pay Mr Blue £15 million was serious and was intended to create a contract, and no one who was actually present in the Horse & Groom that evening – including Mr Blue – did in fact think so at the time. They all thought it was a joke. The fact that Mr Blue has since convinced himself that the offer was a serious one, and that a legally binding agreement was made, shows only that the human capacity for wishful thinking knows few bounds.

Footnotes

1 The example is based on the old case of Rogers v Snow (1573) Dalison 94 .
2 For example, when US college students were asked to remember their high school grades and their memories were checked against records of their actual results, they were highly accurate for A grades (89% correct) but extremely inaccurate for D grades (29% correct). See Daniel Schacter, " *How the Mind Forgets and Remembers: The Seven Sins of Memory* " (2001) pp150-1.
3 The starting figure would have to be £6,666,666, which is highly unlikely to have been a figure suggested.

EXHIBIT 3

[1994–95 CILR 489]

BARCLAYS BANK PLC

v.

KENTON CAPITAL LIMITED, ETOILE LIMITED and HIGHLANDER LIMITED

Grand Court

(Smellie, J.)

6 October 1995

Conflict of Laws—jurisdiction—forum conveniens—Cayman Islands appropriate forum for suit involving offshore investment if relevant contracts governed by Cayman law, Cayman company solicited investments, money held in Cayman Islands and proceedings further advanced in Cayman Islands

Equity—tracing action—beneficiary's right to trace—investor making payment to intermediary for offshore investment venture subsequently cancelled for alleged illegality, under contract expressly stating that intermediary is bare trustee pending investment, entitled to trace and recover funds if reasonably identifiable and tracing not unjust

Banking—banker and customer—banker as constructive trustee—bank only liable as constructive trustee for knowing assistance in breach of trust if acted dishonestly

The plaintiff bank applied by interpleader summons for relief from competing claims by the defendants Kenton, Etoile and Highlander, to funds deposited in the bank in the name of Kenton.

Kenton was a Cayman company which solicited investments from, *inter alia*, the United States. 12 investors deposited money with Kenton for investment, signing standard form agreements which were expressed to be governed by Cayman law. Each investor's contribution was covered by a surety bond obtained by Kenton and paid for out of the deposits. The Securities Exchange Commission of the United States alleged that the solicitation of the investments was in breach of US law and obtained an order in the Washington District Court that Kenton pay all the funds invested to a bank account nominated by that court, with the objective that all investors be fully compensated. Over half of the investors, including Etoile and Highlander, expressed a wish that their money be returned to them directly in the Cayman Islands and consequently the bank brought the present proceedings to resolve the competing claims. All the investors were served with notice of the proceedings but only Etoile and Highlander chose to join in.

Kenton submitted that the court should stay the proceedings, either under the Grand Court Rules, O.17, r.7 or its inherent jurisdiction, on the basis that the United States was the *forum conveniens*, because Kenton's

offices were in the United States, the deposits had been made in US currency and channelled through a US bank and the investments were intended to be made through the United States.

Etoile and Highlander submitted that (a) the court should refuse to stay the proceedings on the ground of *forum conveniens* because (i) the agreements were expressly governed by Cayman law, Kenton was a Cayman company, the money was being held in the Cayman Islands and the Cayman proceedings were further advanced than those in the United States; (ii) staying the proceedings would essentially give effect to orders from foreign penal proceedings, which were unenforceable in the Cayman Islands; and (iii) the Grand Court Rules, O.17, r.7 only applied to situations in which, whilst an action was pending, a defendant applied for interpleader relief in that action, and moreover it did not apply to an application for a stay on the ground of *forum non conveniens*; (b) they were entitled to recover their deposits in the Cayman Islands, either in contract because of a total failure of consideration, or on the basis that, by the express terms of the agreements, Kenton was merely the trustee of the money pending investment and as beneficiaries they were entitled to trace their money, taking priority over Kenton itself; and (c) the bank, having notice of their claims as beneficiaries, would be liable to them as constructive trustee if it paid the money to the US court in accordance with Kenton's mandate.

Held, permitting recovery by Etoile and Highlander:

(1) The Cayman Islands were the more appropriate forum for the hearing of the suit because (i) all of the agreements between Kenton and the investors were expressed to be governed by Cayman law; (ii) Kenton was a Cayman company; (iii) the money deposited was held in the Cayman Islands; and (iv) the proceedings were further advanced in the Cayman Islands than in the United States, with the likely consequence that the cost of resolving the claims would be much less in the Cayman Islands. In addition, since the US proceedings were penal and therefore orders emanating from them were not enforceable in the Cayman Islands, it would be inappropriate to stay the Cayman proceedings. Finally, the Grand Court Rules, O.17, r.7 was not relevant as it applied only to situations in which, while an action was pending, a defendant applied for interpleader relief in that action, and in any case it did not apply to an application for a stay on the ground of *forum conveniens* (page 496, line 39 – page 497, line 7; page 497, lines 26–33; page 498, lines 4–14).

(2) Etoile and Highlander could not recover their deposits in contract because, as the deposits had been mixed in a single fund with their knowledge, they only had an action *in personam* against Kenton and no proprietary right in the money itself. However, the provisions of the agreements expressly stated that, pending investment, Kenton was trustee for the depositors, and Etoile and Highlander therefore had an equitable proprietary right in their money as beneficiaries. Moreover, since the

money was reasonably identifiable and the provision of a remedy would not work injustice, Etoile and Highlander were entitled to trace and recover their investments in the Cayman Islands and take priority over Kenton itself, which was obliged to meet their claims and those of all other investors who had not made a clear demand that their deposits be remitted to the US court. All payments were to be pro-rated according to the size of the respective deposits and would reflect rateable deductions such as the bank's administrative costs. Kenton would then be free to transfer the remainder of the funds to the US court (page 498, lines 37–40; page 499, lines 3–19; page 500, lines 1–29; page 502, lines 35–45).

(3) The bank would not be liable to Etoile and Highlander as constructive trustee if it were knowingly to assist Kenton in its breach of trust by honouring its mandate and paying the money to the US court unless it acted dishonestly in doing so. However, the question was immaterial because the bank, having brought the interpleader summons, had become amenable to the jurisdiction of the court and was therefore unable to comply with Kenton's mandate and obliged to comply with the orders of the court (page 501, lines 18–26; page 502, lines 5–14).

Cases cited:

(1) *Barnes v. Addy* (1874), L.R. 9 Ch. App. 244; 43 L.J. Ch. 513, considered.

(2) *Diplock, In re, Diplock v. Wintle*, [1948] Ch. 465; [1948] 2 All E.R. 318; on appeal, *sub nom. Ministry of Health v. Simpson*, [1951] A.C. 251; [1950] 2 All E.R. 1137, applied.

(3) *Hallett, In re, Knatchbull v. Hallett* (1880), 13 Ch. D. 696; [1874–80] All E.R. Rep. 793, followed.

(4) *J.R.P. Plastics Ltd. v. Gordon Rossall Plastics Ltd.*, [1950] 1 All E.R. 241; (1950), 94 Sol. Jo. 114.

(5) *Karak Rubber Co. Ltd. v. Burden (No. 2)*, [1972] 1 W.L.R. 602; [1972] 1 All E.R. 1210, distinguished.

(6) *Mersey Docks & Harbour Bd., Ex p.*, [1899] 1 Q.B. 546; (1899), 68 L.J.Q.B. 540.

(7) *Royal Brunei Airlines Sdn. Bhd. v. Tan Kok Ming*, [1995] 2 A.C. 378; [1995] 3 All E.R. 97, applied.

(8) *Schemmer v. Property Resources Ltd.*, [1975] Ch. 273; [1974] 3 All E.R. 451, followed.

(9) *Selangor United Rubber Estates Ltd. v. Cradock (No. 3)*, [1968] 1 W.L.R. 1555; [1968] 2 All E.R. 1073, distinguished.

(10) *Sinclair v. Brougham*, [1914] A.C. 398; [1914–15] All E.R. Rep. 622, applied.

(11) *Spiliada Maritime Corp. v. Cansulex Ltd., The Spiliada*, [1987] A.C. 460; [1986] 3 All E.R. 843, followed.

(12) *Stutts v. Premier Benefit Capital Trust*, 1992–93 CILR 605, followed.

Legislation construed:

Grand Court Rules, 1995, O.17, r.7: The relevant terms of this rule are set out at page 498, lines 6–8.

D.M. Murray for the plaintiff;

C.G. Quin for the first defendant;

R.L. Nelson for the second and third defendants;

N.R.F.C. Timms for the Securities Exchange Commission.

SMELLIE, J.: In this matter the bank applies for relief, by way of interpleader summons, from competing claims with which it is faced. The claims relate to moneys which it received on accounts in the name of Kenton. The competing claims come from Kenton itself, from Etoile and Highlander and from 10 other persons or entities, as depositors to the account.

The Securities Exchange Commission of the United States ("the SEC") was allowed to make representations in these proceedings as *amicus curiae*. It has brought a claim to the funds in the account in the context of proceedings ongoing before the Washington District Court in the United States.

Factual background

The factual background is undisputed as between the present parties. Kenton is a company incorporated in the Cayman Islands and maintains its registered office in George Town, but its main office had been kept in Little Rock, Arkansas, until May 1995, when it ceased operations there as a result of the actions of the SEC.

During March and April 1995, Kenton approached various investors within and outside the United States inviting them to invest with it. It offered to place the pool of investment capital through what is referred to as a standard form joint venture agreement, into one or more "offshore trading programs." The joint venture was promoted by Kenton as offering potentially exorbitant returns. None the less, a total of 12 investors or groups participated, each entering into the standard form of agreement. Eventually they deposited by international bank transfers a total of approximately US$1,700,000 into the account at the bank.

Each investor's contribution appears to be covered by a surety bond obtained by Kenton and issued by a US surety company, Atlantic Pacific Guarantee Corporation. For that and related investment purposes, Kenton expended approximately 15–20% of the investment deposits. The balance remains on deposit with the bank, on an interest-bearing suspense account, pursuant to an order of this court of July 10th, 1995, and pending the outcome of this application.

Each joint venture agreement is expressed to be governed by the laws of the Cayman Islands. Importantly also for present purposes, each contains

standard provisions in the following terms which Etoile and Highlander contend provide for an express trust over the respective deposits pending investment by Kenton. I quote, for example, from Clause 1 of the Etoile agreement:

> "1 The Investment
>
> The investor hereby commits the sum of [US$100,000 in Etoile's case] .. and will pay the said amount to the joint venture on or before the execution of this agreement. The investment amount, after payment of the fees and costs described below, *shall be held on trust by the joint venture for the investor pending investment of the net proceeds of the investment account in one or more of the programmes.* The investor warrants that the investment amount represents funds which are clean, clear and of non-criminal origin." [Emphasis supplied.]

Etoile and Highlander also contend that the bank, having been put on notice of their respective claims and of the express trust in their favour in the agreement, has become constructive trustee of their deposits respectively remaining in the account. This they advance notwithstanding that the account contains the mixed funds of all the investors. They also claim that the constructive trust in their favour overrides the contractual obligations owed by the bank to Kenton in respect of their funds.

The bank neither admits nor refutes their claim and brings its interpleader action to interplead all the money. This is in the light also of Kenton's contractual claim, as the bank's customer, to the entire account.

But for the intervention of the SEC, the affidavit and correspondence evidence indicates that the investors would be quite content that the investments should proceed. That intervention arises, based on what the SEC alleges, because Kenton's solicitation of the investments was in breach of SEC regulations and amounted to what the Washington District Court has found to be *prima facie* regulatory fraudulent conduct. Kenton and its principals have been directed by the District Court on pain of penalty to "repatriate" all funds standing to the Kenton account to a bank account nominated by that court. A number of investors, having a claim to just over half of the total deposits, have expressed the wish that Kenton complies with that court's directives.

All investors are assured by the SEC that the objective of its "remedial" action in the Washington District Court is their full compensation. The representations made by Mr. Timms on behalf of the SEC with the leave of the court in these proceedings are also to that effect. I quote from the affidavit filed herein by Mr. Larry Elsworth, an attorney with the SEC, on which Mr. Timms relied:

> "The SEC is an agency of the US Government. By the Securities Exchange Act of 1934 it is charged with enforcing the Federal Securities Law of the United States and with protecting investors in securities sold in the United States. This protection includes bringing

> what are regarded in the United States as civil proceedings for disgorgement of investor funds obtained in breach of the US Securities Law. While the purpose of disgorgement is to deprive defendants of any unjust enrichment, the normal result is that any moneys recovered are returned to investors, and that is the SEC's stated objective in the case pending in the United States."

Those assurances notwithstanding, a majority, in nominal terms but not in terms of value, of investors have required to have their money returned directly to them. Still others have vacillated between the two recourses of direct and indirect reimbursement.

Etoile and Highlander have been most forthcoming among those who require direct reimbursement. Although all investors have been served with notice of these proceedings and given the opportunity to join in, Etoile and Highlander have chosen to join in as parties to these proceedings to secure the result they seek and have consistently objected to Kenton's remitting their deposits to the US court. They object to the SEC intervention, controverting any suggestion of fraud or misrepresentation on Kenton's part, and asserting the total absence of merit in what they describe as the SEC's extra-jurisdictional outreach.

Etoile is a company incorporated in the British Virgin Islands and the deposits of $100,000 on its behalf were wire transferred to the bank by its principals, from Israel. It denies any real connection between its investment in the joint venture and the United States.

Highlander is incorporated in the Bahamas and wire transferred its deposit of $200,000 from Nassau to the bank on April 3rd, 1995. Its stance is the same as Etoile's in respect of the SEC's intervention and it too cites the absence of any real connection with the United States.

The nature of the action

The bank filed its interpleader summons as a stakeholder seeking the protection of the court in respect of the competing claims. The process compels the claimants to bring their claims before the court in order that, at their expense, the entitlement to the account at stake can be decided: see 22 *Atkin's Court Forms*, 2nd ed., at 377 (1991).

As interpleader relief is discretionary and cannot be claimed as of right (*ibid.*, at 377), the bank had first to satisfy this court that it fulfilled the conditions precedent to ground the relief sought. It did so by showing not only the competing claims but also that it faced threats of being sued by Etoile and Highlander (and ostensibly by other depositors) as constructive trustee, having been given notice of their respective rights as beneficiaries of the express trusts imposed by the agreements on Kenton.

For reasons given in writing during the earlier stages of these proceedings, this court determined to hear the competing claims of the parties against the bank as stakeholder. For reasons also given, it was determined that the bank should be kept in as a party until the matter was

resolved, notwithstanding that it sought to withdraw, having brought the entire Kenton account into court by way of interpleader. The most important of those reasons were (a) that the bank was stakeholder of a mixed fund containing other investors' moneys as well as the present claimants'; and (b) that the bank may be required to account for any costs to which it may be entitled and to pro-rate entitlements to be paid out pursuant to any order to be made in that regard. The fact that it holds a mixed fund may also affect the bank's attitude towards the absent claimants and may influence the order to be made in these proceedings.

The court has a wide discretion when determining this summons, as governed by the rules. It is a discretion to be exercised when the court is satisfied that in the circumstances of the case it is just and proper that relief should be granted: see *Ex p. Mersey Docks & Harbour Bd.* (6) ([1899] 1 Q.B. at 551), cited in *Atkin's Court Forms* (*loc. cit.*, at 377) The proceedings are governed by the Grand Court Rules, 1995, O.17.

The bank also submitted that it is entitled to the protection of the court by an order which would bar it from being sued by those claimants who elected not to join in as parties. In that respect it seeks to rely on O.17, r.5(3) which provides:

> "Where a claimant, having been duly served with a summons for relief under this Order, does not appear on the hearing of the summons or, having appeared, fails or refuses to comply with an order made in the proceedings, the Court may make an order declaring the claimant, and all persons claiming under him, forever barred from prosecuting his claim against the applicant for such relief and all persons claiming under him, but such an order shall not affect the rights of the claimants as between themselves."

Since the absent claimants have been given notice of the proceedings by order of this court of July 10th, 1995 and of that order itself and have declined to appear in the proceedings, it is clear that the court is seised of jurisdiction to grant an order pursuant to r.5(3). The question is whether, and if so, in what circumstances, it would be just to do so: see *J.R.P. Plastics Ltd.* v. *Gordon Rossall Plastics Ltd.* (4).

Even though the absent claimants have opted not to join in to advance their claims, the bank and Kenton are on notice of their claims, their factual bases are admitted and I must be satisfied that it is just to bar them before I so order. It is trite that in arriving at a just disposition of the case, I must apply the principles of equity and remind myself that equity follows the law except where to do so would be unjust. In that event the rules of equity prevail: see *Snell's Equity,* 29th ed., at 29 (1990) and the Grand Court Law (1995 Revision), ss. 11(2) and 16.

The case was heard summarily, *i.e.* pursuant to the Grand Court Rules, O.17, r.5(2), for reasons separately given in writing, and the following issues were identified as those to be determined:

1. Whether, on Kenton's application, the matter should be stayed on the

ground of *forum non conveniens* pursuant to the Grand Court Rules, O.17, r.5(2); r.7; r.8; r.11(2), or pursuant to the court's inherent jurisdiction.

2. Whether Kenton is a bare trustee for Etoile and Highlander and, if so, whether it is obliged in the present circumstances to pay over to them sums held in trust for them.

3. Whether the bank is obliged to honour the instructions from its account holder Kenton, in light of the competing claims, to transfer all the funds to the Washington District Court.

4. If so, whether the bank, being on notice of Etoile's and Highlander's claims, would be liable in damages to them as constructive trustee if it were to honour the conflicting instructions from Kenton to pay over the funds to the Washington District Court.

5. The fifth issue, which arises from the bank's application to bar other claimants, must also be decided.

1. *The application for the stay*

I found no proper basis for a stay.

Mr. Quin, for Kenton, relied on the oft-cited principles of *Spiliada Maritime Corp.* v. *Cansulex Ltd., The Spiliada* (11). In that case the House of Lords stated that the fundamental principle was that the court should choose that forum in which the case could be tried more suitably in the interests of all the parties and to achieve the ends of justice. The burden of proof lay on the defendant to show that the stay should be granted and in so doing to establish that the foreign forum is the more suitable.

The headnote to the case in *The All England Law Reports* mentions the following factors to be taken into account ([1986] 3 All E.R. at 844):

> "In considering whether there was another forum which was more appropriate the court would look for that forum with which the action had the most real and substantial connection, e.g. in terms of convenience or expense, availability of witnesses, the law governing the relevant transaction, and the places where the parties resided or carried on business. If the court concluded that there was no other available forum which was more appropriate than the English court it would normally refuse a stay. If, however, the court concluded that there was another forum which was prima facie more appropriate the court would normally grant a stay unless there were circumstances militating against a stay, e.g. if the plaintiff would not obtain justice in the foreign jurisdiction."

In this case the facts showed a stronger connection with the Cayman Islands than with any other jurisdiction. The agreements relied upon by Kenton, Etoile, Highlander and all other claimants are expressed to be governed by Cayman law. Kenton is a Cayman company. The money remitted to its bank account is being held in the Cayman Islands. In nominal terms, a majority of the investors wish to have their claims resolved here although, in terms of value of claims, the reverse is the case by a narrow margin.

The case before this court is more advanced than that before the Washington District Court with the present parties being able to come expeditiously and properly before this court on the basis of the bank's interpleader summons. As a result, the evidence suggests that the costs of having their claims resolved here is likely to be much less than before the foreign court. It is thus apparent that the claims can also more conveniently be dealt with before this court. The matter of availability of witnesses does not become an issue before this court. All the relevant factual material is already filed by way of affidavit evidence.

Despite the SEC's allegations, there are no clear assertions of fraud by way of charges against any person. The temporary restraining order made by the Washington District Court is, for the injunctive purposes, a matter only of a *prima facie* finding of regulatory fraud. Mr. Quin also recited Kenton's position as a party to the US proceedings, where it has undertaken to that court to reimburse all the investors. He urges that the more convenient forum for those purposes must be the United States.

Mr. Timms, on behalf of the SEC, submitted that the SEC's jurisdiction to intervene as it did arose from three main things which connected the case to the United States. First, the fact that Kenton kept offices in Arkansas. Secondly, because all deposits were denominated in US currency and had to be channelled through a clearing bank in the United States. Thirdly, because the investments were intended to be made in or through the United States.

By comparison, it is to my mind clear that the more real and substantial connection is with the Cayman Islands.

There appeared a further reason of principle which, to my mind, militated against ordering a stay of the proceedings on the ground of *forum non conveniens.* The proceedings brought by the SEC, although described as remedial or civil, are to be regarded by this court as penal in nature. Orders deriving from such proceedings are not recognizable or enforceable in this jurisdiction as they would involve the enforcement of the penal laws of a foreign state. Authority on this point is legion and I need cite only a few of the more recent cases.

In *Stutts* v. *Premier Benefit Capital Trust (12),* this court refused the recognition of the appointment of a foreign receiver on the basis that it would not execute the laws of a foreign country and would not give effect to foreign penal laws. The receiver had been appointed by a US court pursuant to applications brought by the SEC based on its regulatory powers which were deemed to be penal in nature. In *Schemmer* v. *Property Resources Ltd.* (8) the English court adopted that same approach after reviewing a long line of authority to the same effect.

With those principles and decided cases in mind it would seem an incongruous and wholly inappropriate exercise of discretion to allow a stay in this case on the ground that the Washington District Court affords the more appropriate forum. The proceedings before that court are penal in

nature, to enforce the SEC regulatory provisions. They provide no proper basis for a stay of the application joined between the parties before this court.

Finally, it was submitted that I should grant the stay pursuant to the Grand Court Rules, O.17, r.7 which provides:

> "Where a defendant to an action applies for relief under this Order in the action, the Court may by order stay all further proceedings in the action."

That provision appears to address a situation where, during the pendency of an action, a defendant brings an application for interpleader relief in that action: see 22 *Atkin's Court Forms*, 2nd ed., at 384 (1991). Even if I am wrong on that, in any event I do not consider that provision at all addresses an application for a stay on grounds of *forum non conveniens*.

2. *Is Kenton trustee of their deposits for Etoile and Highlander?*

Now that the bank has brought its application for relief by way of interpleader, this question must be addressed as a means of arriving at what order would be proper for resolving the competing claims. As matters stand, the bank now seeks protective orders from the court, having established that it has a proper basis for its interpleader application.

It is accepted by all the parties that in resolving this and the other issues the court may make such order as is just: see the Grand Court Rules, O.17, r.5(2). But here, nevertheless, I consider the exercise of that discretion must be guided by the merits of the competing claims having regard, in particular, to the principles which governed their interrelationships prior to the bringing of the bank's interpleader action. Those principles are to be founded, it is agreed on all sides, either in contract or in equity.

Although it is agreed that as a matter of contract the bank would be obliged to honour Kenton's mandate, I am urged by Mr. Nelson on behalf of Etoile and Highlander to find that the respective joint venture contracts do create express trusts in favour of his clients such that Kenton is the bare trustee of the funds deposited. Consequently, he argues, the bank, being on notice of the trusts in favour of his clients, has become a constructive trustee of their funds in the account. Depending on the finding, the court will be advised as to what orders to make.

As a matter of construction of the joint venture agreement, it is to my mind plain that Kenton is the trustee of the funds deposited. The express intention of the parties to create a trust, and the effective creation of the trust is sufficiently evinced from the context of the agreement. Whether an intention to create a trust is sufficiently evinced is a question of interpretation of the agreement: see Underhill & Hayton, *Law of Trusts & Trustees*, 14th ed., at 39–40 (1987). Subject to that, no technical words are necessary and there is no suggestion as between the parties before me, or in any claim in this jurisdiction, that the contract itself, in any case, is void

for illegality or for any other reason so as to vitiate the provisions creating the express trust.

It may also be the case that the depositors would be entitled to recover, as against Kenton in claims at common law, for moneys had and received on the basis that the consideration on which the agreement is based has failed.

The impediment to such a claim would, however, be the fact that the deposits have become mixed into a single fund in Kenton's bank account with the prior knowledge or acquiescence of the depositors. At common law, the case law suggests (see *Sinclair* v. *Brougham* (10) ([1914] A.C. at 420)) that such an action would be one *in personam* (in this case against Kenton) but not one vesting a proprietary right in the *res*, the money itself. This is on the basis that the money, a fungible, having been paid into Kenton's bank account, becomes mixed with other funds and gives rise to a claim only to a chose in action.

On the other hand, the devolution of the funds on express trusts—in the manner advanced on behalf of Etoile and Highlander and as I accept having regard to the express provisions of the contract—gives rise to a proprietary tracing claim to the funds into Kenton's bank account. The proposition is given authoritative expression in *Sinclair* v. *Brougham* (*ibid.*, at 442) citing *In re Hallett* (3) from which I quote (and which is considered in *Snell's Equity*, 29th ed., at 298 *et seq.* (1990)):

> "The principle on which, and the extent to which, trust money can be followed in equity is discussed at length in *In re Hallett's Estate* . . . by Sir George Jessel. He gives two instances. First, he supposes the case of property being purchased by means of the trust money alone. In such a case the beneficiary may either take the property itself or claim a lien on it for the amount of the money expended in the purchase. Secondly, he supposes the case of the purchase having been made partly with the trust money and partly with money of the trustee. In such a case the beneficiary can only claim a charge on the property for the amount of the trust money expended in the purchase. The trustee is precluded by his own misconduct from asserting any interest in the property until such amount has been refunded. By the actual decision in the case, this principle was held applicable when the trust money had been paid into the trustee's banking account."

By reference to the express contractual provisions and to the right of Etoile and Highlander in equity to trace or follow their money, I conclude that they retain a proprietary interest in the money in the account at the bank and that Kenton remains their bare trustee, *i.e.* one having no beneficial interest in their moneys and obliged to pay over on request: see Underhill & Hayton, *Law of Trusts & Trustees*, 14th ed., at 29 (1987). This is so notwithstanding that their funds have been mixed with that of other depositors and, perhaps, with funds of Kenton's in the account: see *In re Diplock* (2).

That being the case, it follows that the right of tracing into the mixed funds, *vis-à-vis* Kenton, affords the *cestui que trust*—in this instance Etoile and Highlander respectively—priority over Kenton itself: see *In re Diplock.*

Finally, I conclude on this issue that Kenton is obliged to accept the claims of Etoile and Highlander despite the claims of others to the mixed fund and must meet their claims *pari passu* and pro-rated with the others. The principles for ranking and pro-rating have been well established since *Hallett's case* (3) and *Sinclair* v. *Brougham* (10). They are restated in the following passage which I quote from the headnote to *In re Diplock* (2) in the *Law Reports* ([1948] Ch. at 466–467):

> "The equitable right of tracing into a 'mixed fund' is not confined to cases like *Hallett's* case . . where the right is asserted against the original 'mixer' who was in a fiduciary relationship to the claimant. The case of *Sinclair* v. *Brougham* . . . decided that *Hallett's* case . . was an illustration of a much wider principle, viz.: that one whose money has been mixed with that of another or others may trace his money into the mixed fund (or assets acquired therewith) though such fund (or assets) be held, and even though the mixing has been done by an innocent volunteer, provided that (a) there was originally such a fiduciary or quasi-fiduciary relationship between the claimant and the recipient of his money as to give rise to an equitable proprietary interest in the claimant; (b) the claimant's money is fairly identifiable; and (c) the equitable remedy available, i.e., a charge on the mixed fund (or assets), does not work an injustice."

To turn to the facts of this case, the final order to be made in this matter will reflect the conclusion that all of those three last-mentioned prerequisites, cited in the passage from *In Re Diplock,* are established in this case.

3 & 4. *The bank's position as stakeholder*

Both of these questions I believe are to be appropriately considered together as they relate to the bank's respective obligations to the competing claimants and as the bank has not yet been released by the court from its obligations as stakeholder.

Having concluded that the depositor and, in this context, Etoile and Highlander as parties before me, are entitled to trace their deposits into the mixed fund, the issues remaining as between Kenton and the bank may seem largely academic. Nevertheless, they remain to be addressed because a number of the claimants are not parties to the present action and the bank seeks a final resolution of the entire matter, including as to the full extent of Kenton's claim against it. Moreover, Etoile and Highlander seek declaratory orders which would be binding on the bank as custodian of their funds.

Vis-à-vis Kenton and the other claimants, Etoile and Highlander submit

that the bank, having received their funds on deposit on Kenton's account and having been put on notice of their claim against Kenton as trustee, would be liable to account to them as constructive trustee if the bank were to assist Kenton in its breach of trust by paying that money out. This would be so, the argument implies, even if neither Kenton nor the bank had a dishonest intention. Put another way, the argument is that the bank becomes liable to account as constructive trustee if it pays out for any purpose, including "repatriation" to the US court, because it is now in "knowing receipt" of property which is trust property and would "knowingly assist" the breach of trust.

The only authorities cited in support of this submission were 3(1) *Halsbury's Laws of England*, 4th ed. (Reissue), para. 174, at 152–153 and the cases foot-noted at note 3 thereto, most notably *Selangor United Rubber Estates Ltd.* v. *Cradock (No. 3)* (9) and *Karak Rubber Co. Ltd.* v. *Burden (No. 2)* (5). But neither of those cases dealt with a situation where a trustee and hence a bank, acting with knowledge of the trust, paid out against the wishes of the beneficiary but without an intent to defraud and without acting in bad faith. Moreover, to the extent that those cases propounded the test of "knowingly assisting" a breach of trust as a basis for liability in a bank, they have been expressly disapproved by the Judicial Committee of the Privy Council in *Royal Brunei Airlines Sdn. Bhd.* v. *Tan Kok Ming* (7). In that regard "dishonesty" is now the test.

I am not persuaded from the authorities cited that the bank could be liable to the claimants as constructive trustee if it honoured Kenton's mandate, legally issued on the basis of Kenton's contractual relationship with the bank, and without an intention to defraud or without bad faith. Kenton's mandate is in response to the Washington District Court's order made for the stated purpose of compensating *all* depositors even if against the strict directives of some, as beneficiaries of the express trusts. It may well be arguable therefore whether Kenton's mandate to the bank is in breach of trust.

48 *Halsbury's Laws of England*, 4th ed., para. 585, at 301, citing *Barnes* v. *Addy* (1) states:

> "A stranger [*e.g.* a bank] who receives property in circumstances where he has actual or constructive notice that it is trust property being transferred to it in breach of trust [*i.e.* 'knowing receipt'] will, however, also be a constructive trustee of that property."

That statement of principle has been disapproved as regards "knowing assistance" by the Privy Council in *Royal Brunei Airlines Sdn. Bhd.* v. *Tan Kok Ming* (7), but in any case it does not cover the position of the bank here, because the bank did not receive the deposits in breach of trust.

It seems to me Etoile and Highlander have not clearly shown the separate basis of a claim against the bank. But I need not decide that issue for the proper and just resolution of the claims. I need not take a definitive view of the separate claim against the bank as raised by them. There is no

longer a basis for the anticipated breach of trust. Although the bank is still technically the stakeholder and custodian of the moneys, it is not at present in a position to honour Kenton's instructions against the wishes of the other parties.

Having filed its interpleader summons, the bank became amenable to the jurisdiction of this court and has been ordered to keep the funds on an interest-bearing suspense account. That state of affairs suspends its contractual relationship with Kenton pending determination of this matter and I conclude would also suspend any duties of constructive trusteeship which the bank may owe to any depositor as well.

It follows that the bank will not only be unable to comply with Kenton's mandate *per se* but instead will be obliged to comply with any orders of the court, the nature of its contractual duty to Kenton or of any duty, legal or equitable, to any depositor, notwithstanding.

Conclusion

Having regard to the foregoing findings of fact and law the just orders as they commend themselves to my mind are as follows:

1. Kenton is declared to be trustee of all remaining funds held to its account with the bank which represent deposits by Etoile and Highlander and, indeed, by any other investor.

2. Etoile and Highlander are entitled to trace into those funds and charges against those funds are declared in their favour to the extent of their proper and respective tracing claims.

3. Those tracing claims are to rank *pari passu* with those of the other investors and the bank is directed to pay Etoile and Highlander's claims pro-rated to reflect amounts already expended by Kenton, as against amounts deposited by them.

4. As the account represents a mixed fund and as all depositors are to rank *pari passu*, the bank is directed to pay all other claimants of whom it has notice that require to be paid in the Cayman Islands as well as those who have not expressed a clear requirement that their deposits be sent to the Washington District Court. All payments are to be pro-rated according to their respective deposits and to reflect rateable deductions.

5. As to the remainder of the funds on deposit, Kenton (and hence the bank) are to be at liberty to fulfil their obligations (in the case of Kenton its contractual and equitable obligations to those depositors and in the case of the bank, its contractual obligations to Kenton) by honouring the request of those depositors to transfer their deposits, pro-rated as above, to the account of the Washington District Court. The bank is then to be at liberty to pay to Kenton any funds remaining to the proper credit of Kenton. I should expressly note that this is neither by way of direct nor indirect compliance with the order of the Washington District Court but, as stated, in accordance with the wishes of depositors who wish to have their moneys transferred and in accordance with Kenton's mandate.

6. Upon compliance by the bank with the foregoing and other aspects of this order, all depositors and Kenton are forever barred from prosecuting their claims against the bank in respect of the subject-matter interpleaded in this action.

7. As the bank doubtlessly owes a fiduciary duty to Kenton to account, it is ordered to render an account to the court copied to all claimants in respect of all payments out and to do so within 30 days.

In respect of the bank's costs of bringing this application and of complying with the orders of the court, appropriate orders are to be made.

Some administrative costs will be involved with pro-rating and accounting for the deposits. Although such costs are typically deductible by the bank on the basis of its contract with its account holder, the bank is on notice that the bulk of, if not all the funds in the account, belong to the depositors/investors as trust moneys.

None the less, it is just that the bank should be allowed to deduct those costs—the depositors would have been aware that their respective deposits were going to a mixed fund. In the event that the investments did not go ahead, as actually happened, they would have anticipated the incidence of costs involved in accounting for their money, particularly as it was likely to be pro-rated after deductions of the costs to be incurred by Kenton in obtaining the surety bonds. That would have been anticipated to be an immediate expenditure. I am informed it may be recoverable from the surety company by Kenton and will be refunded rateably to the depositors if recovered.

As to the bank's costs of this application, the only order I can properly make is that those be recoverable on the basis of taxation, failing agreement. I have been referred to no authority by which to order that its costs of the action be paid on an indemnity basis. Nor would it be just to order that it may recover the full indemnity costs of this action from the account on the basis of its contractual arrangement with Kenton, as the depositors would not have anticipated them.

Order accordingly.

Attorneys: *W.S. Walker & Co.* for the plaintiff; *Quin & Hampson* for the first defendant; *Nelson & Co.* for the second and third defendants; *Maples & Calder* for the Securities Exchange Commission.

EXHIBIT 4

Hilary Term
[2023] UKPC 7
Privy Council Appeal No 0087 of 2020

JUDGMENT

HEB Enterprises Ltd and another (Respondents) *v* Bernice Richards (as Personal Representative of the Estate of Anthony Richards, Deceased) (Appellant) (Cayman Islands)

From the Court of Appeal of the Cayman Islands

before

Lord Reed
Lord Hodge
Lord Lloyd-Jones
Lord Briggs
Lord Kitchin

JUDGMENT GIVEN ON
21 February 2023

Heard on 17 November 2022

Appellant
Jack Watson
(Instructed by KSG Attorneys at Law (Cayman Islands))

Respondent
Hector Robinson KC
(Instructed by Mourant Ozannes (Cayman Islands))

LORD KITCHIN:

1. This appeal concerns long term agreements for the sale of two lots of land within a commercial development in George Town, Grand Cayman. Each agreement provided for the payment, at the outset, of a deposit and then for the balance of the principal to be paid over 20 years by monthly instalments together with interest. As will be seen, it was also agreed that these payments would begin once the buyer had taken possession of the relevant lot.

2. After many years, during which the buyer had in fact enjoyed possession of the lots and the use of them for his commercial purposes, he repudiated the agreements, following which the sellers treated themselves as discharged from the further performance of their obligations under the agreements. The question is whether the buyer then became entitled to recover from the sellers, not just the payments of principal (as to which there is no dispute) but also all the interest payments he had made while enjoying the right to occupy the lots and use them for his own purposes. The buyer contended there had been a total failure of the basis on which those interest payments were made and so, subject to certain exceptions, he was entitled to an order for their return.

3. The Court of Appeal held that there had been a total failure of consideration but the buyer was not entitled to recover the interest payments he had made because he had enjoyed a real benefit in the form of the right to possession, and that the value of that possession, which the Court of Appeal referred to as mesne profits, had to be accounted for as part of the restitutionary adjustment which fell to be made on the failure of the agreements. The issue on this further appeal is whether the Court of Appeal approached the issues before it correctly and, so far as it did not, whether this has affected the overall conclusion to which it came.

The background

4. In the 1990s Mr Henry Bodden and his wife, acting through HEB Enterprises Ltd ("HEB"), a company of which Mr Bodden was director and principal, embarked on the development of a new shopping complex in George Town, Grand Cayman. The complex was called Caymanian Village and it was developed in two phases. It comprised, in total, 22 shops, each with its own title. Mr Bodden was the original owner of each of shops and it was always intended that HEB would act as his agent in connection with their sale. The Board will refer to Mr Bodden and HEB as "the Sellers".

5. Caymanian Village took the form of a strata development. The properties in such a development are self-contained but share common areas. A corporation is established to manage the development and to ensure that all the appropriate supervisory and administrative work is carried out and that the necessary services are provided. The owners or occupiers of the shops then make an appropriate contribution to the costs and charges that are incurred by the corporation in so doing. These contributions are called "strata fees".

6. Mr Anthony Richards expressed interest in acquiring a number of the shops in Caymanian Village and the dispute giving rise to these proceedings relates to two of those he ultimately agreed to buy, referred to as "Lot 10" and "Lot 11". Mr Richards has since died and his estate is represented in this appeal by his widow, Mrs Bernice Richards. For convenience, the Board will refer to Mr Richards and now Mrs Richards, the personal representative of his estate, as "the Buyer".

7. In very broad terms it was agreed that the Buyer would acquire each of the lots at what were described as pre-construction prices and on pre-construction terms. He would pay a small deposit at the outset and the balance of the purchase price in instalments over 20 years with interest of 12% per annum. Title to each lot would pass to the Buyer once the final payment for that lot had been made.

Lot 10

8. More specifically, in or around December 1994, the Buyer made an agreement with the Sellers to purchase Lot 10. The purchase price was CI$ 120,000. A deposit of CI$ 3,000 was payable at the outset and the balance of CI$ 117,000 was payable over 20 years, with interest at 12% per annum, by monthly instalments of CI$ 1,290.

9. Many of the important terms of the agreement to purchase Lot 10 are set out in a written contract dated 28 December 1994 but they did not represent the entire agreement between the parties. In particular, the written contract did not specify the date upon which the payment of the monthly instalments was to begin. It was agreed, however, by clause 4, that title would pass from the Sellers to the Buyer on payment of the final instalment and all outstanding interest. This was referred to as "closing".

10. Clause 5 provided that vacant possession of Lot 10 would be given by the Sellers to the Buyer on closing unless the Sellers gave their "express consent in writing to earlier possession and subject to such terms as shall then be agreed".

11. Clause 6, headed "DEFAULT", addressed the consequences of a failure by the Buyer (referred to in this clause as the "Purchaser") to complete the agreement in the manner provided for and the rights conferred on the Sellers (referred to in this clause as the "Vendor") by such a failure:

> "If the Purchaser fails to complete this Agreement at the times and as provided for in paragraph 3 hereof (in respect of which time shall be of the essence) the Vendor may at it's [sic] option rescind this Agreement by written notice to the Purchaser and forfeit and keep absolutely as liquidated damages the deposit hereof and all or any interest accrued thereon and may in addition keep absolutely out of any further sum paid by the Purchaser such amount as is sufficient to compensate the Vendor for any work done to the Strata Lot by the Vendor at the request of the Purchaser which involves a deviation from or amendment to the basic plan for the Strata Lots or any substitution requested by the Purchaser in respect of the fixtures and fittings installed in the Strata Lot and no further rights of action shall arise in respect thereof nor shall any party hereto have any further rights, demands, actions, claims or damages the one against the other and the Vendor may resell the Strata Lot and keep the full sale price absolutely."

12. Despite the terms of clause 5, the parties had in mind from the outset that the Buyer would take possession of the lot once the building work had been finished and it was ready for occupation, and they agreed that payment of the instalments of principal and interest would begin at that time.

13. The Buyer made the initial deposit payment for the purchase of Lot 10 and he entered into possession, by agreement, on 1 August 1995, having undertaken to pay the relevant strata fees.

14. The Buyer was also provided with detailed interest work sheets showing the amortised payments of interest and principal on the lot from the date of possession to the date of closing. If matters had proceeded in the manner contemplated by the entire agreement between the parties, the final instalment of principal and interest would have fallen due on 1 July 2015.

Lot 11

15. On 11 July 1997 the Buyer made a similar agreement to purchase Lot 11. The purchase price was CI$ 150,000. A deposit of CI$ 7,500 was payable at the outset and the balance of CI$ 142,500 was payable over 20 years, with interest at 12% per annum, by monthly instalments of CI$ 1,321.30.

16. Once again, it was agreed by the Sellers that title would pass to the Buyer on making the final payment. Clauses 4, 5 and 6 of the written contract were in essentially the same terms as those summarised and set out at paras 9 to 11 above.

17. The Buyer made the initial payment required in respect of the agreement to buy Lot 11. After the construction of the shop, he entered into possession, by agreement, on 14 December 1997, having once again undertaken to pay the relevant strata fees. The Buyer was also provided with a detailed interest worksheet showing the amortised payments of principal and interest on the lot from the date of possession to the date of closing, just as he had been for his purchase of Lot 10.

18. In the case of Lot 11, if matters had proceeded in the manner contemplated by the entire agreement between the parties, the final instalment of principal and interest would have fallen due on 30 November 2017.

Repudiation and "rescission"

19. Unfortunately, the Buyer was unable to meet his obligations under the payment schedule of either agreement. Discussions between the parties took place on a number of occasions over the years but to no avail. As recorded by the Court of Appeal, the Buyer from time to time made promises to pay the arrears and benefitted from the repeated forbearance of the Sellers to enforce their rights. In February 2015 the Buyer ceased making any payments in respect of Lot 10. He made some further payments in respect of Lot 11 but was still in arrears when in April 2016 he sent a cheque to the Sellers in the sum of CI$ 1,321 indicating that this was "for all" he "could afford".

20. The Sellers had by this time run out patience, however, and returned this cheque together with a printed email, dated 18 April 2016, which stated (using the original text):

> "It would appear that you do not fully grasp the concept of breach of contract. Your after-the-fact payment, even if it were accepted (which is being sent back to you) still leaves you in breach/default of both our sales agreements.

> Accordingly, we are NOT accepting any further payments on either unit #10 (which you have stopped payments on and are fourteen months behind) or #11 in which you habitually pay months late). Therefore, I will post a check back to you if you make future default payments. The attached check has been mailed back to National House Bakery today."

21. On 28 April 2016, Samson & McGrath, attorneys by then acting for the Buyer, replied that it was clear that the Sellers had invoked clause 6 and had, in the terminology of that clause, "rescinded" each contract by giving the appropriate written notice. They continued that the Buyer was now entitled to the return of all monies paid by him in respect of Lot 10 and Lot 11, subject in each case to the deposits which had been paid and which the Sellers were entitled to keep (together with any interest that had accrued on those deposits). They then proceeded to detail, in tabular form, the payments made by the Buyer and which it was claimed were now due to repaid to him, namely:

Unit #10 payments due over 240 months	$309,184.80
Less payments unpaid	($6,252)
Total	$302,932.80
Unit #11 payments due over 240 months	$317,112
Less payments unpaid	($25,977)
Total	$291,135

22. The Buyer's attorneys maintained that the total sum due to him on rescission was therefore CI$ 594,067.80 (subject to verification and minor correction). They said

that it was possible that the Sellers had rescinded the contracts under the mistaken belief that they were entitled to retain all the monies that had been paid over by the Buyer, and they urged the Sellers to take legal advice. They also indicated that the Buyer might be open to a compromise but subject to that would pursue the payment of the sums to which he was in their view entitled. Finally, they said that the Buyer would need a reasonable period of time to vacate the lots.

23. In the event and as found at trial, the Buyer had by that time made payments of the principal due in respect of Lot 10 and Lot 11 of, respectively, CI$ 110,747.47 and CI$ 96,156.35, and corresponding interest payments of CI$ 191,996.17 and CI$ 194,530.39.

The proceedings

24. On 24 May 2016, the Buyer issued an originating summons seeking a declaration that the agreements had been rescinded by the Sellers' email of 18 April 2016. By a consent order dated 10 February 2017, it was directed that the claim should proceed as if brought by writ. On 29 March 2017, the Buyer filed a statement of claim setting out his claim in more detail. He sought recovery of all the payments of principal and interest he had made and an account of all sums due and owing under clause 6 of the written contracts.

25. On 21 April 2017, the Sellers filed a defence and counterclaim asserting that the Buyer's persistent failures to perform his obligations amounted to a fundamental breach and repudiation of each of the agreements which, on acceptance, discharged them of all further obligations; and that they were entitled to treat the agreements as at an end and, in respect of the breaches of each agreement, were entitled to damages to compensate them for the losses they had suffered. They sought, among other things, payment of interest on instalments due up to the date of termination, strata fees outstanding at the date of termination, strata fees due up to the date of surrender of possession, mesne profits amounting to the commercial rent payable on the shops from the termination date to the date of surrender of possession and, for the avoidance of doubt, orders for possession.

The judgment at trial

26. The action came on for trial before Williams J, in the Grand Court of the Cayman Islands, on 7 February 2018 and it lasted two days. On one important issue between the parties, the Buyer conceded that his breaches of the agreements were repudiatory.

27. Williams J gave judgment on 2 August 2018 and by his order made on 10 August 2018 awarded the Buyer CI$ 593,430.37 on his claim and the Sellers CI$ 135,869.29 on the counterclaim, with the latter figure to be set off against the former. He held that the Buyer was entitled to the return of all of the principal and interest he had paid to the Sellers, less the deposits and any interest on those deposits. He also found that the Sellers were entitled to set off against the sums payable to the Buyer the outstanding strata fees (and interest) in the agreed sum of CI$ 58,297.30 and mesne profits for the period from 19 April 2016 until 30 November 2017 at a rate of CIS$ 4,000 per month for both lots. There was some doubt about the appropriate end date for the mesne profits, as the Court of Appeal later pointed out at para 20 of its judgment. But there was no confusion about the start date, this being the day after the Sellers had, by their email, accepted the Buyer's repudiation of the contracts.

28. In arriving at these conclusions, the judge reasoned that the parties had, in clause 6, addressed the consequence of a repudiatory default by the Buyer. In particular, clause 6, in referring to rescission, meant the exercise of the option to terminate the contract for breach. It provided for the forfeiture by the Buyer of his deposit; the right of the Sellers to resell the property and to retain the full resale price; and the right of the Sellers to retain from the payments made to them compensation for any work done to the relevant lot at the request of the Buyer. But it also prevented the Sellers from claiming damages to compensate them for any other losses they might have suffered as a result of the Buyer's repudiation.

Appeal to the Court of Appeal

29. On appeal, the Sellers argued that the Buyer had enjoyed possession of the lots for nearly 20 years and yet, on the judge's analysis, was entitled to the return of almost everything he had paid. They maintained this was a remarkable and unjust result. The judge ought to have found that the Buyer had repudiated the contracts; that their email accepting the repudiation had not referred to clause 6 and so that clause did not apply; and that the outcome of the repudiation therefore depended on the application of the common law.

30. The Sellers continued that a distinction should be made between, on the one hand, the return of the principal to reflect the failure of any passing of title to Lot 10 or Lot 11 and, on the other hand, the non-return of any interest payments to reflect the use of the shops that the Buyer had enjoyed over the better part of the 20 year instalment programme.

31. The Court of Appeal was persuaded as to the broad merits of the Sellers' submissions and allowed their appeal. Sir Bernard Rix JA, with whom John Martin KC, JA and Sir Alan Moses JA agreed, explained, at para 24, that an argument explored at the hearing was that the failure of the contracts required the application of restitutionary principles. On this approach, the Buyer had to give credit for the enrichment he had received, in the form of possession of the lots, by reference (if not to the interest payable over the period of his possession) to the mesne profits value of that possession.

32. The Court of Appeal acknowledged that one difficulty in the path of the Sellers was the concession at trial that a counterclaim for mesne profits in the form of damages had been abandoned and that, by further concession, the Sellers were only seeking a restitutionary credit up to the value of the interest involved (some CI$ 380,000) and not a larger sum of mesne profits over the period. Nevertheless, the application of general restitutionary principles allowed for a working out of the appropriate amount of any unjust enrichment, as opposed to a counterclaim for damages for breach of contract.

33. There followed a detailed consideration of the submissions advanced by the parties and of a number of authorities, and the Board intends no disrespect for the depth of that analysis by not relating it here. For present purposes it is sufficient to focus on the Court of Appeal's conclusion, at paras 49 to 63, that a full recovery of all the payments in restitution was not compatible with a situation where in the meantime the Buyer had enjoyed a real benefit under each agreement. That incompatibility could be accommodated under the modern law of unjust enrichment. A buyer of land who paid in advance for the later transfer of a title which was never completed could recover the price paid though, in a case such as the present, not the deposit. However, a buyer who had enjoyed possession should not be entitled to recover more than would eliminate any unjust enrichment of the seller. Equally, the Court of Appeal continued, there was no reason why, with the aim of avoiding unjust enrichment on the part of the seller, the buyer should be left unjustly enriched by his possession. As for how that possession was to be valued, there was a well-known way of carrying this out in the absence of a contract, and that was in the form of mesne profits of which the judge in this case had evidence.

34. The next question was whether such a solution was compatible with the parties' contracts. The Court of Appeal was satisfied that clause 6 did not exclude the effect of the principles of restitution. There was express provision for the forfeiture of the deposit and for the retention of sufficient moneys to compensate the Sellers for work done at the Buyer's request. On the other hand, there was no express provision for the return to the Buyer of part payments other than the deposit. This left room for the

application of the general law. Here it was common ground, at least for the purposes of the appeal to the Court of Appeal, that clause 6 did not stand in the way of the Buyer's right to recover what the law permitted by way of restitution. The issue was what that extended to, but it was certainly not to a figure which failed to take account of the value to the Buyer of possession.

35. The Court of Appeal decided that the structure of the transactions and their basis was that the Buyer would obtain possession in return for the price payable with interest over 20 years, at the end of which there would be a closing and passing of title. The court rejected the Buyer's submission that anything less than a full recovery of his payments of principal and interest would give a windfall to the Sellers. To the contrary, the lots had always belonged to the Sellers. The only windfall was that sought by the Buyer, namely that he be permitted to retain the benefit of his possession of the lots for nearly 20 years without any payment, save for the strata fees.

36. The Court of Appeal therefore allowed the Sellers' appeal to the following extent: there fell to be deducted from the sum awarded on the Buyer's claim mesne profits during the period of his possession of the lots, and these mesne profits were to be valued at a figure which, in light of the Sellers' concession, would be limited to the amount of interest paid by the Buyer over that period.

The appeal to the Board

37. Upon this further appeal the Buyer contends first, that the Grand Court and the Court of Appeal were right to recognise that, following the termination of the contracts between the parties, he was entitled to the return of his payments of principal and interest. Secondly, the Court of Appeal was wrong to hold that any award should be discounted to reflect the Buyer's possession of the lots.

38. More specifically, the Buyer contends that no deduction is permitted under the law of unjust enrichment or by reference to the parties' agreements. He argues that the Court of Appeal fell into error in failing properly to apply the legal principles underpinning any claim of unjust enrichment and instead in seeking to engineer a solution which it considered to be fair. As for the written contracts, clause 6 operated as a contractual allocation of risk. On termination, this clause conferred a contractual entitlement to the return of principal and interest without deduction, save as expressly provided for in the clause itself. Alternatively, the clause provided a contractual identification of the basis for the payment of principal and interest such that a restitutionary remedy remained available save as provided under the clause. Put another way, clause 6 provided a clear indicator that in the event of his failure to

complete, consideration in respect of the principal and interest would have failed and so they both ought to be refunded.

39. The Buyer accepts that, absent clause 6, his right to any award would have been subject to the Sellers' rights to sue for damages for his failure to complete the contracts or to seek counter restitution in respect of his occupation of the properties, so far as that was available. As it is, however, the structure of the parties' bargain means that the right to obtain damages is expressly limited to the retention of the deposit and of sums to compensate the Sellers for works carried out, and the Sellers have the right to keep the proceeds of sale of the properties. The parties in this way agreed a contractual limit on liability and a contractual means of ensuring that both parties were compensated in the event of a default.

40. The Sellers do not resist repayment of the instalments of principal but say the claim for return of the instalments of interest on the outstanding principal is misconceived. There was no failure of consideration or basis for these payments of interest because the Buyer was allowed to take possession of the lots, and this possession allowed him to use them and enjoy the commercial benefit of having them, whilst paying the purchase price in instalments, with interest, over a prolonged period. The payment of interest was directly referable to the Buyer's possession. Accordingly, the Court of Appeal arrived at the right conclusion but for rather different and not wholly correct reasons.

41. The resolution of these rival submissions depends, first, upon the identification and interpretation of the entire agreement between the parties in relation to each of the lots, and the correct analysis of the consequences of the repudiation of the agreements by the Buyer. It depends, secondly, on whether the basis for the agreements has failed.

The entire agreements and the right to possession

42. It is convenient to begin with the terms of the agreements themselves. The Board has related the substance of the important terms of the agreements, so far as they were set out in writing, at paras 8 to 18 above. But it is also necessary to say a little more about the basis for the Board's view, expressed at para 12 above, that these terms do not constitute the entire agreement between the parties in relation to each lot.

43. Clause 5 of each written contract provides that vacant possession of the lot will be given on closing unless the vendor gives earlier consent in writing and subject to such terms as shall be agreed. Nevertheless, the Court of Appeal held, and the Board agrees, that the whole arrangement between the parties only makes sense on the basis that the Buyer would take possession once he had paid the deposit and agreed to pay the strata fees and that this was in the contemplation of the parties at the outset. Here the Court of Appeal was right to find that the written contracts, although not themselves providing for vacant possession, contemplate that it will be given.

44. The structure of each of the agreements supports this conclusion. In particular, clause 3(b) of the written contracts did not specify the dates from which the 20 year periods were to run or when they were to end. It was agreed, however, that the periods would start to run with possession. As the Court of Appeal recorded, and the Board has mentioned, the Buyer entered into possession of Lot 10 on 1 August 1995, that is to say, almost nine months after the date of the contract; and he entered into possession of Lot 11 on 14 December 1997, some five months after the date of the contract. The Buyer was from each of these dates required to pay the relevant strata fees and the 20 year period for the payment of the monthly instalments began to run. It was also entirely understandable that the Buyer was thereupon presented with the worksheets setting out amortised payments of principal and interest on each lot from the date of possession to completion. The payments, as recorded on the sheets, differed slightly from those set out in the written contracts but it has not been suggested that these details should affect the outcome of this appeal.

45. The agreement as to the payment of interest is also important. The deposit was payable on making the contract but the balance of the purchase price was payable by monthly instalments over 20 years with interest at 12% per annum. As the Court of Appeal recognised, at para 59, the addition of interest meant the Buyer would pay and the Sellers would receive the equivalent of the full (and not time depreciated) payment of the balance of the price at the time of possession. But so too, the Buyer would have the right to take possession of the lots and enjoy their value over the two decades that he would be making the payments. Further, he would do so without paying rent. Possession by the Buyer was therefore a fundamental aspect of his agreement to make the scheduled payments, including interest at 12%, over such an extended period of time. For their part, the Sellers would be protected by their reservation of title until completion took place and the final payments had been made.

46. In light of all of these matters, the Board is satisfied that the Court of Appeal was entitled and right to find, at para 59, that clause 5 contemplates that possession will be given and similarly, at para 60, that the clause provides for a collateral exercise in fulfilment of what the written contracts already envisage. The Buyer's possession

was a part and parcel of the transactions; indeed, so much so that there was never any separate written consent for the Buyer to take possession, and the Buyer's agreement to pay the strata fees was not even recorded in writing. In this way and although the price would be paid in instalments over 20 years, the addition of interest meant that the Buyer would ultimately pay and the Sellers would receive the equivalent of full payment of the price as at the time of possession.

47. In summary, the entire agreement in relation to each lot is properly to be understood in this way:

(i) The parties agreed for a long postponed transfer of title (that is to say ownership) on full payment of an agreed price by instalments.

(ii) Once the shop had been built and was ready for occupation, the Buyer would have the right to occupy it and to have the full enjoyment of it, rent free, including the right to use it for the purpose of his business. The Sellers would at the same time have what was, commercially and in substance, the full enjoyment of the price.

(iii) These reciprocal rights were achieved by giving possession to the Buyer and by giving to the Sellers (a) the deposit; (b) instalments of the price as they were paid (from which they could derive an income in the form of interest); and (c) interest on the instalments not yet paid from time to time. The aggregate amounted to full enjoyment of the price from the date of possession.

Repudiation and discharge

48. The Board turns now to the repudiation of the agreements by the Buyer. As we have seen, in these circumstances, clause 6 of the contracts, invoked by the Sellers, purports to confer upon them a right to "rescind" the agreement by giving written notice to the Buyer. It is important to understand that any rescission of this kind is very different from rescission *ab initio* such as may arise in cases of fraud or mistake. As the trial judge recognised, the true effect of the step taken by the Sellers was to accept the repudiation by the Buyer as a discharge of the primary obligations of both parties, and to substitute for them a secondary obligation by the Buyer to compensate the Sellers for the losses they had suffered as a result of that repudiation, subject to the effect of any term of the agreement which restricted or excluded any remedy for breach, or provided any further remedy.

49. Here the Buyer contends that there was no term or condition of the agreements that he would, in the event of his default, forfeit his payments of principal or interest and so, the Sellers having accepted his repudiation, he is entitled to recover, if not his deposit, at least the payments of principal and the payments of interest he has made, subject of course to any permissible cross-claim by the Seller for breach of the agreements. He maintains that there is nothing in clause 6 which restricts or precludes that recovery. By contrast, the clause permits the retention by the Sellers of the deposit and any interest which has accrued on the deposit, and any further sum which is sufficient to compensate the Sellers for any work done at his request to Lot 10 or Lot 11 which deviates from the basic plan for the lot, and it also permits the Sellers to resell the lot and to keep the full sale price. But it precludes the Sellers from pursuing any other claim against him as a defaulting buyer.

50. The Board has come to the firm conclusion that this argument of the Buyer must be rejected. Subject to the further but related argument that there has been a total failure of basis for the payments of interest upon the outstanding principal (to which the Board will come), the Board is wholly unpersuaded that, as a matter of interpretation, the Buyer is entitled to the return of these payments of interest on his repudiation of the agreements. The Buyer's argument founders because he has had the benefit of the right to occupy the shops and use them for his business purposes for the many years since their construction, and to do so rent free. It would have made no sense for the parties to agree that he would have that benefit and yet, on his default, towards the end of the instalment period and as the date for closure drew close, have the right to recover all the payments of interest that he had made. Subject again to any total failure of basis, the normal rule applies and payments of interest made by the Buyer under the agreements before the date of discharge are irrecoverable.

Failure of basis?

51. These considerations also provide the foundation for the answer to the next question, namely whether, as the Buyer contends, this is a case in which it was envisaged that title to the lots would be transferred in exchange for all of these payments. The Buyer's argument proceeds in the following way. There has been a failure to transfer title which amounts to a total failure of the basis for the payments. It is important, the Buyer continues, that the court should not be distracted by the fact that he has derived a benefit under each agreement, unless it constituted the basis for the transaction, and here it did not. The only basis for the transaction was the transfer of title and that has not taken place. The Buyer was therefore entitled to recover all the payments he had made by way of principal and interest.

52. A number of other arguments are advanced in support of this aspect of the Buyer's case. It is submitted, first, that there is nothing in the written terms which allows the interest payments to be seen as a form of occupational rent. Here reliance is placed on the terms of the written contracts which provide for vacant possession on closing. It is also submitted that if the Buyer had never entered into occupation of the lots, precisely the same amount of interest would have been payable under clause 3. So, it cannot be said that possession was the basis for the payments of interest. To the contrary, there was express consideration for the Buyer's occupation of the lots namely the payment of insurance and strata fees, but nothing was said about interest.

53. The Buyer points, secondly, to the lack of any relationship between interest and rent. The requirement to pay interest is a feature of the overall price, the balance that remains to be paid and the actual and anticipated interest rates at the time of the written contract. By contrast, rent is usually priced evenly or, in cases the subject of rent review, will increase.

54. These are all powerful points but, in the Board's view, they tend to assume what they are said to establish. In particular, for the reasons the Board has already summarised, the written contract does not represent the entire agreement between the parties in respect of either lot. It was always understood and agreed as part of the complete agreement in respect of each lot that, when the shop had been built and was ready for occupation, the Buyer would take possession, subject in each case to the payment of the strata fees and the deposit. The Buyer would then begin to pay the instalments of the price and interest on the reducing unpaid balance in accordance with the schedule. That is precisely what happened.

55. Next, the Board does not accept that the basis for the interest payments was unrelated to the possession that the Buyer enjoyed. To the contrary, the basis for the interest payments included the right to possession for the duration of each agreement. The payments did not start until the Buyer took possession and the Buyer was entitled to retain possession so long as he continued to pay the strata fees and the instalments of principal and interest. In the result the Buyer was able to enjoy the use of the lots for business purposes for very many years, and to do so rent free.

56. It is true that the same amount of interest would have been payable even if the Buyer had chosen not to enjoy his right to take possession of the lots or had decided not to use them for his business. That would have been a matter for him. In the Board's opinion that does not assist him, however, because he was entitled to take possession of the lots and to use them for his business, and that is what he did. Nevertheless, he invites the Board to hold that this benefit formed no part of the basis for the payments with the result that, in this case and on his default, they must all be

returned. But the Board is firmly of the view that this is not a realistic approach to the respective benefits the parties secured from their agreement, or to the entirety of the basis for them.

57. The commerciality of this conclusion is not affected by what the Buyer calls the arbitrary and unreal relationship between interest and occupational rent. The Board recognises that the right to possession may not be the only basis for the interest payments. Indeed, there is a respectable argument that their basis also includes the Buyer's right and obligation to pay the principal in instalments over the same extended period. But that is nothing to the point if the right to possession, enjoyed by the Buyer, forms a material part of the basis for the interest payments, and the Board is satisfied that it does. As the Board has foreshadowed, it would indeed have made no sense for the parties to agree terms for payment of the price in instalments over 20 years at a significant rate of interest if the Buyer did not have the right to take possession for that time and to use the premises for his business purposes. Nor would it have made sense for the Sellers to have agreed an arrangement under which the Buyer could take possession and yet, many years later, on his repudiation of the agreement, recover all the payments he had made.

58. The Buyer has accepted before the Board that a failure of basis must be total and that if even a part of the benefit which formed the basis for the payments has been conferred, no action will lie for the return of those payments. As Lord Porter explained in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, 77, money had and received to the claimant's use can be recovered where the basis (there referred to as consideration) has wholly failed. So too, if a divisible part of the contract has wholly failed and part of the consideration can be attributed to that part, that portion of the money so paid can be recovered: see for example, *Barnes v Eastenders Cash & Carry plc* [2015] AC 1, para 114. On the other hand, a partial failure of consideration for a particular payment gives rise to no claim for recovery of part of what has been paid.

59. In the opinion of the Board, these principles are fatal to this aspect of the appeal. In the particular circumstances of this case, the basis for the interest payments has not wholly failed and the Court of Appeal was wrong to hold otherwise. Part of the basis for the interest payments may have been for the Buyer to obtain ownership of the lots by paying the purchase price in instalments over many years; but another and important part of the basis for these payments was to obtain the right to take possession of each of the lots and to use them for his business in the years to closing.

60. In reaching this conclusion the Board has taken careful account of a number of decisions involving hire purchase agreements to which the Buyer has referred. They

include *Rowland v Divall* [1923] 2 KB 500; *Karflex Ltd v Poole* [1933] 2 KB 251; *Warman v Southern Counties Car Finance Corporation LD* [1949] 2 KB 576; and a further case involving a conditional sale agreement: *Barber v NWS Bank Plc* [1996] 1 WLR 641. Reliance was also placed on *Rover International Ltd v Cannon Film Sales Ltd* [1989] 1 WLR 912 concerning a joint venture concerning the dubbing and distribution of films in Italy. The circumstances of each of these disputes were very different from those the subject of this appeal but all of them may be said to support a proposition which the Board would readily accept, namely that a failure of basis may be established notwithstanding the receipt of a benefit. The question in any case is not whether the party claiming a total failure of consideration has received any benefit under the agreement but whether that party has received any part of the benefit for which he bargained and which therefore forms the basis of the agreement.

61. Of more direct relevance to the issues now before the Board is the approach taken to long term agreements for the purchase of land by instalments in Victoria, Australia. Here the Board has been referred to the commentary in *Voumard, The Sale of Land*, 6th ed, 2009, an important treatise in Australia. It is explained, at para 12.280, that, at least in Victoria, Australia, where a vendor elects to rescind a contract on the ground of the buyer's default and the buyer has been in possession under the terms of the contract, the buyer is still entitled, upon adjustment of rights with the vendor, to be credited with the instalments of principal that he has paid, but he is not entitled to be credited with the instalments of interest that he has paid on the principal. The basis for that view is that consideration for the payment of the principal is the conveyance or transfer of the land and that once the vendor, in rescinding the contract, deprives the buyer of the right to the transfer, the consideration for the payment of the principal has wholly failed, and the buyer is therefore entitled to the return of the principal as money had and received to his use.

62. It is recognised in *Voumard* that the soundness of this analysis has been questioned in various articles in the Australian Law Journal (for example, an article by H. Walker, *'Rescission of contracts for sale of land'* (1934) 7(10) Australian Law Journal 366). Mr Walker argues in that article that as the buyer has had possession of the land under the contract, it cannot be said there has been a total failure of consideration for which he contracted. In other words, the contract is an entire contract for the use and occupation for a specified period and a transfer of the freehold at the end of that period in return for a principal sum with interest. The force of this view is acknowledged in *Voumard* but it is suggested that, correctly understood, the consideration is not entire but divisible and that the contract is, from the point of view of failure of consideration or basis, properly regarded as a main contract for the transfer of the freehold in return for the principal sum, and a subsidiary contract under which the buyer is entitled to enjoy possession of the land pending execution of the

transfer, in consideration of the payment of interest on the balance of the principal which remains unpaid.

63. It is not necessary for present purposes (nor would it be appropriate) to attempt to resolve the different views expressed by these authors as to the position under the law of Victoria, Australia. The important point is the recognition that, in the context of an agreement for the purchase of land over a long period, such as that with which the Board is now concerned, a right to enjoy possession of the land before title is transferred may provide at least part of the basis for an obligation to pay interest on the principal that remains outstanding from time to time.

64. The identification of the basis for the agreement in any particular case is therefore of the utmost importance. All will depend on the circumstances of the case and the nature and terms of the entire agreement in issue. The Board has carried out that exercise in the context of the agreements in relation to Lot 10 and Lot 11 and has reached the firm conclusion for the reasons given earlier in this judgment that at least a part of the basis for the entire agreement in relation to each of these lots was the right to enter into possession and occupation, on the completion of the construction, whilst the instalments of principal were being paid. That conclusion is not in any way undermined by a different conclusion reached in relation to other agreements made in different circumstances.

65. The Board must now consider the implications of clause 6 on the claim in respect of these interest payments. The Buyer submits that where a contract makes provision for the recovery of sums on termination, those provisions will govern the parties' entitlements. Here, clause 6 envisages the Buyer will be entitled to recover all payments made under the contract other than the sums expressly referred to, and so the Buyer is entitled to recover the interest payments on the outstanding principal.

66. The Board does not accept these submissions. Clause 6 does not confer on the defaulting Buyer a contractual right to the return of the interest payments he has made prior to the termination of the contract. Nor does the clause provide that in the event of the Buyer's default, the basis for the interest payments would have totally failed.

67. Accordingly, the Buyer's claim for the return of the interest payments can only be advanced on the ground that, having regard to the entire agreement in relation to each lot and all the circumstances, the basis for the obligation to make these payments has failed and that the interest therefore ought to be refunded together with the principal. But that claim suffers from the further flaw the Board has already identified,

namely that the whole basis for the requirement to pay the interest has not failed because the Buyer enjoyed the right to possession of each lot until he repudiated the agreements.

68. In reaching this conclusion the Board has given careful consideration to the decision of the Board in *Mayson v Clouet* [1924] AC 980. That case involved a contract for the sale of land with a deposit to be paid immediately, two instalments of the price to be paid on particular dates and the balance to be paid within 10 days of the production of a certificate that the construction of certain buildings on the land had been completed. The contract provided that if the buyer failed to comply with his obligations, his deposit might be forfeited and the land resold. The deposit was duly paid, as were the first two instalments of the price. But the buyer failed to pay the balance of the price at the stipulated time and failed to complete despite being served with a certificate of completion and fitness for occupation, and despite a final extension of time. The vendor rescinded the contract. The Board held the contract distinguished between the deposit and the instalments and provided for a forfeiture of the deposit only. It followed that the deposit had been forfeited, but the instalments were recoverable.

69. The Buyer contends that, just as in *Mayson*, clause 6 confers upon him a right to recover all the payments made under the agreement (including the interest payments) other than the sums expressly referred to; that if the parties had intended that the deposit and the interest payments were to be forfeited, the contract would have said so; and that the interest payments made by the Buyer on the outstanding principal were refundable on rescission is reinforced by the fact that the clause does consider the position of the interest on the deposit, making it clear that both the deposit and the interest on the deposit were non-refundable.

70. The Board is unable to accept these submissions or that the decision in *Mayson* can bear the weight the Buyer seeks to place upon it. Indeed Lord Dunedin, giving the judgment of the Judicial Committee, made clear ([1924] AC 980, 985) that the answer to the question of whether the instalments of principal and interest are in any particular case repayable must always depend on the terms of the particular contract and the circumstances in which it is made. In *Mayson* the contract distinguished between the deposit and the instalments and provided for the forfeiture of the deposit only, but there was no question of the buyer taking possession before the final payment had been made. Indeed, the balance of the price was to be paid within 10 days of the production of a certificate that certain buildings had been completed.

71. The circumstances giving rise to the dispute and appeal presently before the Board are very different because the agreements contemplated that the Buyer would

continue to make payments of interest on the outstanding part of the purchase price for many years after taking possession. The Board is satisfied that this is a case in which it is appropriate to regard the entire agreement as comprising a contract for the transfer of the title to the lots in return for the payment of the principal and a further and closely related contract under which the Buyer was, on completion of construction, entitled to take possession of the lot at least in part on the basis of the payment of interest on the balance of the purchase price which remained outstanding at any time.

Conclusion

72. For all of these reasons, which differ from those given by the Court of Appeal, the Board is of the view that the Buyer was not entitled to the return of the interest paid on the outstanding principal. The Board will therefore humbly advise His Majesty that this appeal should be dismissed.

EXHIBIT 5

[2018 (2) CILR 84]

RICHARDS v. H.E.B. ENTERPRISES LIMITED and BODDEN JR.

GRAND CT. (Williams, J.) August 2nd, 2018

Land Law — contract of sale — repudiation — if contract for sale of land by instalments terminated for purchaser's repudiatory breach, "rescission" in contract means rescission de futuro unless contract clearly provides for rescission ab initio — vendor entitled to damages for any loss caused by breach unless express contrary provision in contract — under common law, purchaser entitled to recover money paid in part performance (including interest payments) other than deposit, unless parties agreed payments to be forfeited

The plaintiff sought a declaration that agreements had been rescinded.

In 1994, the plaintiff entered into an agreement for sale with the first defendant for an uncompleted strata lot within a commercial strata development. The first defendant acted at all times through the second defendant. Pursuant to cl. 3 of the agreement, the price for the strata lot was CI$120,000. A deposit of CI$3,000 was to be paid on execution of the agreement and the balance of CI$117,000 was to be paid in monthly instalments over 20 years with interest at 12% per annum. Title was to pass to the plaintiff once the final payment was made. The plaintiff entered into a second agreement with the first defendant in 1997 for a second property within the same strata development. Pursuant to cl. 3, the

price for the second property was CI$150,000. A deposit of CI$7,500 was to be paid on execution of the agreement and the balance in monthly instalments over 20 years with interest at 12% per annum. Title would pass to the plaintiff once the final payment was made. The properties were held in the second defendant's name and each was used by the plaintiff as a shop. The plaintiff was responsible for paying the strata fees during the owner-financed period.

Clause 6 in each agreement, under the heading "Default," provided that the defendants "may at its option rescind" the agreement by written notice if the plaintiff failed to complete the agreement as provided in cl. 3 and at the specified times. Clause 6 went on to provide that the defendants might then—

"forfeit and keep absolutely as liquidated damages the deposit hereof and all or any interest accrued thereon and may in addition keep absolutely out of any further sum paid by the [plaintiff] such amount as is sufficient to compensate the [defendants] for any work done to the Strata Lot by the [defendant] at the request of the [plaintiff] . . . and no further right of action shall arise in respect thereof nor shall any party hereto have any further rights, demands, actions, claims for damages the one against the other and the [defendants] may resell the Strata Lot and keep the full price absolutely."

The plaintiff paid the deposits and made some contracted payments, including strata fees. He subsequently failed to make the payments in compliance with cl. 3. The contracts stipulated that time should be of the essence. By April 2016, no payment had been made in accordance with the first agreement for 14 months, no payment towards the strata had been made since 2010 and the payments under the second agreement were sporadic. The defendants considered the plaintiff to be unwilling and/or unable to comply with his contractual obligations. The second defendant emailed the plaintiff on April 18th, 2016 stating that the plaintiff was in breach of both agreements and that no further payments would be accepted.

The parties agreed that the agreements were terminated in April 2016 but they did not agree on the legal analysis applicable to the termination or the consequences of the termination.

The plaintiff contended that by their email and their subsequent conduct the defendants had rescinded the two agreements as they were entitled to do under cl. 6. The plaintiff sought repayment of all moneys paid by it under the agreements, less the deposits and certain other sums. (The plaintiff accepted that the defendants were entitled to retain the deposits, as well as interest on the balance of the purchase price after April 1st, 2016; outstanding late fees; outstanding strata fees; and mesne profits for his occupation of the properties from April 18th, 2016 to the date he vacated the properties.) The defendants filed a defence and counterclaim pleading that the plaintiff's persistent breaches of the agreements amounted to fundamental breaches and to repudiation of each contract entitling the defendants, on acceptance, to be discharged of all further

obligations under the contracts, to treat the contracts as being at an end and to claim damages for breach of contract. The defendants counterclaimed for interest on the instalments due up to the termination date; outstanding late fees; outstanding strata fees up to the date of delivery up of possession; mesne profits equivalent to the commercial rent payable on the shops from the termination date to the date of delivery up of possession; orders for possession of the shops and the removal of cautions against the land registers; and a right to set off the sums against the sums due to the plaintiff.

The plaintiff submitted that (a) "rescission" in cl. 6 was intended to refer to termination for repudiatory breach; (b) the defendants could only rescind pursuant to cl. 6; they did not have a choice between rescinding under cl. 6 or terminating for repudiatory breach; (c) the defendants rescinded the agreements by means of the email of April 18th, 2016, and cl. 6 therefore set out the consequences that flowed from the termination; (d) while cl. 6 made clear that the deposit and interest thereon were non-refundable it did not provide that any other payment was non-refundable and there was no other clause in the agreements containing a forfeiture provision permitting the defendants to retain instalment payments; (e) if the parties had intended there to be a departure from the position at common law regarding the return of instalment payments to the purchaser, there would have been provision in the agreements; and (f) the wording at the end of cl. 6 made clear that it was not possible for a party to recover consequential losses arising out of a failure to complete the contract.

The defendants submitted that (a) the agreements were terminated not by rescission by them but by the second defendant's acceptance of the plaintiff's repudiatory breaches of contract; (b) the second defendant's email of April 18th, 2016 was not an invocation by him of cl. 6 in the agreements but simply acceptance of the plaintiff's repudiatory breaches; (c) cl. 6 of the agreements provided the defendants with an option to rescind but did not prevent them from also terminating for repudiatory breach; (d) the agreements did not record the terms of the "owner-financing agreement," especially in relation to the rights of the parties in the event of a default in principal and interest payments; (e) as there had been fundamental breaches by the plaintiff, they were entitled to sue for damages arising before termination, including outstanding interest and late fees; (f) while the defendants accepted that the principal payments made under the agreements should be repaid, they disputed the plaintiff's claim for repayment of the interest payments; and (g) each of the agreements were in the nature of two agreements: one for the sale of the relevant parcel and the other an owner-financed loan agreement.

Held, ruling as follows:

(1) When a purchaser defaulted on a contract for the purchase of land by instalments, the first enquiry must be to the terms of the contract and then to the vendor's actions to determine which particular remedy he

purported to exercise. The traditional use of the term "rescission" was where there was a defect in the formation of a contract entitling one of the parties to extinguish the contract *ab initio.* Where a contract was brought to an end by one party's acceptance of the other's repudiatory breach, the contract would be rescinded *de futuro*, not *ab initio*, unless the contract clearly provided for rescission *ab initio.* In the present case, the court was satisfied that the defendants' email of April 18th, 2016 constituted notice for the purposes of cl. 6 of the agreements. In the absence of a clause by which the parties contemplated rescission *ab initio*, it was clear that rescission in default in sale of land matters normally meant that the vendor was terminating the contract *de futuro* for breach because the power to do so was conferred on him by the contract. The provision in cl. 6 that the defendant "may at its option rescind" referred to the now common interpretation and use of "rescind" in default in sale of land contracts. The court was satisfied that the parties' intention, as shown in the agreements, was that cl. 6 would provide the avenue to rescind when accepting a repudiatory breach arising out of the plaintiff's failure to comply with the agreement. The court was satisfied that the defendants invoked cl. 6 by the email, and that cl. 6 was the governing clause. The court would therefore consider whether cl. 6 was drafted in such a way as to exclude or restrict the defendants' right to recover damages not provided for in the clause, in particular the retention of interest payments made by the plaintiff (paras. 75–80).

(2) In the absence of any contrary express provision in the contract, if a vendor elected to treat a contract as being terminated as a result of the failure of the purchaser to pay the purchase price or an instalment of the purchase price, he was entitled to recover damages for the breach if he suffered loss as a consequence. It was agreed that cl. 6 provided that the deposit (and interest thereon) should be forfeited to the defendants, who were at liberty upon written notice to rescind the contract and resell the property and retain the full sale price. It was agreed that the defendants could also retain out of the other payments made to them an amount sufficient to compensate for any work done to the premises at the plaintiff's request which involved a deviation from or amendment to the basic plan, or any substitution by the plaintiff in respect of the fixture and fitting. If that was all cl. 6 provided, it would not take away from the defendants or in any way restrict their rights which, according to general legal principles, they would have on any breach of contract by the plaintiff. Clause 6 conferred on the defendants several separate rights, any of which they could choose to exercise or not. The power to rescind contained in cl. 6 was a power which, when exercised, would bring the contract to an end. However, cl. 6 did not stop there. The clause provided that "no further right of action shall arise in respect thereof nor shall any party hereto have any further rights, demands, actions, claims for damages the one against the other and the Vendor may resell the Strata Lot and keep the full price absolutely." It was clear from the words used that the parties intended that actions and recovery for breach be restricted to that set out in

the contract. If cl. 6 had not contained such wording, the defendants would arguably have retained a wider right to sue the plaintiff for damages for breach of contract. The court considered whether, if it were wrong in determining that the termination was by rescission as meant in cl. 6 and the right to claim damages was restricted by cl. 6, that would change the position in relation to the contested claim to the interest payments. The common law position was that, in the absence of an express or implied agreement to forfeit payments as liquidated damages on termination, a purchaser was entitled to recover the money he had paid in part performance. The court rejected the defendants' submissions that the agreements were made up of a sale/purchase agreement and a separate loan agreement. It was no more appropriate for the defendants to retain the interest payments separately than it was for them to retain the whole or any part of the principal payments. Clause 6 clearly did not alter the common law position concerning the retention of instalment payments which included interest. The plaintiff was therefore entitled to recover the interest payments. The defendants would be ordered to repay the instalment payments, made up of the principal and interest, to the plaintiff subject to the agreed and ordered set-off amounts (paras. 83–89; paras. 103–109).

Cases cited:

(1) *Bank of Boston Connecticut* v. *European Grain & Shipping Ltd.*, [1989] A.C. 1056; [1989] 2 W.L.R. 440; [1989] 1 All E.R. 545; [1989] 1 Lloyd's Rep. 431, referred to.

(2) *Barber* v. *Wolfe*, [1945] Ch. 187; [1945] 1 All E.R. 399, considered.

(3) *Chartbrook Ltd.* v. *Persimmon Homes Ltd.*, [2009] UKHL 38; [2009] 1 A.C. 1101; [2009] 3 W.L.R. 267; [2009] 4 All E.R. 677; [2010] 1 All E.R. (Comm) 365; [2009] Bus. L.R. 1200; [2009] B.L.R. 551; [2010] 1 P. & C.R. 9; [2009] 3 E.G.L.R. 119, referred to.

(4) *Heyman* v. *Darwins*, [1942] A.C. 356; [1942] 1 All E.R. 337, *dicta* of Viscount Simon approved.

(5) *Howard* v. *Pickford Tool Co. Ltd.*, [1951] 1 K.B. 417, followed.

(6) *Howe* v. *Smith* (1881), 27 Ch. D. 89, applied.

(7) *Investors Compensation Scheme Ltd.* v. *West Bromwich Bldg. Socy.*, [1998] 1 W.L.R. 896; [1998] 1 All E.R. 98; [1998] 1 BCLC 531; [1997] C.L.C. 1243, considered.

(8) *Jamaican Redevelopment Foundation Inc.* v. *Real Estate Bd.*, 2009HCV5152, Jamaican Supreme Ct., [2011] 5 JJC 1202, referred to.

(9) *Johnson* v. *Agnew*, [1980] A.C. 367; [1979] 2 W.L.R. 487; [1979] 1 All E.R. 883; (1979), 38 P. & C.R. 424, followed.

(10) *McDonald* v. *Dennys Lascelles Ltd.*, [1933] H.C.A. 25; (1933), 48 C.L.R. 457, followed.

(11) *McKenna* v. *Richey*, [1950] V.L.R. 360, referred to.

(12) *Marley* v. *Rawlings*, [2014] UKSC 2; [2015] A.C. 129; [2014] 2 W.L.R. 213; [2014] 1 All E.R. 807; [2014] 2 FLR 555; [2015]

1 F.C.R. 187; [2014] W.T.L.R. 299; (2014), 16 ITELR 642, *dictum* of Lord Neuberger considered.
(13) *Mayson* v. *Clouet*, [1924] A.C. 980, followed.
(14) *Stockloser* v. *Johnson*, [1954] 1 Q.B. 476; [1954] 2 W.L.R. 438; [1954] 1 All E.R. 630, considered.
(15) *Workers Trust & Merchant Bank Ltd.* v. *Dojap Invs. Ltd.*, [1993] A.C. 573; [1993] 2 W.L.R. 702; [1993] 2 All E.R. 370; (1993), 66 P. & C.R. 15; [1993] 1 E.G.L.R. 203, referred to.

J. Kennedy for the plaintiff;
H. Robinson, Q.C. for the defendants.

1 **WILLIAMS, J.:**

Background

On December 28th, 1994, the plaintiff ("P") entered into an agreement for sale ("the first agreement") with the first defendant ("D1") for an uncompleted strata lot within a commercial strata development known as Caymanian Village. It is agreed that D1 acted at all times through the second defendant ("D2"). D2 signed the first agreement "for H.E.B Enterprises" and he sent the email communication dated April 18th, 2016 (see para. 15 herein) that grounds P's claim. The properties, which the first agreement and the agreement mentioned in para. 3 below ("the second agreement") refer to, are both held in the name of D2.[1] Each property was used as a shop in a complex comprising 22 shops, each with their own separate title.

2 Pursuant to cl. 3 of the first agreement the total price for the strata lot known as George Town Central Block 14C Parcel 296H10 ("Parcel 296H10") was CI$120,000. The $3,000 deposit was to be paid on the execution of the first agreement and the balance of CI$117,000 over 20 years with interest at 12% per annum by monthly instalments of CI$1,290. Title to Parcel 296H10 would pass once the final payment was made. The defendants ("D") claim that at that time the parties entered into an oral agreement to pay the strata fees on the parcel.

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1 It is agreed that although the first agreement named D1 as the vendor, the agreement was being entered into by D1 on D2's behalf, and for his benefit, as the registered proprietor of the parcels. The bundle contains written agreements relating to the parcels dated June 28th, 2008, albeit signed only by P, which are consistent with the parties accepting that the contracting vendor is D2.

3 P entered into the second agreement[2] in July 1997 for a second property within the same strata development from D1, this time for the sum of CI$150,000 with CI$7,500 to be paid on execution of the second agreement and the balance of CI$142,500 over 20 years with interest at 12% per annum by monthly instalments of CI$1,321.[3] Title to this property would also pass once the final payment was made. This property is known as George Town Central Block 14C Parcel 296H11 ("Parcel 296H11"). D claim that at that time the parties entered into an oral agreement to pay the strata fees on the parcel.

4 The phrase "the parcels" will be used when referring collectively to Parcel 296H10 and Parcel 296H11 herein. The phrase "the agreements" will be used when referring collectively to the first agreement and to the second agreement herein.

5 The purchases of the parcels were both at pre-construction prices, with possession being upon closing[4] and with the provision of owner-financing over a lengthy period of time. By the end of the hearing it was accepted that it was also later agreed that P, as may be ordinarily expected of a purchaser who is occupying a property, would be responsible for paying the strata fees over the owner-financed period. After P had paid the deposits he commenced making the contracted payments including the strata fees.

6 Clause 6 in each agreement, under the heading "Default," provided that D "may at its option rescind" that agreement by written notice to P if P failed to complete that agreement as provided for in cl. 3 of the agreement and at the specified times. Clause 6 went on to provide that D may then—

> "forfeit and keep absolutely as liquidated damages the deposit hereof and all or any interest accrued thereon and may in addition keep absolutely out of any further sum paid by the [plaintiff] such amount as is sufficient to compensate the [defendant] for any work done to the Strata Lot by the [defendant] at the request of the [plaintiff] which involves a deviation from or amendment to that basic plan for the Strata Lots or any substitution requested by the [plaintiff] in respect of the fixtures and fittings installed in the Strata Lot and no

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2 P and D also entered into a third sale agreement for a third property and that agreement was fully honoured and the title transferred to P in 2005 after all contracted payments had been made.

3 Pursuant to cl. 3 of the second agreement.

4 Despite this provision appearing at cl. 5 of each agreement and cl. 4 defining "closing" to be upon payment of the final instalment due on the purchase price and all interest thereon, P was able to occupy Parcel 296H10 on July 1st, 2015 and Parcel 296H11 after payment of the relevant deposit but before closing.

further right of action shall arise in respect thereof nor shall any party hereto have any further rights, demands, actions, claims for damages the one against the other and the [defendant] may resell the Strata Lot and keep the full price absolutely."

7 Clause 6 provides that if the purchaser fails to complete the agreement at the times and as provided for in cl. 3, the vendor may exercise its option to rescind the agreement. All parties agree that the purchaser had failed to make the payments in compliance with cl. 3 and that the contract stipulates that time shall be of the essence. It is clear that, where time is of the essence, a failure to pay one or more instalments of purchase money under a contract providing for payment on extended terms, the vendor will be entitled to rescind immediately the default occurs. If time is not of the essence, the mere failure to pay an instalment will not give the vendor a right to rescind. I will return to analyse the wording of this key clause later herein.

8 D state that P was provided with detailed "Interest Worksheets" showing the amortized payments of principal and interest on each parcel from the date of possession to the date of completion. If all the payments had been made as and when they fell due (i) in relation to Parcel 296H10, the final payment for that parcel would have been on July 1st, 2015, and (ii) in relation to Parcel 296H11, the final payment date for that parcel would have been November 30th, 2017.

9 Regretfully, P failed to strictly adhere to the payment schedule, making sporadic and irregular payments on the parcels which sometimes involved cheques being dishonoured by the bank due to insufficient funds. P states that when he fell behind it was not from a "desire to skip payment," but because he simply did not have the available funds. It is clear that he did not have the means to adhere to and complete the agreements. P said that D2 would threaten to "rescind the agreements" as can be seen from (i) D2's fax message of August 17th, 2010 in which he said that "the option of rescinding the two contracts will be looming"; (ii) his message of May 21st, 2010 when he referred to the "remedy for default on our contract"; (iii) his letter of March 4th, 2015 when he stated that "You are hereby served notice that you are in serious breach/default of contracts and agreement dates . . . and are in the hands of an attorney pending litigation"; and (iv) his fax message dated February 15th, 2000 in which he stated:

> "It is with a very heavy heart that we have to refer to the contract and enforce #6 (Default) clause by using our option to rescind our agreement by this written notice as described. Contrary to what the contract states we are willing to give you back what you have paid into the shop. This means that you would be credited your down payment and principal paid up to January 2000."

10 P said at times the relations with D2 "became very poor." However, it is evident that there was an acceptance that D2 had been patient towards him. P's wife wrote in February 15th, 2008 that she felt "guilty" about the payment situation and stated that "words cannot express the thanks and gratefulness in my heart for the way that you have helped us over the years."

11 The last payment of principal and interest in relation to Parcel 296H10 was made by P in February 2015. P has made principal payments of CI$110,747.47 and interest payments of CI$191,996.17 (total CI$302,743.63) in relation to that parcel. As of February 2015 a balance of CI$6,252 remained due towards the purchase price.[5] P completely stopped paying the strata fees on the parcel in February 2010, when P wrongly contended that there was no agreement for him to make those payments.

12 In relation to Parcel 296H11, P has made principal payments of CI$96,156.35 and interest payments of CI$194,530.39 (total CI$290,686.74). P completely stopped paying the strata fees on this parcel in February 2010, when P wrongly contended that there was no agreement for him to make those payments.

13 By April 2016, P was behind payment in relation to both parcels. No payment had been made by P towards Parcel 296H10 for 14 months, no payment towards the strata had been made since 2010 and the payments on Parcel 296H11 were sporadic and not made when as and when they fell due. In March 2016, P had received an offer to purchase the parcels from another owner in the strata complex, with closing due on April 8th, 2016. P offered that, if permitted to sell the parcels, he would, upon closing, pay all the sums owed under the contracts to D and "a portion" of the strata fees. D2, as he was arguably entitled to do in law especially when there was an unresolved dispute about the responsibility for P to pay strata fees, refused to accept this offer.[6] By letter dated March 29th, 2016, P's attorney wrote to D threatening legal action if consent to the sale was not forthcoming within seven days. By letter dated April 11th, 2016, P's attorney, with reference to a letter from D2 dated January 31st, 2014, stated that to prevent the need to apply to court to obtain an order for the sale of the parcels, agreement could be reached on the conditions set out therein by D2.

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5 Excluding interest and any late charges.

6 D2, by email dated March 4th, 2016, expressed a willingness to allow the sales to go through, but only if it was accepted that he would be paid the amounts specified therein which he said were due to him.

14 P sent a cheque "for all" he "could afford" to D in the sum of CI$1,321 towards the principal and interest on Parcel 296H11.

15 With the backdrop of P threatening legal proceedings to force the sale of the parcels, as P had regularly failed to make the cl. 3 payments and strata payments as and when they fell due on each parcel, with no payments having being made since February 2015 on Parcel 296H11, D formed the view that P was unwilling and/or unable to comply with his contractual obligations. D contends that P, due to the nature of his payment history, had fundamentally breached the contracts, thereby enabling D to treat the contracts as repudiated. He said that, as a consequence, an email was sent by D2 to P on April 18th, 2016 in the following terms:

> "It would appear that you do not fully grasp the concept of breach of contract. Your after-the-fact payment, even if it were accepted (which is being sent back to you) still leaves you in breach/default of both our sale agreements. Accordingly, we are NOT accepting any further payments on either #10 (which you stopped payments on and are fourteen months behind) or #11 in which you habitually pay months late). Therefore I will post a check back to you if you make future default payments. The attached check has been mailed back to National House Bakery today."

16 P contends that D, by the April 18th, 2016 email and conduct thereafter, have rescinded the two agreements, as they are empowered to do under cl. 6 in each agreement. P submits that the word "rescission" used in cl. 6 is intended to refer to termination for repudiatory breach. Accordingly, on April 28th, 2016, P's attorney wrote to D in reply to the email stating: "Whilst not explicitly referenced it is clear that you have invoked clause 6 of the Agreements by rescinding the agreements by written notice." In the letter P's attorney formally demanded forthwith payment of all moneys paid by P under the agreements less deposits paid. P claimed that these amounts totalled approximately CI$594,067.80. In the letter P stated that, although cl. 6 permitted D to rescind the agreements, it did not entitle them to keep "all principal sums" paid by P under the agreements.

Background—the pleadings and the proceedings

17 In light of the above, P issued his originating summons on May 24th, 2016 in which he sought a declaration that the agreements had been rescinded by D2's email sent April 18th, 2016. P also sought an account of and payment of all sums due and owing pursuant to cl. 6 in each of the agreements as a consequence of the termination and sought interest on all sums found due and owing from the date of the said email.

18 Having regard to issues raised by D, on February 10th, 2017, the parties agreed that the claim should be treated as if brought by writ. P's statement of claim was filed on March 29th, 2017.

19 D filed their defence and counterclaim on April 21st, 2017. D pleaded that P's persistent breaches of the agreements amounted to fundamental breaches of the contracts and amounted to a repudiation of each contract by P which entitled D, on acceptance, to be discharged of all further obligations under the contracts, to treat the contracts as being at an end and, in respect of each contract, to claim damages for breach of contract. D pleaded at para. 15 that "by written notice" they accepted P's repudiation of each contract and that D treated each of them as having been terminated. D counterclaimed for—

> "interest on the instalments due up to the termination date: late fees outstanding up to the termination date; outstanding strata fees due and unpaid up to the date of delivery up of possession: mesne profits equivalent to the commercial rent payable on the shops, from the termination date to the date the Plaintiff delivers up possession: orders of possession of the shops and for the removal of cautions against the land registers[7]; a right to set-off the sums due to the Defendant against the sums due to the Plaintiff."[8]

20 P filed his defence to the counterclaim on May 17th, 2017.

21 P, despite contending that the agreements had been rescinded by D pursuant to cl. 6, remained in occupation of the parcels resulting in a summons for vacant possession[9] and for the removal of two registered cautions[10] being issued by D on May 19th, 2017. By a consent order on October 20th, 2017, P was ordered to deliver up vacant possession of the parcels on or before November 30th, 2017 (extended later to January 31st, 2018) and the Registrar of Lands was directed to register a discharge of the cautions.

22 The final hearing with oral evidence took place on February 7th and 8th, 2018. The matter was adjourned for this reserved written judgment to be delivered following the receipt of further written submissions which

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7 See para. 21 below.
8 Paragraph 19 of D's written opening submissions.
9 On October 20th, 2017, Carter, Ag. J. approved a consent order for P to deliver vacant possession of the property by November 30th, 2017. That date was extended by consent on November 30th, 2017 and finally on January 24th, 2018 until January 31st, 2018 upon payment of a fixed monthly rent.
10 P had cautions in his favour placed on the parcels at the Land Registry on October 1st, 2009 when he discovered that D2 was borrowing money secured on the complex.

were received from the parties by or on February 12th, 2018. Unfortunately, this judgment is longer than I would have wished it to be. However, as this appears to be the first time that the Grand Court has been asked to consider issues arising from default in the sale of land in an instalment contract case, it is hoped that the wider analysis of the general principles and the law may prove to be of assistance if there are any similar cases in the future.

23 On June 20th, 2018, the court wrote to both parties. First, the court found it necessary to seek further clarification from the parties about the effect of the wording at the closing part of cl. 6 in the agreements. Secondly, the court felt it appropriate to provide the parties with an article written by John Toohey[11] in 1964 entitled "Default in the Sale of Land," 6(3) *University of Western Australia Law Review* 407 (1964), and an extract from Voumard, "Chapter XII, Breach of Contract and the Remedies Therefor," in *The Sale of Land in Victoria*, 1st ed., 484–514 (1939).[12] Although both of these extracts relate to the approach in Australia, an opportunity for comment upon the content was given to the parties, especially as the Cayman Islands, by enactment of the Registered Land Law in 1971, adopted the Torrens title system that is used in and originated in Australia. Mangatal, J. in her judgment delivered in the Supreme Court of Jamaica (a country which has also adopted the Torrens system) in the case of *Jamaican Redevelopment Foundation Inc.* v. *Real Estate Bd.* (8) recognized the potential usefulness of the analysis conducted by the authors in the highly regarded *Voumard* when considering issues of dispute arising out of the sale of land. At the outset of the hearing I had made some reference to the parties about the case law in Australia. The written comments prepared by the parties were received on July 10th, 2018.

The termination of the agreements and the issues arising from it

24 Both parties agree that the agreements were terminated on April 18th, 2016. P accepts that the failure to pay the purchase price on time was "inconsistent with the continuation of the contract" and that his breaches of the contract were repudiatory.[13] In these circumstances I find that the two contracts have been validly terminated.

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11 A barrister and solicitor of the Supreme Court of Western Australia.
12 The chapter was referenced at footnote 83 in the John Toohey article written in 1964.
13 Paragraph 10 of P's written opening skeleton argument at para. 1 of P's written closing submissions.

25 However, the parties do not agree what legal analysis is applicable to the termination by D's email of April 18th, 2016 and what consequences flow from that termination.

P's submissions in relation to the legal analysis applicable to the termination

26 P states that that word "rescission" is often seen in contracts of sale in the context of termination for breach and that in cl. 6 it was intended to refer to termination for repudiatory breach. P rightly does not suggest that rescission used in cl. 6 was intended to result in rescission *ab initio*, which would have put the parties back to the position they were in prior to entering each agreement. The clause did not include the type of wording along the lines of "as if this agreement had never been entered into" which may be found in agreements where the parties expressly agree that they intend the contract to provide for a recession operating *ab initio*.

27 P submits that there is nothing in the agreements that suggests that D had an option to terminate for the breach, save than by the means set out in cl. 6. P argues that, in the absence of any other provision in each agreement, cl. 6 sets out the only intended mechanism by which contracts could be terminated for a breach for failure to complete. P therefore contends that, although he accepts that each contract was terminated for repudiatory breach,[14] it is wrong for D to state that they had a choice either to rescind the contract under cl. 6 or to terminate for repudiatory breach.

28 P claims that D, by taking the option to terminate the agreements by means of D2's email dated April 18th, 2016, were thereby electing to exercise their right to "rescind" found in cl. 6 in each agreement. P submits that D2's email could only properly be regarded as being written notification given in accordance with cl. 6. P argues that D followed the procedure set out in cl. 6 when he sent the April 18th, 2016 email, and as a consequence cl. 6 sets out what consequences flow from the termination.

P's submissions in relation to the consequences that flow from the termination

29 P correctly states that, due to the termination, the parcels were no longer being sold to him and the transfer of the parcels will not occur and as a consequence the consideration in the contracts has totally failed.

30 Although neither agreement made any specific mention of what should happen to the interest payments made by P, save for the interest on the deposits, P contends that provisions in each agreement, including cl. 6,

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14 Paragraph 17 of P's written opening skeleton argument.

were intended to cover the parties' dealings relating to the sale/purchase of each parcel, including the principal sum and interest.

31 Clause 6 makes clear that the deposit and interest thereon are non-refundable, but does not provide that any other payment by P is non-refundable. Neither cl. 6 nor any other clause in the agreements contains a forfeiture provision permitting the vendor to retain instalment payments. Such provision may sometimes be found in sale of land contracts by the use of wording along the lines of:

> "The purchaser agrees that if the purchaser fails to comply with any provision of this contract and the vendor elects to terminate the contract, then in addition to any other remedy available to the vendor, the vendor may retain all of the instalments (including interest) paid or payable by the purchaser up to the date of termination as compensation to the seller for the purchaser's use and occupation of the property."

If the parties had intended there to be a departure from the position in common law as regards the return of instalment payments to the purchaser, then a clause similar to this example would have been in the agreements. P correctly states that the fact that the agreements specifically provide that the deposit and interest are not to be refunded indicates an intention that any other payments made are to be refunded.

32 Clause 6 provides for compensation for the vendor (D), namely for work done by the vendor (D) to the specific parcel at the purchaser's (P) request. It also provides that the vendor (D) may resell the parcels and keep the proceeds from that. P rightly adds that the term in cl. 6 permitting D to keep "such an amount as is sufficient to compensate the Vendor for any work done to the Strata Lot by the Vendor" would only make sense if it could be deducted from the instalment sums that D were obligated to return to P.

33 In his written response dated July 10th, 2018, P contends that the purpose of the wording at the final part of cl. 6 was to make clear that it was not possible for a party to recover consequential losses arising out of a failure to complete the contract. P states that the wording in the clause means that any recovery for breach is that set out in the agreement. That said, P contends that does not preclude the recovery of the purchase price and interest. P states that this is because (i) the deposit paid by the purchaser is expressed to be non-refundable, thereby envisaging that other payments made by the purchaser are refundable; (ii) the entitlement of the vendor to keep sums to compensate for work done by him only makes sense if it was intended that the vendor had to return the amounts paid by the purchaser subject to this deduction being made; and because (iii) it would be "deeply unattractive" and "commercially absurd" if the vendor

could keep all the sums paid by the purchaser and in addition keep all the proceeds from the reselling of the parcel.

34 In support of his contention that the agreements regulate the rights and remedies available to the parties, P refers to p.425 of the article written by John Toohey (see para. 23 above), where the author states:

> "What has emerged from this paper, I hope, is that in certain respects the law has been unable to make adequate safeguards in this part of the field of vendor and purchaser relationships. *The difficulty facing the courts is that this relationship is usually regulated by a formal contract albeit one on a printed form and there is a limit to how far the terms of the contract can be ignored or over-ridden.*" [Emphasis supplied.]

35 P correctly states that the common law position is that if, as is the case here, in the contract of sale there is no express or implied forfeiture clause, and the vendor terminates the contract upon the purchaser's default, the purchaser may recover any prepayment or instalments paid in part payment of the price. With this in mind, P submits that it matters not whether one characterizes the termination as a rescission or termination on repudiatory breach as neither scenario, in the absence of forfeiture provisions in the agreements, alters the common law position relating to the purchaser recovering the money (including the interest payments) paid over by him in part performance. P contends that, for the purposes of recovery of payments made to D, one cannot separate the principal and interest payments made by him as they are both a part of the contractual bargain. In support of this contention, P reiterates that the parties had put their mind to the issue of interest, as illustrated by cl. 6 permitting the interest accrued on the deposit to also be retained as liquidated damages whilst containing no similar forfeiture provision in relation to the other interest. Accordingly, P claims that both the principal and interest payments should be returned to him.

36 It appears from a letter from P's attorneys dated September 27th, 2017 that P "acknowledges" that D are entitled to also recover the following:

(i) Interest on the balance of the purchase price after April 1st, 2016.[15]

(ii) Outstanding late fees.[16]

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15 See para. 57 below for agreed figures.

16 Due to the sums involved "P concedes these sums on a pragmatic basis and without any admission of any liability with regard to the other claims made"—see para. 35 of P's written opening skeleton argument and para. 57 below for agreed figures.

(iii) Outstanding strata fees (subject to verification of the figure claimed and any sums being statute barred).[17]

(iv) Mesne profits for P's occupation of the properties between April 18th, 2016 (the expiry of P's legal right to occupy the two parcels) and P vacating the properties.[18] The CI$2,400 figure for mesne profits suggested by D was not agreed in the letter.[19] In P's opening written submissions it is contended that CI$1,500/month is the appropriate market rent figure for the properties, as this is the same rate that P is renting his property at in the complex.

(v) The deposits of $3,000 and $7,500.[20]

(vi) To now sell or lease the properties as he sees fit.

D's submissions in relation to the legal analysis applicable to the termination

37 D agree that the agreements were terminated, but not by any rescission by them under cl. 6, but by repudiation arising out of D2's acceptance of P's repudiatory breaches of contract. D contend that D2's April 18th, 2016 email was not "an invocation" by D2 of cl. 6 in the agreements, but was simply a taking up of an option to accept P's repudiatory breaches of contract. D contend that on its plain reading cl. 6 provided the vendor (D) with an option to rescind the relevant agreement by written notice, but did not restrict them from terminating by repudiation.

38 D, placing reliance upon Lord Hoffmann's restatement in *Chartbrook Ltd.* v. *Persimmon Homes Ltd.* (3) ([2009] 1 A.C. 1101, at para. 14) of the principles set out by the House of Lords in *Investors Compensation Scheme Ltd.* v. *West Bromwich Bldg. Socy.* (7) ([1998] 1 W.L.R. at 912–913), contend that, when interpreting cl. 6 in each agreement and considering its effect, one should have regard to what a reasonable person informed by the available background knowledge would have understood it to mean. D highlighted Lord Neuberger's following guidance given in *Marley* v. *Rawlings* (12) ([2015] A.C. 129, at para. 19):

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17 Confirmed by P at para. 24 of his first witness statement, re-signed on February 7th, 2018, and at para. 26 of P's written opening skeleton argument—see para. 57 below for agreed figures.
18 Confirmed by P at para. 30(c) of his first witness statement re-signed on February 7th, 2018.
19 D2 states that the rent being paid for such a property in the complex is in the region of CI$2,400 per month.
20 Confirmed by P at para. 31 of his first witness statement re-signed on February 7th, 2018.

> "When interpreting a contract, the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words, (a) in the light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document, (iv) the facts known or assumed by the parties at the time that the document was executed, and (v) common sense, but (b) ignoring subjective evidence of any party's intentions."

39 D state that cl. 6 sets out how the vendor must exercise the option to rescind, and that this includes providing express written notice of his invoking of the clause and that all he seeks to do is forfeit the deposit to the purchaser. It is submitted that D did not do this by the sending of the email on April 18th, 2016. D states that the content of the email did not meet the requirements of a notice and that the language used by D2 therein was not such to show an assertion of the cl. 6 rights. However, I note that cl. 6 does not set out any formal requirements for the notice, simply requiring that it be a "written notice."

40 D highlight that the email "written notice"[21] to P dated April 18th, 2016 made no mention of the term "rescinding."[22] I note that the notice made no specific mention of the word "repudiation." Upon reading the email, it is evident that D2 therein refers to the "concept of breach of contract" and to P remaining "in breach/default of both of our sales agreements." D2 goes on to say that the received cheques and any future cheques will be returned. When reading this email what is clear is that D2 was not intending to rescind the contract in the traditional sense, as he was not seeking to restore the parties to be in the same position that they were before the agreements were made. What is clear from the email is that D2 had concluded that P was in breach of the agreements. It is clear from the email that D2 was no longer going to accept cheques and thereby he was terminating the contract for breach, albeit without using the terms "repudiation" or "rescission" for the termination.

41 When considering D's surrounding conduct when determining whether D2 intended to invoke the option in cl. 6, I note that, when P wrote to D2 on April 28th, 2016 highlighting that although "not explicitly referenced" D2 had invoked cl. 6 of the agreements by rescinding the agreements by written notice, surprisingly no reply was given in writing refuting that contention or seeking to make clear the intended nature of the termination. In fact, on the papers placed before the court, the first mention of the termination being by "renunciation" (rather than by

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21 Paragraph 15 of the defence and counterclaim.
22 Unlike D2's faxes dated August 17th, 2010 and February 15th, 2000—see para. 9 above.

rescission) by D to P was over nine months later in a letter dated February 9th, 2017 from D's attorney despite D's attorneys filing D2's acknowledgment of service on August 26th, 2016 and D1's acknowledgment of service on September 26th, 2016. The originating summons in which P reiterated his contention that the contract had been rescinded by the April 18th, 2016 email had been served on D1 by registered mail to its registered office on May 24th, 2016.

42 D argue that the signed first agreement and second agreements did not record the terms of the "owner-financing agreement," especially in relation to what would happen if there was a default of the interest and principal payments. It is submitted that it would be "absurd" to interpret that the intention of cl. 6, which it is contended made no mention of the rights of the parties arising from a default of principal and interest payments, was for it to govern every situation where D sought to exercise a right in relation to non-payment of the instalments. D contend that cl. 6 does not exclude any of the remedies available to D under the general law. As a consequence, it is argued by D that they, as the vendors, in light of the repudiatory breaches by P, did not need to invoke cl. 6 in order to terminate the contracts, adding that upon terminating the agreement they could seek other remedies on any other ground on which they are entitled at common law or in equity.

D's submissions in relation to the consequences that flow from the termination

43 By the close of the hearing, D were contending that the issues remaining for determination following the termination were (i) what portion of the moneys received by them are recoverable by P, and (ii) what is the appropriate commercial rent P should pay to D as mesne profits for his use and occupation of the properties following the date of termination of agreements to the date of delivery up of possession.

44 D contend that a distinction exists between the type of case that is before me and the type of case where the contract contains a forfeiture clause. D state that the approach to be taken in each instance is the one advocated by Denning, L.J. in *Stockloser* v. *Johnson* (14) ([1954] 1 Q.B. at 489 and 492):

> "It seems to me that the cases show the law to be this. (1) *When there is no forfeiture clause.* If money is handed over *in part payment of the purchase price*, and then the buyer makes default as to the balance, then, so long as the seller keeps the contract open and available for performance, the buyer cannot recover the money; *but once the seller rescinds the contract or treats it as at an end owing to the buyer's default, then the buyer is entitled to recover his money by action at law, subject to a cross-claim by the seller for damages*: see

> *Palmer* v. *Temple*; *Mayson* v. *Clouet*; *Dies* v. *British & International Co.*; Williams on Vendor and Purchaser, 4th ed., p. 1006. (2) *But when there is a forfeiture clause or the money is expressly paid as a deposit (which is equivalent to a forfeiture clause),* then the buyer who is in default cannot recover the money at law at all. He may, however, have a remedy in equity, for, despite the express stipulation in the contract, equity can relieve the buyer from forfeiture of the money and order the seller to repay it on such terms as the court thinks fit . . .
>
> In a proper case there is an equity of restitution which a party in default does not lose simply because he is not able and willing to perform the contract. Nay, that is the very reason why he needs the equity. The equity operates not because of the purchaser's default, but because in the particular case it is unconscionable for the seller to retain the money." [Emphasis supplied.]

45 D submit that the situation in the matter before me is consistent with the second part of the first limb outlined by Denning, L.J. in *Stockloser* as there is no forfeiture clause[23] and they, as vendors, have treated the contracts as being at an end due to P's default. D claim that as fundamental breaches have occurred due to P's persistent breaches, they are entitled to sue for damages which arose before the termination on April 18th, 2016 and these include outstanding interest and late fees to the date of termination.

46 D submit that too much reliance has been placed by P on cl. 6. D argue that cl. 6 simply provides and reiterates the principle that there is a right to retain a reasonable deposit and interest thereon as liquidated damages.

47 As already mentioned, D's main contention is that cl. 6 is not determinative of D's rights and does not exclude any of the remedies at common law and in equity which are available to them under the general law as a consequence of P's repudiatory breaches of the agreements. D contends that he has elected to discharge his future obligations under the contract, using the breaches by P as his justification, and reserves his right to sue for damages for breach. Therefore it is contended that the principles under the general law still apply. Reliance is placed upon the extract of *Voumard*[24] where the authors state, when commenting upon a similar clause in a statute (albeit a clause without the "no further action" wording seen in cl. 6), as follows (*op. cit.* at 501):

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23 For example, similar to the one set out in para. 6 herein.
24 See para. 23.

> "Such a clause does not take away from the vendor or in any way restrict the right, which according to general legal principles, he would have apart from it upon a breach by the purchaser of the contract."

48 In their further written submission filed on July 10th, 2018, when addressing P's contention that the latter part of cl. 6 was intended to make clear that it was not possible to recover consequential losses as a result of a failure to complete the contract, D contend that, due to the wording "in respect thereof," the correct interpretation of cl. 6 is that it is referring to rights of action arising from the forfeiture of P's deposit, interest on the deposit and payments made to compensate the vendor for work done upon rescission of the contract pursuant to the clause. It is suggested that the word "thereof" relates to the exercising of the option to rescind in accordance with and pursuant to cl. 6. D argue that the words in the clause only apply to the rights specified in that earlier part of the clause. D claim that if their interpretation is wrong, then cl. 6 would operate as a bar to P's claim for relief or remedy arising from D's exercise of their option to rescind provided by the clause.

49 D accept that the principal payments made under the agreements should be repaid. D dispute P's claim for recovery of the interest paid pursuant to the agreements. D contend that P's interest payments were not a part payment of the purchase price, but were made pursuant to the arrangements for D's financing of the purchase price. D argue that the interest payments constitute compensation to D for providing the financing and are compensation for being deprived of the use of the premises over the amortization period. At para. 18 of D's written closing submissions, D added that P has derived a benefit from the payments. The "value" received for the payments is set out at para. 50 of D's earlier written opening submissions, namely, P's use and occupation of the property for the duration of the amortization period. Therefore, even in the absence of a forfeiture clause permitting the retention of the instalment payments, D contend that the common law position, outlined in para. 35 herein, which enables a purchaser to recover any prepayment or instalments paid in part payment of the price, does not apply to the interest payments made.

50 D contend that the extracts from the John Toohey article and from *Voumard* which are later analysed herein "are accurate statements of the applicable principles and completely support" their case concerning their retention of the interest payments.

51 During oral closing submissions, counsel for D was asked by the court what amount should be refunded to P if the court found that the agreements had been rescinded by D pursuant to cl. 6. At that time counsel conceded P would then be entitled to the return of principal and interest.

52 However, counsel then filed a written supplement to his closing submissions on February 9th, 2018 in which he retracted his concession, contending that under the proper construction of the agreements P would only be able to recover the balance of the principal payments made by him towards the purchase price. In support of his revised position counsel pointed out that cl. 3 of the agreement in relation to Parcel 296H10 states that the "total purchase price of the Strata Lot will be the sum of CI$120,000" and that cl. 3 of the agreement in relation to Parcel 296H11 states that the "total purchase price of the Strata Lot will be the sum of CI$150,000." Counsel then highlighted that interest is not included in the balance figure set out in cl. 3(b) and contended that it was therefore intended to be an amount payable in addition to the balance to compensate D for being kept out of the balance of the purchase price until the balance was cleared.

53 Counsel for D contended that, when considering cl. 6, the wording that D may "keep absolutely out of any further sum paid by the purchaser sufficient to compensate the vendor for any work done to the strata lot" is specifying that further amounts in addition to the deposit may be deducted from the amount to be paid to P. Counsel added that the words "any further sum paid" relates to the balance sum set out in cl. 3(b) in the agreements, and as interest is not defined as being part of the balance, those payments are not included. Counsel submits that this supports a submission that the interest is intended to be compensation for D.

54 P, on the other hand, counters that the reference in cl. 6 to a failure to complete the agreement relates to a failure to perform the purchaser's duty found at cl. 3, which includes at cl. 3(b) payment of the interest and principal. P also argues that cl. 6 when using the term "at the times" found in cl. 3, is clearly referring to monthly payments of interest and principal set out in cl. 3(b).

55 Counsel for D completed his revised submissions by reiterating, for the avoidance of doubt, his contention that if the court were to find that the agreements were terminated by D's acceptance of repudiatory breaches by P, then the same situation would arise and interest could not be regarded as being part of the purchase price that is required to be refunded to P.

56 D had originally pleaded, as an alternative, compensation from P by means of mesne profits for his occupation of each parcel from the date of him taking possession to the date of him vacating. At the close of the case, as clarified in the most helpful further amended schedule of loss and damages dated February 9th, 2018 prepared by counsel for D, D made clear that he was no longer pursuing this alternative claim for an occupation rent.

Areas of agreement and mesne profits

57 D rightly seek, and P does not oppose, the retention of the deposits paid and interest thereon. In *Stockloser* (14), Denning, L.J. said ([1954] 1 Q.B. at 490) that if money was expressly paid as a deposit, that was "equivalent to a forfeiture clause." A deposit is a part of the purchase price, but it is also a guarantee for the performance of the contract. It is sound legal principle, on the authority of *Howe* v. *Smith* (6) and reiterated by Lord Browne-Wilkinson's statement in the Privy Council decision (on appeal from Jamaica) *Workers Trust & Merchant Bank Ltd.* v. *Dojap Invs. Ltd.* (15) ([1993] A.C. at 578), that, generally, reasonable deposits paid to secure the performance of a contract are forfeitable where the purchaser breaches the agreement. P did not seek a remedy in equity to relieve him from forfeiture of the deposit and recovery of the same. This is so whether or not there is a forfeiture clause. P, accepting that the size of each deposit means that it should not be regarded as being a penalty, agrees to their retention by D.

58 D, pursuant to oral agreements made between the parties for P to pay them whilst in occupation of the parcels, also claim for strata fees paid by D and for the outstanding strata fees. This is not a surprising or unusual arrangement, as a purchaser, whilst in occupation of the relevant property under an instalment sale contract, would ordinarily be expected to meet the running costs of that property. In contracts that are to be performed over a substantial period of time, often a purchaser will be required to enter into certain covenants in respect of the land. Common obligations might well be to pay strata fees, rates and taxes if in England and Wales and insure the property. As earlier mentioned, this is now agreed by P, as are the figures for the same which are set out in para. 57 below.

59 By the end of the hearing the parties had been able to narrow down the issues by reaching considerable agreement as to what amounts were due in CI$ to D on counterclaim. These are as follows:

A. Parcel 296H10

(i)	Outstanding late fees	934.00
(ii)	Interest on 934 at Court Funds rate (2.375% p.a. from 19/04/16 to 7/02/18—0.6 per day for 660 days)	39.60
(iii)	Interest on 3,000.96 at Court Funds rate (2.375% p.a. from 19/04/16 to 17/02/18—0.19 per day for 670 days)	127.30
(iv)	Strata fees paid by D from 31/01/14 to 22/07/14	17,593.17
(v)	Outstanding strata fees from 31/07/14 to 18/04/16	9,815.59
	Agreed sub-total of amounts due to D on this parcel	28,509.66

B. Parcel 296H11

(i)	Outstanding late fees	2,229.00
(ii)	Interest on 2,229 at rate 2.375% p.a. from 19/04/16 to 7/02/18—0.14 per day for 660 days	92.40
(iii)	Strata fees paid by D from 31/01/14 to 22/07/14	17,642.46
(iv)	Outstanding strata fees from 31/07/14 to 18/04/16	9,823.78
	Agreed sub-total of amounts due to D on this parcel	29,787.64
	Agreed sub-total of amounts due to D on both parcels	58,297.30

60 *Accordingly, I order that CI$58,297.30 should be deducted and retained by D from any sums that are ordered returnable to P.*

61 Although the parties agree that D are entitled to mesne profits from April 19th, 2016 to November 30th, 2017 (19 months) on each parcel, they cannot agree the rate.

62 D have provided a comprehensive valuation report dated December 15th, 2017 prepared by Uche Obi, M.A., FRICS, a chartered valuation surveyor with DDL Studio. I have also had the benefit of hearing Mr. Obi's oral evidence. Mr. Obi helpfully conducted a comparable method approach when ascertaining the market rental value. He referenced units within the same complex and others nearby when reaching a conclusion that the market value for Parcel 296H10 is CI$1,985/month and for Parcel 296H11 is CI$2,015/month. When I compare Mr. Obi's detailed and informed analysis with P's evidence and valuation of CI$1,500/month based on his analysis of the physical layout of the parcels and the fact that he obtains $1,500/month for his unit in the complex, I prefer the evidence submitted by D.

63 I find that the level of mesne profits should be CI$1,985/month for Parcel 296H10 and CI$2,015 for Parcel 296H11. The total amount of mesne profits for Parcel 296H10 amount to CI$38,508 and for Parcel 296H11 they amount to CI$39,090.99. *Accordingly, I order that a further CI$77,598.99 should be deducted from the sums that are returnable to P.*

Analysis of the remaining contested issues in light of the parties' above positions

(1) *The termination of the agreements—rescission/repudiation—interpretation and effect of cl. 6*

64 It is rightly conceded in this case by P that his breaches of the agreements are repudiatory. Even if a person wished to perform their

contract, but due to lack of finance was unable to do so, a party may still treat this as a repudiation and a discharge of the contract.

65 In the past there has been confusion caused when determining what rescission actually means in cases similar to the one before me. In the cases one sees the word "rescission" being used in a number of different ways and having different meanings. The traditional primary use, when applied to contracts, conveys the idea of an avoidance *ab initio,* treating the contract as if it had never been. If this occurs, then one can no longer claim to treat the contract as subsisting and therefore cannot recover damages for its breach. There is a distinction between that usage and a second type, which P contends is what D did in this case, namely where a party treats the contract as discharged by breach and elects to discharge his future obligations under the contract. In such a situation the phrase "rescind" is used more loosely, as it is in reality a discharge by breach. There are instances where a party might refer to a situation as "rescinding" the contract, when it is in fact and in law a case where there has been a repudiatory breach of contract and a party has declared the contract to be at an end. This latter use comes about usually by the insertion in the contract of a default provision conferring on a party the right to determine the contract upon the happening of certain events. Upon the determination of an agreement pursuant to a condition of this nature, the rights of the parties will depend on the construction of the contract. If P is correct about the purpose of D2's termination email, in the matter before me, the relevant provision is the right expressly provided for in cl. 6 to D to "rescind" upon P's default of payment as required in cl. 3.

66 The different use of the word "rescission" is helpfully set out in statements of principle in O'Sullivan, *The Law of Rescission*, 2nd ed., para. 1.02, at 3 (2014). Although the parties did not refer to this text, the principles are not controversial and I see merit in repeating them herein:

> "The term 'rescission' is often and confusingly used to describe two quite different ways in which a contract may be brought to an end. One form of 'rescission' is found on a defect in the formation of the contract, arising by reason of fraud, duress, undue influence, or other invalidating cause. The defect affects consent, and entitles one of the parties to extinguish the agreement as from the beginning or *ab initio.* But a contract may also be brought to an end by reason of the other party's later non-performance or defective performance, or because it has become frustrated: the contract was properly formed, but then not carried out in accordance with its terms. When a contract is 'rescinded' for breach or frustration in this way it is terminated only in respect of future rights and obligations, or *de futuro.*"

67 The authors continue (paras. 1.08–1.09, at 5):

> "1.08 In England this distinction was fully elaborated only in the second half of the twentieth century. Misconceptions that culminated in the decision in *Horsler v Zorro* prompted some of the clearest extra-judicial explanations of the nature and basis of the distinctions. Eventually the law was definitively restated in *Johnson v Agnew*. The divide between termination *ab initio* and *de futuro* is also recognised in Canada, Singapore and Malaysia.
>
> . . .
>
> 1.09 It is now accepted that it is the character of the event that confers the right to terminate which is of decisive importance in explaining the entitlement to termination *ab initio* and *de futuro*. In the case of termination *ab initio* there is a defect in the formation of the contract whereas termination *de futuro* involves a later, defective performance or impossibility of performance. Hence, it is said, the contract in the former case can be undone from the start, whereas in the latter it can only be truncated for the future."

68 Again the authors state (para. 1.20, at 9–10):

> "A contract terminated by one party for the other's breach or repudiation, or terminated automatically by reason of frustrating events, is terminated *de futuro* or for the future. The prospective nature of termination *de futuro* means that although obligations that would have fallen due after the date of termination are extinguished, thus discharging the party from the need to perform them, rights and obligations that have unconditionally accrued prior to termination remain enforceable. Unpaid deposits and certain kinds of instalment payments are the most common examples."

69 The authors then go on to state (para 1.22, at 10):

> "Rights to contractual damages survive termination for breach or frustration. Both parties remain liable to pay damages for any prior breaches and where the contract is terminated for breach the defaulting party is also obliged to pay damages to compensate for the other party's loss of the bargain."

70 The consequences when a contract is brought to an end by the acceptance by one party to it of a repudiatory breach of contract by the other party were illustrated by Dixon, J.'s statement of principle in the High Court of Australia case of *McDonald* v. *Dennys Lascelles Ltd.* (10).[25] The question for determination by the High Court was whether a

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25 In *McDonald* a purchaser "rescinded" for his vendor's breach.

guarantor of the obligations of a purchaser under a terms contract was liable following the termination of the terms contract by the vendor for the purchaser's default for an unpaid instalment of the purchase price. The guarantors contended, first, that upon the termination by the vendor of the contract of sale, the contract was cancelled *in futuro.* Since there would be no transfer or conveyance of the subject real property, the obligation to pay the outstanding instalment of the purchase price came to an end. Next, they contended that their obligation as guarantors was secondary only, and the termination of the purchaser's obligation to pay the instalment likewise terminated the guarantors' obligation. The court accepted both of these contentions (Evatt, J. dissenting). Dixon, J. stated that (48 C.L.R. at 476–477):

> "When a party to a simple contract, upon a breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning. Both parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired. Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected. When a contract is rescinded because of matters which affect its formation, as in the case of fraud, the parties are to be rehabilitated and restored, so far as may be, to the position they occupied before the contract was made. But *when a contract, which is not void or voidable at law, or liable to be set aside in equity, is dissolved at the election of one party because the other has not observed an essential condition or has committed a breach going to its root, the contract is determined so far as it is executory only and the party in default is liable for damages for its breach* . . ." [Emphasis supplied.]

71 This passage from *McDonald* (10) has been expressly approved by the House of Lords in *Bank of Boston Connecticut* v. *European Grain & Shipping Ltd.* (1) ([1989] A.C. at 1098–1099) by Lord Brandon of Oakbrook and by Lord Wilberforce in *Johnson* v. *Agnew* (9). Lord Wilberforce in *Johnson,* when considering the right of an innocent party to a contract for the sale of land to damages on the contract, approved the "attractive" and "logical approach" of Dixon, J. ([1980] A.C. at 396).

72 In *Johnson* (*ibid.* at 392), Lord Wilberforce considered the options available to a vendor in a contract for sale of land when repudiation arises due to a failure to complete by the purchaser. Lord Wilberforce, when advocating a departure from what he termed to be a "weak" line of English case authorities and expressing a preference for the approach taken by Dixon, J. in *McDonald,* stated (*ibid.* at 396): "This is however the first time that this House has had to consider the right of an innocent party

to a contract for sale of land to damages on the contract being put an end to by accepted repudiation . . .” Lord Wilberforce highlighted the distinction between rescission *ab initio* arising from an allegation about a defect in the formation of the contract and cases where, although parties might in fact refer to a situation as “rescinding” the contract, it is, in fact and in law, a case where there has been a repudiatory breach of contract and the parties (or the courts) have declared the contract to be at an end. Lord Wilberforce stated that in the latter case, where the contract is at an end, that does not bring about rescission *ab initio* and a party can indeed claim for damages for breach of contract. Lord Wilberforce stated (*ibid.* at 392–393):

> “In this situation it is possible to state at least some uncontroversial propositions of law.
>
> First, in a contract for the sale of land, after time has been made, or has become, of the essence of the contract, if the purchaser fails to complete, the vendor can either treat the purchaser as having repudiated the contract, accept the repudiation, and proceed to claim damages for breach of the contract, both parties being discharged from further performance of the contract; *or* he may seek from the court an order for specific performance with damages for any loss arising from delay in performance. (Similar remedies are of course available to purchasers against vendors.) This is simply the ordinary law of contract applied to contracts capable of specific performance. [Emphasis in original.]
>
> Secondly, the vendor may proceed by action for the above remedies (viz. specific performance or damages) in the alternative. At the trial he will however have to elect which remedy to pursue.
>
> Thirdly, if the vendor treats the purchaser as having repudiated the contract and accepts the repudiation, he cannot thereafter seek specific performance. This follows from the fact that, the purchaser having repudiated the contract and his repudiation having been accepted, both parties are discharged from further performance.
>
> *At this point it is important to dissipate a fertile source of confusion and to make clear that although the vendor is sometimes referred to in the above situation as ‘rescinding’ the contract, this so-called ‘rescission’ is quite different from rescission ab initio,* such as may arise for example in cases of mistake, fraud or lack of consent. In those cases, the contract is treated in law as never having come into existence. (Cases of a contractual right to rescind may fall under this principle but are not relevant to the present discussion.) *In the case of an accepted repudiatory breach the contract has come into existence but has been put an end to or discharged.* Whatever contrary indications may be disinterred from old authorities, *it is now quite*

clear, under the general law of contract, that acceptance of a repudiatory breach does not bring about 'rescission ab initio'. I need only quote one passage to establish these propositions.

In *Heyman* v. *Darwins Ltd.* [1942] AC 356 Lord Porter said at p. 399:

> 'To say that the contract is rescinded or has come to an end or has ceased to exist may in individual cases convey the truth with sufficient accuracy, but the fuller expression that the injured party is thereby absolved from future performance of his obligations under the contract is a more exact description of the position. *Strictly speaking, to say that, upon acceptance of the renunciation of a contract, the contract is rescinded is incorrect. In such a case the injured party may accept the renunciation as a breach going to the root of the whole of the consideration. By that acceptance he is discharged from further performance and may bring an action for damages, but the contract itself is not rescinded.*'

See also *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (1888) 39 Ch. D. 339, 365, *per* Bowen L.J.; *Mayson* v. *Clouet* [1924] AC 980, 985, *per* Lord Dunedin and *Lep Air Services Ltd.* v. *Rolloswin Investments Ltd.* [1973] A.C. 331, 345, *per* Lord Reid, 350, *per* Lord Diplock. I can see no reason, and no logical reason has ever been given, why any different result should follow as regards contracts for the sale of land, but a doctrine to this effect has infiltrated into that part of the law with unfortunate results. I shall return to this point when considering *Henty* v. *Schroder* (1879) 12 Ch.D. 666 and cases which have followed it down to *Barber* v. *Wolfe* [1945] Ch. 187 and *Horsler* v. *Zorro* [1975] Ch. 302." [Emphasis supplied.]

73 Lord Wilberforce then outlined his fourth and fifth propositions, but these arose when there were specific performance issues. He went on to conclude with reference to all of the propositions (*ibid.*, at 394):

> "These propositions being, as I think they are, uncontrovertible, there only remains the question whether, if the vendor takes the latter course, i.e., of applying to the court to put an end to the contract, he is entitled to recover damages for breach of the contract. On principle one may ask 'Why ever not?' If, as is clear, the vendor is entitled, after, and notwithstanding that an order for specific performance has been made, if the purchaser still does not complete the contract, to ask the court to permit him to accept the purchaser's repudiation and to declare the contract to be terminated, why, if the court accedes to this, should there not follow the ordinary consequences, undoubted under the general law of contract, that on such acceptance and termination the vendor may recover damages for breach of contract?"

74 As made clear in *Howard* v. *Pickford Tool Co. Ltd.* (5), it is settled law that the repudiation of a contract has no legal effect in itself except to confer on another party the option to discharge the contract. In *Heyman* v. *Darwins* (4), Viscount Simon stated ([1942] A.C. at 361):

> "If one party so acts or so expresses himself, as to show that he does not mean to accept and discharge the obligations of a contract any further, the other party has an option as to the attitude he may take up. He may, notwithstanding the so-called repudiation, insist on holding his co-contractor to the bargain and continue to tender due performance on his part. In that event, the co-contractor has the opportunity of withdrawing from his false position, and even if he does not, may escape ultimate liability because of some supervening event not due to his own fault which excuses or put an end to further performance: a classic example of this is to be found in *Avery* v. *Bowden* [(1885) 5 E. & B. 714]. *Alternatively, the other party may rescind the contract, or as it is sometimes expressed, 'accept the repudiation,' by so acting as to make plain that in view of the wrongful action of the party who has repudiated, he claims to treat the contract as at an end, in which case he can sue at once for damages. 'Rescission (except by mutual consent or by a competent court)' said Lord Sumner in Hirji Mulji v Cheong Yue Steamship Co., Ltd [[1926] A.C. at 509], 'is the right of one party, arising upon conduct by the other, by which he intimates his intention to abide by the contract no longer. It is a right to treat the contract as at an end if he chooses, and to claim damages for its total breach, but it is a right in his option.'* But repudiation by one party standing alone does not terminate the contract. It takes two to end it, by repudiation, on the one side, and acceptance of the repudiation, on the other." [Emphasis supplied.]

Conclusion on issue of rescission/repudiation and application of cl. 6

75 Whenever default occurs, the first enquiry must be into the terms of the contract and then into the vendor's actions to determine which particular remedy he is purporting to exercise because that may directly affect what he is entitled to recover.

76 I accept that if a vendor wishes to sue a purchaser for damages they must first rescind the contract or if the purchaser has repudiated the contract, accept such repudiation and then bring an action for damages for breach of contract. However, rescission in this context, unless the contract makes clear that the intention is that it be recession *ab initio*, may also cover the way that rescission is used to cover acceptance of termination for breach. The contract, albeit extinguished, remains alive for the purposes of allowing the vendor to pursue all rights required under it.

77 If a right to terminate has arisen at common law, the innocent party may also have a right to terminate pursuant to a clause in the contract. Whether to terminate a contract at common law or whether to terminate pursuant to a particular provision of a contract which does not include a provision excluding damages not mentioned in the contract may be a matter of strategy and may depend on a comparison of the value of the claim for damages recoverable under the general law on the one hand and any remedy which the contract may confer if a contractual right is exercised on the other hand. Unless there is an express or implied agreement to the contrary, a contractual right to terminate the breach does not displace any right of termination arising by operation of law in respect of breaches of essential terms, sufficiently serious breaches of non-essential terms or repudiation.

78 I am satisfied that the email of April 18th constituted notice for the purpose of cl. 6. The agreements do not set out any requirements for the cl. 6 written notice. For example, there is no requirement about the content of the notice or for the notice to contain a notice period for the intention to terminate.

79 In the absence of a clause by which the parties contemplated rescission *ab initio*, it is now clear that "rescission" in default of sale of land matters normally means that the vendor is terminating the contract for breach because the power or option for him to do so is conferred on him by the contract for any breach committed by the purchaser. When I look at cl. 6 in the agreements, it is clear that the wording that the vendor "may at its option rescind" is referring to the now common interpretation and use of the word rescinding in default in sale of land contracts. It is clearly used in the context of D2 exercising his option to terminate the contract for breach if he chooses.

80 Accordingly, I am satisfied that the parties' intention, as shown in the agreements, was that cl. 6 would provide the avenue to rescind when accepting a repudiatory breach arising out of the purchaser's failure to keep the agreement. I am satisfied that P invoked cl. 6 when he sent notice by the April 18th, 2016 email of the termination due to the breach. I am satisfied that clause is the governing clause. What I must now go on to consider is whether cl. 6 was drafted in such a way as to exclude or restrict P's right to recover damages not provided for in the clause, in particular retention of the interest payments made by P.

(2) *Consequences that flow from the termination and the application of cl. 6*

81 In *Mayson* v. *Clouet* (13), Lord Dunedin stated ([1924] A.C. at 985):

> "The law is quite plain. If one party to a contract commits a breach then if that breach is something that goes to the root of the contract,

> the other party has his option. He may still treat the contract as existing and sue for specific performance; or he may elect to hold the contract is at an end—i.e., no longer binding on him—while retaining the right to sue for damages in respect of the breach committed."

82 As already mentioned herein, in *Johnson* (9) ([1980] A.C. at 392) Lord Wilberforce found that, where the word "rescission" is used in cases where there has been a repudiatory breach of contract and the parties have declared the contract to be at an end, a party can claim for damages for breach of contract. In *Johnson*, Lord Wilberforce judicially approved (*ibid.*, at 397) an extract from *Voumard* (*op. cit.*, at 508), where the authors stated that damages may be recovered and then, referring to *McKenna* v. *Richey* (11), a case decided in the Supreme Court of Victoria, Australia where damages were awarded in lieu of a decree for specific performance, he added (*ibid.*, at 398):

> ". . . I am happy to follow the latter case. In my opinion *Henty* v. *Schroder*, 12 Ch.D. 666, cannot stand against the powerful tide of logical objection and judicial reasoning. It should no longer be regarded as of authority: the cases following it should be overruled.
>
> *In particular Barber* v. *Wolfe* [1945] Ch. 187 and *Horsler* v. *Zorro* [1975] Ch. 302 cannot stand so far as they are based on the theory of 'rescission ab initio' which has no application to the termination of a contract on accepted repudiation." [Emphasis supplied.]

It is clear that in this regard the law in England and Wales relating to the default in the sale of land in recent times has started to move towards a more similar line to that taken in Australia. A development which is evidenced by the above approach in *Johnson* post the John Toohey article where the author, relying on *Barber* v. *Wolfe* (2) as being good law in England, wrote (at 408) that, unlike in Australia, the English courts at the time did not accept that a vendor who had rescinded due to the purchaser's default could sue for damages.

83 *In the absence of any contrary express provision in the contract*, if a party elects to treat the contract as being terminated as a result of the failure of a purchaser to pay the purchase money or an instalment of the purchase money, he is entitled to recover damages for the breach if he suffers loss as a consequence. It is therefore again necessary to look more closely at cl. 6.

84 Clause 6 makes time of the essence. It is agreed that the clause provides that the deposit (and interest thereon) shall be forfeited to the vendor, who is at liberty upon written notice to rescind the contract and to resell the property and retain the full sale price absolutely. It is agreed that the vendor may also retain out of the other payments made to him an amount sufficient to compensate him for any work done to the parcel at

the request of the purchaser which involves a deviation from or amendment to the basic plan for the parcel or any substitution requested by the purchaser in respect of the fixture and fitting.

85 If that was all that cl. 6 stated it would not take away from D or in any way restrict their rights which, according to general legal principles they would have apart from it upon any breach of contract by P. Clause 6 confers on the vendor several separate rights, any of which he may choose to exercise or not (see *Voumard*, *op. cit.*, at 501). The power to rescind contained in cl. 6 is a power which when exercised would bring the contract to an end, save that the vendor may then act under the special provision in cl. 6 when exercising a right to recover damages for breach of contract.

86 However, cl. 6 does not end there. A clause giving a power to rescind may be drafted in such a way as to exclude or restrict the right to recover damages. The clause is written without any punctuation, and at its close it states:

> ". . . [A]nd no further right of action shall arise in respect thereof *nor* shall any party hereto have *any further* rights, demands, actions, claims for damages the one against the other and the Vendor may resell the Strata Lot and keep the full price absolutely." [Emphasis supplied.]

When one looks at the language used at the end of the clause it is clear that the intention of the parties here was that actions and recovery for breach be restricted to that set out in the contract. The words "in relation thereof" relate to a consequence of the rescinding by notice. The final words, "nor shall any party hereto have any further rights, demands, action, claims or damages the one against the other and the vendor may resell the Strata Lot and keep the full sale price absolutely," is wider and is an express provision intending to restrict any recovery for consequential losses resulting from the breach.

87 If cl. 6 did not have that wording towards its end, a finding that D2's email constituted him exercising his option to rescind in the context of accepting repudiatory breach (as "rescind" in such circumstances merely means putting an end to the contract) would have meant that arguably he still retained a wider right to sue P for damages for breach of contract over and above the separate rights contained in the clause.

88 If I am wrong when determining that (i) the termination was by rescission as meant in cl. 6 and that (ii) the right of claiming damages was restricted by cl. 6, then consideration needs to be given as to whether that would change the position in relation to the contested claim by P for the interest payments.

89 The Privy Council decision in *Mayson* (13) makes clear the common law position that in the absence of express or implied agreement in the contract to forfeit payments as liquidated damages upon termination, the purchaser is entitled to recover the money paid over in part performance, as vendors are bound to restore any moneys paid as they cannot have the land and its value too. The clause in *Mayson* allowed the vendor to keep the deposit paid under a contract for sale, but made no mention of retaining two later instalments of cash.

90 The authors confirm that position in *McGregor on Damages*, 20th ed., para. 15–098, at 580 (2017):

> "If there is no agreement, whether express or implied, that money paid shall not be returnable on default, then nothing in the nature of agreed liquidated damages exists in the contract and the defaulter is entitled, if the other party rescinds on the basis of default and does not keep the contract open and available for performance, to recover the money he has paid over in part performance in an action for money had and received. Clear decisions to this effect are *Mayson v Clouet* and *Dies v British and International Mining Corporation*, where a buyer of land and a buyer of goods respectively defaulted in their instalments of the purchase price, and the law is so stated by Somervell and Denning L.JJ in the Court of Appeal in *Stockloser v Johnson.*"

91 In *McDonald* (10), Dixon, J. considered what consequences may flow from the termination of an instalment agreement, including the status of instalment payments already made. Dixon, J. stated (48 C.L.R. at 477–478):

> "It does not, however, necessarily follow from these principles that when, under an executory contract for the sale of property, the price or part of it is paid or payable in advance, the seller may both retain what he has received, or recover overdue instalments, and at the same time treat himself as relieved from the obligation of transferring the property to the buyer. When a contract stipulates for payment of part of the purchase money in advance, the purchaser relying only on the vendor's promise to give him a conveyance, the vendor is entitled to enforce payment before the time has arrived for conveying the land; yet his title to retain the money has been considered not to be absolute but conditional upon the subsequent completion of the contract. 'The very idea of payment falls to the ground when both have treated the bargain as at an end; and from that moment the vendor holds the money advanced to the use of the purchaser' (*Palmer v. Temple* [(1839), 9 Ad. & E 508, at 520–21; 112 E.R. 1304, at 1309]). In *Laird v. Pim* [(1841), 7 M. & W. 474, at 478; 151 E.R. 852, at 854], Parke B. says: 'It is clear he cannot have the land and its

value too'; the case, however, was one in which conveyance and payment were contemporaneous conditions (see *Laird v. Pim* [7 M. & W. at 480; 151 E.R. at 855]). *It is now beyond question that instalments already paid may be recovered by a defaulting purchaser when the vendor elects to discharge the contract (Mayson v. Clouet . . .).* Although the parties might by express agreement give the vendor an absolute right at law to retain the instalments in the event of the contract going off, yet in equity such a contract is considered to involve a forfeiture from which the purchaser is entitled to be relieved (see the judgment of Long Innes J. in *Pitt v. Curotta* [[1931] NSWStRp 30; (1931), 31 S.R. (N.S.W.) 477, at 480–482]). The view adopted *in In re Dagenham (Thames) Dock Co.; Ex parte Huls* [(1873), L.R. 8 Ch. 1022] seems to have been that relief should be granted, not against the forfeiture of the instalments, but against the forfeiture of the estate under a contract which involved the retention of the purchase money: and this may have been the ground upon which Lord Moulton proceeded in *Kilmer v. British Columbia Orchard Lands Ltd.* [[1913] A.C. 319] notwithstanding the explanation of that case given in *Steedman v. Drinkle* [[1916] 1 A.C. 275] and *Brickles v. Snell* [[1916] 2 A.C. 599]. However, these cases establish the purchaser's right to recover the instalments, other than the deposit, although the contract is not carried into execution. If a vendor under a contract containing an express power to forfeit instalments at first determined the contract and retained the instalments but afterwards resiled from his former election to treat the contract as discharged and insisted that, if the purchaser was unwilling to forfeit his instalments according to the tenor of the agreement, he should at least carry out the sale, perhaps the purchaser as a term of equitable relief against forfeiture would be required to carry out his contract. *But, where there is no express agreement excluding the implication made at law, by which the instalments become repayable upon the discharge of the obligation to convey and the purchaser has a legal right to the return of the purchase money already paid which makes it needless to resort to equity and submit to equity as a condition of obtaining relief, the vendor appears to be unable to deduct from the amount of the instalments the amount of his loss occasioned by the purchaser's abandonment of the contract.* A vendor may, of course, counterclaim for damages in the action in which the purchaser seeks to recover the instalments." [Emphasis supplied.]

92 D contend that the interest payments should not be regarded as being instalment part payments of the purchase and that they are recoverable in

damages as compensation for P's use and occupation of the property,[26] for being deprived of the balance of the purchase price and "for effectively financing the purchase price" over the duration of the amortization period.

93 When arguing that D has an entitlement to retain the interest payments made, D submit that each of the agreements was "in the nature of" two agreements. Agreement 1 being for the sale of the relevant parcel and Agreement 2 being an owner-financed loan agreement. D argue that, after P had paid the deposit and occupied the parcels, the parties' relationship changed from being one of a vendor and purchaser to one of a lender and borrower under the owner-financed loan agreement. D relied upon the interest worksheets as being evidence of the owner-finance agreements.

94 As mentioned earlier herein, in his written supplement closing submissions dated July 10th, 2018, D rely upon extracts from the John Toohey article and from *Voumard* as support for their case concerning their retention of the interest payments.

95 At 507 in *Voumard*, *op. cit.*, under the heading "Effect of an Express Provision for Forfeiture of Instalments,"[27] the authors start by reiterating that at common law a purchaser is entitled to recover instalments of principal paid by him if the contract does not provide for the forfeiture of those instalments to the vendor. They go on to state that where such a provision exists the purchaser must invoke the equitable jurisdiction of the court to relieve against forfeiture. They suggest that in Australia, even if a purchaser has been in possession of the property under the terms of the contract, that a provision for forfeiture upon rescission would be a penalty and that he would have an "equitable right, subject to the imposition of such terms and conditions as the Court may think just, to be relieved against the forfeiture of all payments of principal money paid by him."

96 The authors of *Voumard* then analyse what relief may be given to the purchaser, highlighting the different approach to this then taken in England. The authors state (*op. cit.*, at 509–510) that:

> "Where the Court relieves a defaulting purchaser from forfeiture of instalments paid it will do so only upon such terms and conditions as it thinks just in the circumstances. These terms and conditions will be determined upon a consideration of the terms of the contract, what has happened since the contract was made (including the circumstances under which it was rescinded), and the attitude of the vendor

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26 Expressed as being that para. 50 of the opening written submissions but at para. 19 of the closing written submissions as compensation for being deprived of the use of the parcels.

27 My emphasis, as in the matter before me there is no such forfeiture clause.

at the hearing in the action. Normally relief will be granted upon the following terms:—The purchaser is entitled to be credited with instalments of principal moneys but not interest, paid by him, but against this the vendor is entitled to (i.) damages sustained by loss of contract, that is the difference between the contract price and the fair market value of the land at the date of the termination of the contract, (but in estimating this damage the vendor must take into account any improvements made by the purchaser which increase the value of the land, and he must also give credit for the amount of any deposit received by him and which is forfeited under the contract), and (ii.) any interest payable under the contract which is in arrears at the time of determination of the contract. *The vendor is entitled to interest on purchase money in lieu of an occupation rent for the period during which the purchaser has had possession of the property. He is therefore entitled to retain any interest payment already made and to receive credit for any arrears of interest.* [Emphasis added.]

The court will order that amount found to be due to one party be set-off against the amount found to be due to the other party."

97 At p.423 in the Toohey article, under the heading "*Remedies available to purchaser only*" and under the sub-heading "*Recovery of Interest Payments*," the author refers to the emphasized part of the above extract from *Voumard.* He states that *Voumard* is suggesting that such an entitlement for the vendor should be considered in calculating what moneys a vendor is entitled to retain. However, Toohey went on to write:

"This relation of interest to occupation is both arbitrary and unreal. The amount of interest paid by a purchaser depends on three factors, the amount of the purchase price, the size of the deposit he pays, and the size of the instalments. In these circumstances, any relation the interest payments may have to the value of the property as a rental proposition is entirely accidental. The authorities on the matter are not clear. In *Mallett v. Jones* [[1959] V.L.R. 122, at 132] Dean and Smith JJ. suggested that the vendor 'cannot have both an occupation rent and interest . . . In cases where the contract provides for the forfeiture of instalments and the purchaser seeks relief in equity against such forfeiture, it is common to allow relief on terms which include such rent.' The court then referred to *Berry v. Mahoney* [[1933] V.L.R. 314] and *Hodder v. Watters* [[1946] V.L.R. 222, at 231–232] where this was done.

Once again a more equitable assessment would be achieved by an assessment of the rental value of the property, by taking into account that the purchaser 'had use and occupation of the (vendor's) asset.' [*Coates* v. *Sarich* ([1964] W.A.R. 2).]

> Having elected to rescind, the vendor cannot then claim interest which has not yet accrued [*Nowak* v. *Linton* ([1960] W.A.R. 2)] but he is entitled to interest which has accrued but has not been paid."

98 P counters D's submissions that the interest payments should constitute compensation by stating that D have had the benefit of using the CI$593,421.54 principal and interest sums paid by P for around 20 years. P adds that D have actually benefited from the appreciation of the parcels totaling CI$175,000 and have utilized the parcels to their benefit, because in or around 2009 D2 borrowed money secured against the properties at the complex to fund his construction project, including the parcels without the consent of P. This was a benefit to D. I note with interest that, for good reason, in Queensland, Australia s.73 of the Property Law 1974 (QLD) provides a statutory protection to a purchaser where there is an instalment contract as it prohibits a vendor from mortgaging the property. It also provides that if the vendor does that without the consent of the purchaser the contract is voidable and the seller is guilty of an offence for which a fine can be imposed. There is, of course, no similar statutory prohibition in the Cayman Islands and D have not committed any offence.

99 P contends that the passage in *Voumard* should carry little weight in the Cayman Islands. He highlights that it is a dated commentary on Australian law relating to default in the sale of land which has developed differently, presumably when compared to the law in England and Wales. It is accepted that instalment contracts may be more prevalent in Australia, but P does not acknowledge that a further reason highlighted by John Toohey for the different development is that Australia has a Torrens system, the same system used in the Cayman Islands. I also note that one example of the difference shared by John Toohey, relying on *Barber* v. *Wolfe* (2), was the English court's refusal at the time to allow a vendor, who has rescinded because of a purchaser's default, to sue for damages as well. However, in more recent times the House of Lords in *Johnson* (9) rejected the approach advocated in the line of authorities including *Barber* and favoured the Australian approach explained by Dixon, J. (as he was then) in *McDonald* (10) (see paras. 72 and 82). *In the appropriate circumstances*, although not binding, I am satisfied that some of the Australian case authorities and the texts analysing them may be helpful and informative. That said, care would have to be taken when applying them, especially in the absence of any evidence of the adoption of that approach hitherto in the courts of the Cayman Islands or England and Wales. However, having regard to the context in which they were written, the above extracts are more likely applicable to a situation where there is a forfeiture provision in relation to the instalment payments in contract and the court has to carry out its balancing exercise in equity.

100 P further contends that the emphasized part of the extract from *Voumard* in para. 48 above has no application in the matter before me. He

refers to an extract from the section "Right to Recover Instalments in the Absence of an Express Provision for Forfeiture." As already clarified herein, the agreements before me do not contain an express forfeiture provision. At 505, the authors of *Voumard* state:

> "Where the vendor elects to rescind the contract upon the ground of the purchaser's default, what is the position of the parties as to the instalments of principal moneys paid by the purchaser if the contract does not provide for forfeiture thereof to the vendor? If the purchaser has not been in possession of the property, it is clear that he is entitled at common law to recover those instalments from the vendor. Is his position any different if he has had possession under the terms of the contract? There is no express decision as to the matter, but there are strong dicta to the effect that where the purchaser has been in possession he is still entitled to repayment of instalments of principal, but not repayment of interest already paid [*McDonald* v. *Dennys Lascelles Ltd.* (*per* Dixon, J. (1933), 48 C.L.R. at 478); *Berry* v. *Mahoney* ([1933] V.L.R. 314, at 320); *Real Estate Secs. Ltd.* v. *Kew Golf Links Estate Pty. Ltd.* (*per* Lowe, J. ([1935] V.L.R. 114, at 120))]. The ground upon which this view is based is that the consideration for the payment of the principal moneys under the contract is the conveyance or transfer of the land, that once the act of the vendor in rescinding the contract deprives the purchaser of the right to a conveyance or transfer, the consideration for the payment of the instalments of principal money has wholly failed, and he is thus entitled to recover them at common law as money had and received to his use. The soundness of this view has been questioned in three learned articles in the Australian Law Journal [(1933), 7 A.L.J. 366; (1934), 8 A.L.J. 8; and (1935), 9 A.L.J. 3], the view there but being that as the purchaser has had possession of the land under the contract, it cannot be said that there has been a total failure of the consideration for which he contracted. In substance this contention is that a contract for sale on terms, the purchaser being entitled to possession before paying the whole of the purchase money, is an entire contract for use and occupation for a specified period and a transfer of the freehold at the end of that period in return for a principal sum with interest thereon. If it be correct to regard such a contract as entire, it may be conceded that the argument is sound; for, in the circumstances under consideration, the rule applicable is that money paid upon a consideration which is entire, cannot be recovered unless there has been a total failure of consideration. It is submitted, however, that the consideration is not entire, but divisible, and that a contract such as we are considering is, from the point of view of failure of consideration, properly regarded as a main contract for the transfer of the freehold in return for the principal sum, and a

> subsidiary contract under which the purchaser is entitled to possession pending execution of the transfer, in consideration of the payment of interest on the balance of the purchase money from time to time unpaid. Thus the dicta of above referred to would appear to be sound in principle, that it may be assumed that on this point the law is settled so far at least as the Courts of Victoria are concerned."

101 I am unable to find, and have not been shown, any similar *dicta* expressed in cases outside of Victoria. Although I accept that it is an approach that may well be followed in other Australian states, I have not been made aware of a similar approach having been followed in the Cayman Islands or in England and Wales.

102 In any event, P rightly submits in his written response dated July 10th, 2018 that the passage has no application to the matter before me, as it relates to contracts which provide for occupation on commencement of the payment of the purchase price. The agreements provide that vacant possession would be given on closing, unless the vendor gave its express consent in writing to earlier possession and subject to such terms as shall then be agreed. Clause 3 set out details of the interest to be paid under the contract, and as a consequence of cl. 5 these payments would therefore not be consideration for occupation of the parcels. P rightly points out that if he had never entered into occupation of the parcels before the final payment, the same amount of interest would still have been payable pursuant to cl. 3. Accordingly, it is correctly submitted that under the terms of the agreements, there has still been a total failure of consideration on the sale of the parcels. The parties intended that the express consideration for the occupation was the linked later agreement made pursuant to cl. 5, namely for P to pay insurance and strata fees and there is no provision in the contract or linked agreement for interest to be used as a form of occupational rent. P reiterates that cl. 6 is intended to govern what happens upon default and, although it makes provision for the vendor to keep interest on the deposit, it does not provide for the vendor to retain the interest payments.

103 When I consider D's arguments about whether the first and second agreements were themselves made up of two separate agreements, I accept P's contention that there is no clear indication in either agreement that the parties intended each one to contain two separate agreements. When I review them, it is evident that the agreements relating to the parcels are nothing more than instalment contracts. They are agreements for the purchase of a property where the purchaser pays a deposit and then pays the purchase price by gradual increments (monthly instalments which include an interest element) without obtaining a transfer of title into his name until the final payment is made. I therefore find that the agreements are not made up of a separate sale/purchase agreement and a separate loan agreement.

104 If I am wrong, and each agreement is constituted by two separate agreements as contended by D, then the fact that the title was not transferred to P at the time the agreements were entered into means that, due to the termination and resultant non-transfer of title, the consideration has failed for the loan. The cases of *Mayson* (13) and *McDonald* (10) confirm that any instalments paid (which are regarded as pre-payments of the consideration for the ultimate conveyance) belong at law to the purchaser on the basis that consideration for the conveyance had failed and accordingly can be recovered at law by him, whether or not there is a forfeiture provision. That is precisely the position in the matter before me, consideration having totally failed upon termination of the agreement. Clause 6 does not change that and it is clearly not an express forfeiture provision in relation to instalment payments. In cl. 6, the parties specifically put their minds to interest payments upon default, but made provision only in relation to interest on the deposit payment. In fact, cl. 6 implies that after the deposit and interest thereon "any further sum paid by the purchaser" cannot be retained by the vendor save to extent permitted in cl. 6. Due to the common law, there is no requirement for the clause to expressly provide for the return of the instalment payments.

105 Due to cl. 3(b), interest is a component of the purchase obligations, especially in this case where the agreements did not provide for possession of the parcels at the commencement of the payment of the purchase price. In consequence it is no more appropriate for D to retain the interest payments separately than it is for them to retain the whole or any part of the principal payments. The question one might ask is that, in the absence of a specific forfeiture provision, how can interest be payable upon a principal sum that ultimately was never payable?

106 When default happens regard must first be had to the terms of the contract and also then to the vendor's actions to determine what remedy he is exercising. If the vendor validly terminates the agreement for repudiatory breach of the contract of sale by reason of the purchaser's default, by exercising his rights pursuant to cl. 6, his remedies would be set out in the same cl. 6. The consequences flowing from a failure by P to make any interest payments are governed by cl. 6. Clause 6 does not provide for the forfeiture of any part of the interest payments. Clause 6 clearly does not alter the common law position concerning the retrain of instalment payments which includes interest paid.

107 If I am wrong when I conclude that the parties intended by the word "rescind" in cl. 6 for it to be the governing clause when there has been termination for breach in the performance of the contract and that P by his email did not intend to invoke cl. 6, I am still satisfied that the interest paid by P still cannot be retained by D as damages under repudiation for the reasons set out in paras. 100–104 herein.

108 Therefore, P rightly states that he is entitled to recover the interest payments. D2 remains the absolute owner of the parcels, but subject to his obligation of refunding to the purchasers all sums of money (except the deposit and interest thereon) which P has paid on account of the purchase.

109 Accordingly, I order that D, subject to the agreed and above ordered set-off amounts (see paras. 62–66 herein), do repay the instalment payments which are made up of the principal and interest payments to P.

Costs

110 I note than an order for costs was made in favour of the defendants in the order dated October 20th, 2017. If either party wishes to be heard on any other issue as to costs, then they should within 21 days of the circulation of the perfected version of this judgment, file and serve a summons seeking a costs hearing.

111 I thank counsel for their well-argued and helpful contributions on the novel points of law for this jurisdiction, including the prompt response to my request for clarification submissions. I also thank counsel and their clients for their patience in awaiting this decision.

Footnote

112 Having regard to the aim of damages being to put the injured party in the same position he would have been in if the contract had been performed, I note that in the written further supplement to the defendants' closing submissions dated July 10th, 2018, the court was informed that D2 has placed the parcels on the market for sale. If cl. 6, which entitles the vendor to sell the property and keep the full sale price absolutely, had not been found to be the governing clause in this case, the capital appreciation in the parcels may have been a relevant consideration for the court as a set-off when assessing damages.

Attorneys: *KSG Attorneys* for the plaintiff; *Mourant Ozannes* for the defendants.

Orders accordingly.

EXHIBIT 6

[1980–83 CILR 223]

BEACH CLUB ENTERPRISES LIMITED

v.

HORIZON MANAGEMENT LIMITED

Court of Appeal

(Robinson, P., Carberry and Carey, JJ.A.)

7 June 1982

Contract—payment—part-payment—part-payment not changed into deposit by change of name in subsequent contract variations—partpayment forfeited on breach by purchaser if express forfeiture clause

Documents—interpretation—interrelated documents to be interpreted together—clauses in separate contract documents expressly made subject to each other to be construed together provided no violence to natural meaning

Contract—repudiation—effect of repudiation—failure to pay balance of purchase-price by date specified and introduction of alternative purchaser is breach by repudiation—acceptance by other party relieves of obligation of further performance but forfeiture clause operative on breach remains valid

Land Law—contract of sale—part-payment—no equitable relief against forfeiture of part-payment equivalent to 10% of purchase price—relief only where sum forfeited excessive in relation to loss and retention unconscionable

The plaintiff-respondent brought an action in the Grand Court to recover from the defendant-appellant a part-payment of the purchase price paid under an unperformed contract for the sale of property.

The parties entered into a contract for the sale of a hotel, initially for the sum of $2.6m. which was subsequently increased to $2.7m. The original agreement of April 11th, 1979 referred to a "deposit of $25,000" which had already been paid, specified that $235,000 of the purchase price was to be paid on or before April 20th and stated that completion was to take place on or before June 1st, with the balance of the purchase price payable on such completion. It also stated that time was of the essence.

The $235,000 was duly paid but on April 26th, certain variations were made to the contract, one of which extended the completion date to 14 days after the purchaser had obtained all necessary licences for running the hotel, provided that this did not extend beyond September 1st at the latest. By a later variation, the completion date was changed to July 1st subject to the 14-day stipulation in the previous variation and a new cl. 10 also specified that if all licences were granted by "not later than Sep-

tember 1st" and the purchaser still failed to complete by then, the vendor would be entitled to forfeit and retain "the deposit of $260,000," the total of the initial $25,000 deposit and the part-payment of $235,000.

All the licences had already been obtained when, on July 3rd (July 1st being a holiday), the purchaser indicated to the vendor that he would be unable to pay the balance of the purchase price in the foreseeable future, and, by introducing a new prospective purchaser, made it clear that he was no longer pursuing the contract. On August 1st the vendor then informed the purchaser by letter that he considered the contract at an end and was therefore forfeiting the "deposit of $260,000." The purchaser agreed that the contract had been terminated but demandea the return of $235,000. When the vendor refused to comply, the purchaser brought the present proceedings to recover it.

The Grand Court (Summerfield, C.J.) gave judgment for the purchaser, holding that the part-payment was not forfeitable since (a) there was no provision in the contract or any of its variations expressly converting the part-payment into a true deposit and the parties had therefore never intended it to be treated as one; and (b) cl. 10 did not provide for the events which had occurred, as it was the vendor and not the purchaser who had rescinded the agreement after learning of the purchaser's inability to pay—an act on the part of the vendor which had put an end to the contract and any rights he had under it and had given the purchaser the right to recover the money he had already paid under the contract.

On appeal, the vendor submitted that (a) although in the original contract the $235,000 had been a part-payment, it was clear from the subsequent variations of the terms and the references to this sum as a "deposit" that the parties intended to change its status to that of a deposit, which would make it forfeitable on breach by the purchaser; and (b) in any event cl. 10 was an express forfeiture provision which was specifically designed to protect him in the event of such a breach by the purchaser as had in fact occurred.

The purchaser submitted in reply that (a) he was entitled to a refund of the part-payment of $235,000 as the contract had terminated not on breach by him but on the vendor's rescission; (b) the rescission before the final date for completion, *i.e.* September 1st, had in effect put an end to the future operation of the forfeiture provision; and (c) the court should grant equitable relief against forfeiture, since the amount forfeited was in the nature of a penalty, no loss having in fact been suffered by the vendor.

Held, allowing the appeal:

(1) The parties had not specifically provided for a 10% deposit in their contract of sale. Although in later variations to the contract, incidental references were made to the initial deposit together with the more substantial instalment as a "deposit," even though the two sums together made up 10% of the purchase price, this circumstance did not suffice to convert the instalment into a true deposit (*per* Carey, J.A. page 241, line 18 – page 242, line 2; Robinson, P. concurring; Carberry, J.A. dis-

senting, page 231, line 39 – page 232, line 15). In any event cl. 10 expressly provided for forfeiture of both and effect had to be given to it since it was clear from the history of the dealings between the parties that it was designed for precisely the situation which had occurred, namely, the repudiation by the purchaser (page 245, lines 26–32).

(2) The Grand Court should have considered the contract documents as a whole and read the variations, which were dependent upon each other, together, in such a way as to harmonise them, if that were possible, without doing violence to their natural meaning. The court had failed to do so and had therefore been wrong in concluding that cl. 10 did not apply in the circumstances that had arisen (page 242, lines 3–15; page 246, lines 1–6).

(3) Clause 10 did apply. The purchaser did not have the right to wait until September 1st for completion since the licences had been granted before the end of June. In accordance with the second variation of the contract, he was therefore obliged to complete by July 1st. The only significance of the September 1st deadline was to give the purchaser time to obtain the necessary licences if they had not been granted before July 1st. Thus, when on July 3rd the purchaser had indicated unequivocally that he was withdrawing from the contract, this amounted to a breach by repudiation which the vendor was entitled to accept and upon which cl. 10 became immediately operational. Although at that stage the parties had rescinded the contract, this did not put an end to the operation of cl. 10, its function being to prescribe the measure of the purchaser's liability for damages for the breach. He could not, therefore, rely on his own breach to nullify the effect of this clause (page 236, lines 11–17; page 244, line 29 – page 245, line 20; page 245, lines 32–41).

(4) Equitable relief against forfeiture was not warranted, as a deposit of 10% and its forfeiture on breach of contract was normal and reasonable in sale of land transactions and therefore neither cl. 10 nor the retention of the part-payment by the vendor on the basis of it could be regarded as penal. A forfeiture clause such as the one in the present case was not governed by the same principles as a penalty clause; to obtain relief against the effects of a clause such as cl. 10, the purchaser would have to show not only that the amount forfeited was out of proportion to the loss sustained but also that it would be unconscionable for the vendor to retain the money. He had established neither of these propositions and the court would therefore hold that the $235,000 claimed had been properly forfeited (page 246, lines 11–18; page 247, lines 13–28).

Cases cited:

(1) *Brickies* v. *Snelt*, [1916] 2 A.C. 599.

(2) *Buckland* v. *Farmar & Moody*, [1979] 1 W.L.R. 221; [1978] 3 All E.R. 929.

(3) *Cooden Engr. Co. Ltd.* v. *Stanford*, [1953] 1 Q.B. 86; [1952] 2 All E.R. 915.

(4) *Cornwall* v. *Henson*, [1900] 2 Ch. 298.

(5) *Dagenham (Thames) Dock Co., In re., ex p. Hulse* (1873), 8 Ch. App. 1022.

(6) *Dies* v. *British & Intl. Mining & Fin. Corp. Ltd.*, [1939] 1 K.B. 724.

(7) *Frost* v. *Knight* (1871), L.R. 7 Ex. Ill; [1861–73] All E.R. Rep. 221, *dictum* of Cockburn, C.J. applied.

(8) *Galbraith* v. *Mitchenall Estates Ltd.*, [1965] 2 Q.B. 473; [1964] 2 All E.R. 653.

(9) *Heyman* v. *Darwins Ltd.*, [1942] 1 All E.R. 337.

(10) *Hochster* v. *De La Tour* (1853), 2 E. & B. 678; 118 E.R. 922; [1843–60] All E.R. Rep. 12, followed.

(11) *Howe v. Smith* (1884), 27 Ch. D. 89; [1881–5] All E.R. Rep. 201.

(12) *Johnson* v. *Agnew*, [1980] A.C. 367; [1979] 1 All E.R. 883, *dictum* of Lord Wilberforce applied.

(13) *Kilmer* v. *British Columbia Orchard Lands Ltd.*, [1913] A.C. 319.

(14) *McDonald* v. *Dennys Lascelles Ltd.* (1933), 48 C.L.R. 457, *dictum* of Dixon, J. applied.

(15) *Mayson* v. *Clouet*, [1924] A.C. 980.

(16) *Moschi* v. *Lep Air Services Ltd.*, [1973] A.C. 331; [1972] 2 All E.R. 393.

(17) *Mussen* v. *Van Diemen's Land Co.*, [1938] Ch. 253; [1938] 1 All E.R. 210.

(18) *Smith* v. *Hamilton*, [1951] Ch. 179; [19501 2 All E.R. 928.

(19) *Soper* v. *Arnold* (1889), 14 App. Cas. 429.

(20) *Sprague v. Booth*, [1909] A.C. 576.

(21) *Steedman* v. *Drinkle*, [1916] 1 A.C. 275; [1914–15] All E.R. Rep. 298

(22) *Stickney* v. *Keeble*, [1915] A.C. 386; [1914–15] All E.R. Rep. 73.

(23) *Stockloser* v. *Johnson*, [1954] 1 Q.B. 476; [1954] 1 All E.R. 630, *dicta* of Lord Denning, M.R. applied.

R. Malfood, Q.C. and *J. Miller* for the appellant;

R.D. Alberga, Q.C. and *P. Dougherty* for the respondent.

CARBERRY, J.A.: This appeal was concerned with the claim made by the respondent/plaintiff (hereinafter for convenience called "the purchaser") to recover from the appellant/defendant (hereinafter called "the vendor") a sum of $235,000 paid by the purchaser to the vendor in the course of attempts by the former to buy from the latter certain freehold property in Grand Cayman known as the Beach Club Colony.

The decision of the Court of Appeal and its order was made as long ago as June 18th, 1981 immediately following on the ending of the argument herein. We promised to put our reasons into writing and the main judgment in this matter, written by Carey, J.A., was available in draft as long ago as November. However,

in deference to the careful judgment of the Chief Justice, from which we had differed; and to the incisive judgment of Carey, J.A., with whose main conclusions I agreed, save for a point hereafter noted; and also to the expressed desire of the parties to test our decision elsewhere, as is their right, I thought it desirable to add a few words of my own. I express my regret at my delay in doing so, due to the pressure of work in our own jurisdiction.

If I may say so, the points in dispute were not in themselves difficult, as we saw them, but they did fall within the overlap of three difficult fields of law. The first of these was the forfeiture of deposits and recovery of instalments of purchase price which presents difficulties because of the multiplicity of cases thereon. The second area concerns the effect of repudiation of contract and its acceptance where the difficulty has been caused by the confusion brought about by the use of the word "rescission" to describe the acceptance of the repudiation; and finally, in the third field, the possibility of equitable relief from forfeiture, where the difficulty has been due to attendant growing pains of the principles in this field of law.

I set out briefly the situation as it appeared to me, so that such remarks as I may make may have a setting. As the Chief Justice remarked in his judgment, both the purchaser and the vendor are locally incorporated companies. Mr. Stenson was for all practical purposes the owner and operator of the purchaser, while Mr. Smatt filled a similar role with regard to the vendor. Mr. Stenson, for the purchaser, was assisted by legal advisers at all significant stages; Mr. Smatt for the vendor had similar assistance on his side.

On March 21st, 1979 the purchaser bought for $25,000 (all sums are in US dollars) a 30-day option to purchase from the vendor the Beach Club Colony for the sum of $2.6m. If the option were exercised, the price of the option would go towards payment of the purchase price, and what was then contemplated was completion on or before May 15th, 1979, by paying the balance in cash, or its equivalent. The object of the purchase was to take over the hotel as a going concern and this intent appears in all the subsequent course of dealings. I emphasise this point because though time is not usually of the essence in sale of land transactions, it can be specially made so, as Harman, J. remarked in the leading case of *Smith* v. *Hamilton* (18) ([1951] Ch. at 179):

"There are circumstances in which time can be said to be

> of the essence of the contract from the beginning. It is well known that time may be of the essence on a sale of licensed premises, or of a shop as a going concern . . . .”

The option was exercised and the parties entered into what may be called the principal agreement on April 11th, 1979. I am content to take the outline of that agreement as it appears in the judgment of the Chief Justice. It shows that the parties were buying the hotel and its goodwill as a going concern. Completion was to take place on or before June 1st, 1979. As to payment, this was governed by cl. 4, set out in full in the judgment of Carey, J.A. and I do not repeat it, save to note that it stated that a “deposit” of $25,000 had been paid to the vendor, and that— “ . . . the balance of the purchase price shall be paid as follows: (a) $235,000 on or before April 20th, 1979; (b) the balance on completion.” The contract contained a cl. 7 which read: “Time shall be of the essence in respect of this agreement.”

Curiously enough, the principal agreement did not contain any express provision for the payment of a deposit, usually 10% of the price. The only so-called “deposit” was the $25,000 mentioned in cl. 4, which was the price already paid for the option to purchase, and which was to go towards the sale price if the option were taken up. Perhaps this was due to an atmosphere of euphoria: the purchaser confident in his resources and the vendor confident in being paid in full on June 1st, some six weeks away. The only note of caution that was struck was that as the running of the hotel would require various licences to be issued to its operators by the Government of the Cayman Islands, the agreement was made conditional on the purchaser obtaining those licences prior to completion.

At this stage of the proceedings, I agree that the $235,000, the subject-matter of this action, was an instalment of the purchase price, though I note that by what may be more than an odd coincidence the total of both sums, $235,000 plus $25,000, amounts to $260,000, or 10% of the $2.6m. quoted in the option as the original price. Set against that, however, is that some minor adjustments had taken place. The original option had provided in cl. 4 for the vendor to retain a room. This disappeared and the price was adjusted upwards by $70,000 and $50,000 and became $2.72m. as against the original $2.6m.

The $235,000 was duly paid and acknowledged by a receipt which refers to it as a “deposit.” I agree that this alone would not

convert an "instalment" into a "deposit" but it is some indication as to what the vendor's agents thought. Two weeks after the principal agreement of April 11th, the parties made on April 26th, 1979 their first variation of the terms of the principal agreement. It appears that the obtaining of the necessary licences did not now seem so easy.

The relevant clauses are set out in the judgment of the Chief Justice, and I do not repeat them save to note the following points:

(a) The June 1st, 1979 date for completion was extended, or made more flexible; it was to be 14 days after the date on which all the necessary licences referred to earlier had been formally approved.

(b) There was, however, a provision that if any of these licences were still outstanding by September 1st, 1979, either the vendor or the purchaser should have the right to cancel the agreement; if the vendor cancelled he should "pay to the purchaser all deposits paid by [him] under the agreement but with interest earned thereon accruing to the purchaser."

(c) There was a further provision that if by August 15th, 1979 any of the licences were still outstanding, the purchaser might waive his right to terminate and complete the purchase on giving 14 days' notice.

(d) Though the completion date had in a sense been moved from June 1st, 1979, the first variation of April 26th still provided expressly that the balance of the purchase price was to be paid on June 1st, 1979 "in escrow" to Guinness Mahon Cayman Trust Ltd. who would hold it as stakeholder and pending completion were to invest it *pro tempore*.

Two comments may be made. It was clearly of importance to the vendor that the balance of the purchase price should come into Cayman and be paid to a stakeholder by the original completion date, June 1st, 1979. Secondly, consciously or unconsciously, both parties were now referring in their contract to both the $25,000 and the $235,000 as "deposits" and the vendor had promised to return them if he cancelled the agreement; nothing was said as to what would happen if the purchaser cancelled.

A new factor emerged at this stage: The purchaser was having difficulty in raising the balance of the purchase price. Up to now we have a vendor relatively unprotected as there was no express forfeitable deposit. True, he had two sums of $25,000 and

$235,000 in hand, but as shown in (b) above he might have to return them. All that he had was a promise to pay the balance of the price to stakeholders by June 1st, 1979 and then the purchaser revealed his difficulty. The only reasonable inference in this situation is that the parties approached the second variation of their agreement of May 31st, 1979 with the vendor determined to safeguard his position and the purchaser trying to play for both extra time and better terms of payment.

The relevant clauses of the second variation of May 31st, 1979 are set out in the judgment of the Chief Justice and Carey, J.A. and I refrain from repeating them, save to note the following points. Once again the variation takes the form of a letter from the purchaser to be agreed to by the vendor. Once again both sides were accompanied by their respective lawyers and, for my part, I must assume that the actual wording used is that agreed to by the lawyers on both sides and our prime consideration, therefore, must be the language that they used.

(i) The June 1st completion date, in its flexible form, was put to July 1st, 1979; but the provisions referred to in paras. (b) and (c) above were still preserved. These were the provisions dealing with whether or not the necessary licences had been secured by September 1st; if they had not, the previous options still existed.

(ii) For this extension, the true effect of which was to put off the purchaser having to pay the balance of the purchase money by June 1st, the purchaser had to pay $25,000 more, which was expressly made non-refundable.

(iii) As to the payment of the balance of the purchase money previously due on June 1st, the purchaser asked for a mortgage in the sum of $1.7m. to be given him by the vendor, *i.e.* the vendor was to allow this to remain outstanding. Hence, taking the mortgage of $1.7m. from the price of $2.72m. would have left a balance of $1.02m. to be paid in cash. The vendor already had in hand $260,000 (being the original $25,000 and the $235,000) so the purchaser had to find $760,000 in cash as the balance of the purchase money, assuming agreement on the mortgage.

(iv) The purchaser then offered further sums to the vendor to secure the mortgage.

(v) With respect to payment of the balance of $760,000, though it did not say so clearly, this sum was apparently to be paid to the stakeholder on July 1st (instead of June 1st) and was to be held by the stakeholder pending completion.

(vi) There were some adjustments to the provisions dealing with the possibility of any of the licences being outstanding on September 1st. In this event, the vendor was to repay "the *deposit* of $260,000 and the further payment of $760,000 . . . ." Though it was not clearly said, this also meant that if the purchaser cancelled because the licence was outstanding, the same result was to follow. This time, however, the interest on these sums was to go to the vendor, not the purchaser.

(vii) There were clauses dealing with the operation of the hotel as a going concern in this interim period.

(viii) The letter ended with cl. 10 which deserves to be quoted verbatim:

> "In the event that all the licences are granted by not later than September 1st but we [*i.e.* the purchaser] fail to complete by that date, you [*i.e.* the vendor] shall be entitled to forfeit and retain the deposit of $260,000 paid by us."

I would note that by the time of the second variation on May 31st, 1979, the $260,000 (which consisted of the sum of $25,000 and the $235,000 which was originally a part-payment or instalment of the purchase price) was now being referred to in two clauses of the document as a "deposit." The document, carefully prepared by and with the advice of the legal advisers on both sides, represented a radical alteration of the original agreement, particularly as to payment of the purchase price, and to a lesser extent as to the completion date.

In my view, when in the second variation the parties referred to the $260,000 as a "deposit," they meant exactly what they said. Our prime consideration must be the language that they used. There had been no provision before in their agreement for a "deposit," apart from the fact that the $25,000 originally paid for the option had been styled a "deposit" in the principal agreement. As I have said earlier, it may be that the prospect of collecting over $2m. in six or seven weeks had disarmed the vendor. But it is quite clear that by May 31st that situation no longer obtained.

The cash prospect had shrunk to $760,000 and some 60% of the price was to remain outstanding on mortgage. The purchaser was made to offer various non-refundable sums of $25,000 for various concessions, and in that situation I must respectfully differ from both the Chief Justice and from Carey, J.A. as to whether the $235,000 had been altered in character from part-payment to

deposit. I cannot, with respect, regard it as a "misdescription" as the Chief Justice does, or a failed "metamorphosis" as does Carey, J.A. Though the $235,000 had originally been a part-payment or instalment, in my opinion the parties in their second variation had clearly converted it, with the $25,000 originally described as a "deposit," into a "deposit of $260,000." I cannot believe that the negotiating lawyers, trained in the English common law system and experienced in negotiations for the buying and selling of land did not know exactly what they were doing when they used those words, particularly in the context of the stage their negotiations had reached.

In my opinion the $260,000, or rather the $235,000, for there is no dispute as to the fate of the $25,000, had been altered from being a part-payment into being a deposit, with all the consequences that that entails in the events that followed. Clause 4 of the original agreement dealt with arrangements for the payment of the purchase price, both interim and as to the outstanding balance. The main thrust of the second variation dealt with arrangements regarding both payments on account and the payment of the balance, together with the securing of a vendor's mortgage as to the major part of that balance. The arrangements were such that cl. 4 of the original agreement in effect disappeared.

With respect, I cannot accept the comment of the Chief Justice to the effect that had there been an intention to vary that clause and convert the instalment paid into a deposit, in the sense of its being an earnest, one would have expected an item expressly to that effect, such as: "It is hereby agreed that the sum of $25,000 and $235,000 paid pursuant to cl. 4 of the original agreement shall for all purposes be treated as a deposit."

As a result of the negotiations and the new agreement of May 31st, cl. 4 had for all practical purposes disappeared. What the parties did was to insert a new cl. 10 (set out above) that expressly provided for the two sums totalling £260,000 to be forfeited and retained in the event that the licences were granted by September 1st and the vendor still failed to complete. This was not very different to the clause that it is suggested that they might have made. The effect of that clause was that if the licences had been granted and the purchaser still failed to complete by that date, the vendor would have been "entitled to forfeit and retain the deposit of $260,000 paid by us."

A final comment on the negotiations that had ensued. It is clear above all that time was of the essence of the contract. Not only did the parties say so originally but every variation that they made was conditioned on this, particularly the time frame with regard to the payment of the balance of the purchase money.

To continue the broad outline of the story, it is clear that at some time before the new completion date of July 1st, 1979 the necessary licences had been obtained and, as the Chief Justice remarked, "there has been no suggestion that any of the licences had not been obtained by that date." Further, as July 1st fell on a Sunday, with a public holiday on Monday 2nd, the July 1st completion date became July 3rd, 1979. On that date the purchaser was expected to attend and pay over to the stakeholder the reduced outstanding cash balance of $760,000. What took place is set out in the judgment of the Chief Justice, and has been accepted by both sides to this appeal. Mr. Stenson for the purchaser told Mr. Smatt for the vendor that his backers had withdrawn, that he did not have the money to complete and pay the $760,000 due that day, and it is clear that he was not likely to be able to raise that money in any relevant period. Instead, he introduced to the vendor a new prospective purchaser, a Mr. Cook, who was going to make his own contract with the vendor, and who was in no sense acting with or on behalf of the purchaser. As the Chief Justice put it:

> "Mr. Cook made it clear that he was acting on his own behalf, or on behalf of his company. There was no question of this being a joint venture with Mr. Stenson, or of Mr. Stenson's payments operating as the initial deposit by Mr. Cook, and I do not accept the suggestions to the contrary."

There were inconclusive discussions to the effect that Mr. Stenson might, *ex gratia*, be given back some of the money he had advanced if a sale resulted with the new purchaser. It did not. Discussions continued with the new purchaser and are reflected in a letter of July 5th, 1979 by Bruce Campbell & Co. to Mr. Smatt's lawyer, Mr. D. Myers. It is of interest to note that they envisaged a price of $3m. and that a deposit of 10% was to be paid, non-refundable in the event that the new purchaser did not proceed. As the Chief Justice put it: "At no stage after July 3rd, 1979 did Mr. Stenson or the plaintiff make any further attempt at completion or make any offer of the $760,000 or any further proposal." He adds that it was clear that Mr. Stenson would not have stood by with

knowledge that the Cook—Smatt negotiations were going on if there was any intention on the part of the purchaser to complete.

As I understand it, it is clear that Mr. Stenson on behalf of the plaintiff/purchaser had repudiated the contract. Whether this can be regarded as an actual present breach of the duty to complete on the appointed day in a contract in which time was of the essence, or whether it is to be regarded as what is sometimes called anticipatory breach does not appear to me to be of major importance in this context. It was a breach of the purchaser's fundamental duty to pay the price. I quote as apt a short passage from Treitel, *The Law of Contract*, 5th ed., at 633 (1979). After dealing with failure or refusal to perform, the author considers the standard of duty and, under "Cases of strict liability," remarks:

> "Many contractual duties are strict. The most obvious illustration of this principle is provided by the case of a buyer who cannot pay the price because his bank has failed or because his expectation of raising a loan has not been fulfilled. There is no doubt that he is liable; the point is taken so much for granted that it has hardly ever been litigated."

In *Hochster* v. *De La Tour* (10) Lord Campbell, C.J., giving the judgment of the court, remarked (2 E. & B. at 691; 118 E.R. at 927):

> "The man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured: and it seems reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding . . . ."

To the same effect is the *dictum* of Cockburn, C.J. in *Frost* v. *Knight* (7) (L.R. 7 Ex. at 113):

> "On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss."

In the case of what is sometimes called anticipatory breach, as in the case of an ordinary breach, which justifies rescission, the victim has an option to treat the contract as determined, or to affirm it and to claim further performance. Unfortunately, due to the poverty of current legal terminology, the word "rescission" used in this connection suffers from an ambiguity that has best been explained by Dixon, J. in the Australian case of *McDonald* v. *Dennys Lascelles Ltd.* (4). Though a little long, it is worth quoting in full (48 C.L.R. at 476–477):

> "When a party to a simple contract, upon a breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning. Both parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired. Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected. When a contract is rescinded because of matters which affect its formation, as in the case of fraud, the parties are to be rehabilitated and restored, so far as may be, to the position they occupied before the contract was made. But when a contract, which is not void or voidable at law, or liable to be set aside in equity, is dissolved at the election of one party because the other has not observed an essential condition or has committed a breach going to its root, the contract is determined so far as it is executory only and the party in default is liable for damages for its breach."

The passage above was cited and approved by Lord Wilberforce in *Johnson* v. *Agnew* (12) ([1980] A.C. at 396). This case, the most recent in a long line of cases dealing with repudiation, and the effect of accepting it, and the remedies of the parties thereon, contains a series of what Lord Wilberforce calls "uncontroversial propositions of law." I cite the first (*ibid.*, at 392):

> "First, in a contract for the sale of land, after time has been made, or has become, of the essence of the contract, if the purchaser fails to complete, the vendor can *either* treat the purchaser as having repudiated the contract, accept the repudiation, and proceed to claim damages for breach of the contract, both parties being discharged from further performance of the contract; *or* he may seek from the court an

order for specific performance with damages for any loss arising from delay in performance."

See too a passage by Lord Diplock in his speech in *Moschi* v. *Lep Air Services Ltd.* (16) ([1972] 2 All E.R. at 402–403), in which he discusses the acceptance of the wrongful repudiation of the contract by the other party, distinguishes it from "rescission" and points to the rights of the victim arising from that acceptance of repudiation. And see also *Buckland* v. *Farmar & Moody* (2) ([1978] 3 All E.R. at 938, *per* Buckley, L.J.; at 943, *per* Goff, L.J.).

In the result, in this case, the vendor acquired, as a result of the repudiation by the purchaser, the right to accept that repudiation and consequent on that a right to damages, or alternatively to forfeit the deposit, if there was a deposit; or to exercise any of the rights given him by the contract or at law, or in equity. Acceptance of the repudiation was by letter from the vendor's attorney on August 1st, 1979.

I must confess to being somewhat disturbed by the learned Chief Justice's treating this letter as a rescission, and then speaking of the purchaser's reply of August 10th as "accepting the rescission." The failure sharply to distinguish the senses in which rescission is used has on occasion caused error in assessing its true significance and effect. Here the acceptance of the purchaser's repudiation left the vendor, to quote Dixon, J. above, with rights "not divested or discharged which [had] already been unconditionally acquired."

Both letters are set out in the judgment of the Chief Justice. That of the vendor of August 1st announced acceptance of the repudiation and in effect claimed to forfeit the deposit, but softened it by offering to make an *ex gratia* payment from it if the sale to Mr. Cook went through. The purchaser in his letter acknowledged failure to make the payment due on July 1st, agreed that the contract had come to an end, and formally demanded return of the $235,000 and two other payments. As to these claims, it is to be observed that the purchaser's action was commenced by action filed in the Grand Court on August 28th, 1979, before the "cut-off" date of September 1st.

I have already indicated that by virtue of the second variation of May 31st, the $235,000 (part of the $260,000) became a *deposit*, forfeitable in the normal way on the purchaser withdrawing from the sale, or repudiating it as he did. It is also my opinion,

as it is that of Carey, J.A., that in the events as they occurred, this sum was properly forfeited on a proper construction of cl. 10 of the variation of May 31st. If I may say so with respect to the Chief Justice, the analysis made by Carey, J.A. of the meaning and effect of cl. 10 is to be preferred and I accept it without repeating it here.

So far as the law with respect to the forfeiture of deposits goes, I hazard a few of what I hope are uncontroversial propositions:

(a) When a sale goes off, as this one did, the fate of payments that have been made by the purchaser is to be determined by what the court perceives to be the intent of the parties in the original contract; this is without prejudice to their rights of action, save that forfeiture of the deposit may reduce or on occasion eliminate the losses that the disappointed vendor may have suffered.

(b) Over the course of the years, particularly in cases in which the parties have failed to state expressly in their contract what is to happen to such payments, the courts have attached to the description of a payment as a "deposit" the implication that this means it was given as an earnest, or as a guarantee of performance by the purchaser, and is to be forfeited in case the sale goes off by reason of his default. If, however, it goes off by reason of the vendor's default, it is returnable, while if the sale goes through to completion it will be counted as a portion of the purchase price: see *Howe* v. *Smith* (11); *Soper* v. *Arnold* (19) and *Stickney* v. *Keeble* (22) (vendor's default, deposit returned).

(c) Parties often stipulate that a given sum (usually 10%) is to be a "deposit" and then go on to provide expressly what is to happen to it. Naturally, effect is given to their declared intent: *Sprague* v. *Booth* (20).

(d) In general, payments by the purchaser that are intended to be instalments of the.price and are not intended to be forfeitable, are returnable to the purchaser, no matter how the sale goes off, whether it be due to his fault or not; though if it be due to the purchaser's fault, the vendor will have his claim for damages for breach and may be able to set the damages off against the returnable instalment: see *Mayson* v. *Clouet* (15) and *Dies* v. *British & Intl. Mining & Fin. Corp. Ltd.* (6).

(e) There have been occasions on which payments made as instalments of the price have been expressly declared nevertheless to be forfeitable if the purchaser defaults in completing the

sale. There is no reason why parties should not be able to make their own bargain in this respect, but the disproportion between the sum involved and that of the normal deposit has been such as to invite equitable intervention directed to examining whether the provision does not amount to either a "penalty" or to a "forfeiture" against which equitable relief should be given. This has happened in sales of land by instalments: see *Re Dagenham (Thames) Dock Co., ex p. Hulse* (5); *Cornwall* v. *Henson* (4); *Kilmer v. British Columbia Orchard Lands Ltd.* (13) (relief given by allowing instalment missed to be paid late); *Steedman* v. *Drinkle* (21) (relief uncertain); *Brickies* v. *Snell* (1) (relief uncertain); *Mussen* v. *Van Diemen's Land Co.* (17) (Farwell, J. refused relief, as the purchaser had goUsome of the land conveyed to him).

(f) The forfeiture of instalments of the purchase price already paid has happened fairly often in hire-purchase agreements, and has invited equitable relief: see *Cooden Engr. Co. Ltd.* v. *Stanford* (3); *Stockloser* v. *Johnson* (23) (no relief granted; Denning and Somervell, L.JJ. took a more liberal view of the situations in which equity would grant relief than Romer, L.J., who preferred the view of Farwell, J. in *Mussen's case); Galbraith* v. *Mitchenall Estates Ltd.* (8) (Sachs, J. refused relief).

As a general comment, relief has seldom been actually granted in the hire-purchase cases. As to the land cases, the form of relief most often granted has been to permit the defaulting purchaser to make the missing payment late and, subject to that, to restore him to his position under the contract. I have cited these cases and the general propositions they suggest because they were all cited to us and because counsel for the respondent in particular, who, fearing loss on the question of the effect of cl. 10, prayed in aid equitable relief from penalties, or forfeiture. The Chief Justice did not of course express any view on this matter as, having found that the $235,000 was not forfeited, it was unnecessary to cover this point. I agree with Carey, J.A. that equitable relief is not available to the purchaser here, and I will not repeat the valuable quotations that he has made from the judgment in *Stockloser* v. *Johnson* (23).

It is to be noted that unlike most of the land purchasers who have successfully sought equitable intervention, the purchaser here does not seek to make his payment out of time and ask to be restored to his position under the contract. While this is not now

considered an indispensable condition for relief, it continues to be an important and significant factor.

In any event, it could not be successfully contended that forfeiture of a sum rather less than the customary 10% deposit constitutes a sum which it is unconscionable for the vendor to retain. The sum is large, it is true, but then so was the purchase price, and on the evidence so was the value of the property which the purchaser hoped to obtain. There is uncontroverted evidence that the new purchaser. Mr. Cook, whom the original purchaser introduced, himself offered $3m. and a 10% deposit on this price, non-refundable.

I have referred to a few cases not cited and have, I think, mentioned every case that was cited to us. having read them all and many more. Some of the cases have been difficult but none that I have read has caused me to alter the views formed at the end of the argument. I would wish to express thanks to Carey. J.A. for his acute analysis of the meaning of cl. 10 in the May 31st variation in the context of the agreement as a whole. I am sure that all the members of the court would wish to thank both leading counsel for the assistance that they gave to the court.

In my opinion the appeal must be allowed; as in the order made on June 18th, 1981.

CAREY, J.A.: This appeal is concerned with the true construction of a forfeiture clause contained in a letter varying an agreement for the sale of a hotel, the Beach Club Colony in Grand Cayman, by the appellant to the respondent. The whole contract is to be gathered from the original agreement for sale dated April 11th, 1979, and variation agreements contained in letters exchanged between the parties dated April 26th, 1979 and May 31st, 1979 respectively. The forfeiture clause, which is numbered 10, is to be found in the letter of May 31st, 1979.

The original agreement for sale recited, so far as is relevant for the purposes of this appeal, as follows:

> "4. A deposit of $25,000 has been paid to the vendor (the receipt whereof the vendor hereby acknowledges) and the balance of the purchase price shall be paid as follows:
>
> (a) $235,000 on or before April 20th, 1979;
>
> (b) the balance on completion.
>
> 5. Completion shall take place on or before June 1st, 1979 at the office of Guinness Mahon Cayman Trust Ltd., George Town, Grand Cayman."

The letter dated April 26th, 1979 (to which I will refer hereafter as "the first variation") *inter alia* extended the completion date, introduced provisions regarding the grant of licences and linked the completion date to the grant of licences. The material terms are these:

> "1. The completion date be extended to a date 14 days after the date on which all the licences required under cl. 17 have been formally approved.
>
> 2. (a) Subject to the provisions of 2(b) below and if for any reason that in the event that by September 1st, 1979 one or more of the licences are still outstanding either the vendor or purchaser shall have the right to cancel the Agreement and upon cancellation, the vendor shall then pay to the purchaser all deposits paid by [him] under the agreement but with interest thereon accruing fo the purchaser.
>
> (b) In the event that one or more of the licences are still outstanding on August 12th, 1979, the purchaser may waive his right to terminate and may elect to complete despite the absence of such licence or licences upon giving 14 days' notice to the vendor."

The learned Chief Justice found that the respondent, who was experiencing difficulty in raising the remainder of the necessary finance proposed further amendments which in the event were accepted by the appellant. These were contained in a letter of May 31st, 1979 to which I will hereafter refer as the "second variation." The clauses so far as they are material, are as follows:

> " 1. The date of completion shall be extended to July 1st, 1979 subject however to the provisions of items 1, 2 and 5 of the second paragraph of the said letter but in any event shall not be later than September 1st, 1979."
>
> "8. In the event that one or more of the licences are still outstanding at Sepember 1st, 1979 and the sale has not been completed by that date—
>
> . . .
>
> (b) You will repay to us the sum of $1.02m., being the deposit of £260,000 and the further payment of $760,000 paid under the said agreement and the said letter."
>
> "10. In the event that all licences are granted by not later than September 1st, 1979 but we fail to complete by that date you shall be entitled to forfeit and retain the deposit of £260,000 paid by us."

The agreement for sale showed the purchase price as $2.7m. The purchaser paid the deposit of £25,000 and subsequently the sum of $235,000 required by virtue of cl. 4 of the original agreement but never paid the balance of the purchase price despite the several extensions, already noted, which were allowed.

In an action before Summerfield, C.J. in the Grand Court, the purchaser (the respondent in this appeal) claimed *inter alia* that he was entitled to be refunded this £235,000. The vendor (the present appellant) contended that this sum was forfeited under cl. 10 of the second variation. The learned Chief Justice, in a considered judgment, rejected the defence contention holding that on the true construction of this clause, it was designed for a set of circumstances altogether different from those which actually came about. Consequently the clause could not be invoked so as to be applied to the events which occurred. He accordingly ordered that that sum should be refunded, entering judgment for the purchaser.

Before us, learned counsel for the appellant advanced the argument which was also pressed in the court below, that the $235,000 which began life as "balance of purchase price," *i.e.* a part-payment, had undergone a metamorphosis and become a "deposit" so that it would be forfeited in the event of non-completion on the part of the respondent. The main basis of this argument rested on two references in the second variation to "the deposit of $260,000 paid by us." In the use of the unambiguous term "the deposit," so it was said, both parties were at arm's length and had the benefit of legal advice; indeed, the variations were drafted by lawyers.

This argument was rightly rejected by the Chief Justice. I do not propose to deal with it except to say that in my view this appeal is concerned with an express forfeiture clause relating to $260,000, in which event it matters not whether the payment of $235,000 was expressed as "a deposit" or "a further payment" or "a part-payment." Indeed, if the amount were a deposit, a forfeiture clause would be wholly unnecessary and its inclusion would be the clearest and most cogent indication that the parties regarded the £235,000 as a part-payment and not a deposit. It is trite law that deposits are liable to be forfeited in the event of non-completion by the purchaser, while sums paid as part-payment are not. Like the learned Chief Justice, I would hold that but for the forfeiture clause the amount of $235,000 would not be liable to forfeiture. However, for reasons which will emerge here-

after in this judgment, I am impelled to differ from his conclusion that the sum is at all refundable.

In construing the original agreement and the two variations, I accept it as settled law that contract documents must be read as a whole—

> "in order to ascertain the true meaning of [their] several clauses, and the words of each clause must be so interpreted as to bring them into harmony with the other provisions of the instrument, if that interpretation does no violence to the meaning of which they are naturally susceptible" (see *Halsbury's Laws of England*, 3rd ed., para. 638, at 389).

So that although cl. 10 is now the focus of our attention in the interpretation of its meaning to derive the intention of the parties, all the other clauses so far as they bear on the matter must be harmonised so that a reasonable result is attained.

Clause 10 of the second variation agreement stipulated forfeiture in the case of non-completion by September 1st, 1979 on the part of the purchaser. That clause, however, does not stand alone. When the first variation agreement was made, it amended the original agreement as regards the completion date by stipulating a date 14 days after the approval of the necessary licences. At the time of the second variation agreement, which itself again extended the completion date, there was included a term which required that the new completion date was subject to the stipulation just set out. The effect of this stipulation was that it governed any construction of cl. 10. The completion date by the time of the second variation was now any date between July 1st, 1979 and September 1st subject to the provisions regarding the approval of all licences. It is worth noting that the first variation provided for what should occur if licences were still outstanding at September 1st, 1979.

What did occur, as the Chief Justice found, was that all licences had been obtained by the end of June. Completion should have taken place to accord with the agreement on July 1st or 14 days after the approval of all licences. When the several variations were drafted, no one presumably knew when the licences would be approved. Once, however, the licences had been approved by the end of June, September 1st,. 1979 no longer remained as a date for completion. Indeed, the parties met on July 3rd, 1979 to complete, July 1st being a *dies non.* The plainest evidence of a party's intention is to be inferred usually from his actions. According to the evidence, at the purchaser's suggestion com-

pletion was set for 2.15 p.m. on July 3rd, 1979. At this meeting the purchaser intimated that he was unable to complete. He also put forward another purchaser in his stead. The vendor wrote subsequently to the purchaser rescinding the agreement for sale and advised that the $260,000, *i.e.* $25,000 paid as a deposit and the further sum of $235,000, was forfeited.

I have detailed these facts because the Chief Justice found that the impugned clause did not provide for the events which occurred. He expressed himself in this way:

> "What item 10 provides for is the contingency: (a) all licences have been granted by not later than September 1st, 1979; and (b) failure of the plaintiff to complete by September 1st, 1979.
>
> What in fact happened was:
>
> (a) all licences had been granted by not later than September 1st, 1979 (indeed, before June 30th, 1979); and
>
> (b) rescission of the agreement by the defendant by letter of August 1st, 1979, the termination being accepted by the plaintiff by letter of August 10th, 1979, thereby putting an end to any right or possibility of the plaintiff completing between the date of the rescission and September 1st, 1979 specified in item 10."

The judge in setting out his conclusion of law said this:

> "By rescinding the agreement the defendant put an end to the operation of a provision (item 10) which would have operated in the defendant's favour had rescission been deferred to a date after September 1st, 1979 and completion had not taken place by that date. The item clearly envisaged the possibility of completion on a date not later than September 1st, 1979, the licences having been obtained some time before that date. It provides for failure to complete by that date. In those circumstances only is the whole sum of $260,000 payable to them. It was the defendant's own action of rescission which deprived the plaintiff of the right, by completing on a date not later than September 1st, 1979, to save forfeiting the $260,000. Whether the defendant's action was justified (as it was) or not is immaterial. Likewise, whether the plaintiff could have completed between the date of the rescission and September 1st, 1979 is immaterial. The defendant's own act put an end to the operation of the contingent provisions of item 10."

With all respect to the learned judge, I am quite unable to accept this analysis as valid. I am of the opinion that in construing cl. 10 scant attention was paid to cl. 1 of the first variation or to cl. 1 of the second variation which itself was expressly made subject to the former. In other words, the contract documents were not read as a whole.

The contract, in my view, contemplated completion on September 1st, 1979, if, and it would seem only if, the licences had been approved 14 days before September 1st. In the event that the licences were not approved prior to September 1st, then by cl. 2(a) either party had the right to cancel the agreement, in which case all deposits were refundable to the purchaser, except that, if by August 15th, 1979 any licences were outstanding, the purchaser had the right to waive his right to terminate.

Attention should also be called to cl. 8 of the second variation agreement which provided for the repayment of $1.02m., being the earlier payments amounting to $260,000 and the further sum which was required to be paid by June 1st in escrow to the purchaser, in the event that any of the licences required to be obtained were still outstanding. It was thus plain that the whole agreement was conditional on the approval of the necessary licences on some date not being later than September 1st, 1979. In the event, the licences were approved by the end of June.

It is difficult to understand how September 1st could then remain a date for completion, having regard to the provisions of the agreement read as a whole. The purchaser would not be entitled in the circumstances which occurred to wait until September 1st to pay the balance of the purchase price nor would the vendor be required to wait until that date. Plainly the reason why July 1st, or in the event July 3rd, was the appropriate date for completion was because, the licences having been obtained, cl. 1 of the second variation agreement stipulated as at May 31st, 1979, that completion was extended expressly to July 1st, 1979.

The situation which came about was therefore this: All the licences had been approved by the end of June 1979 and completion which should have taken place in accordance with the express terms of the agreement on July 1st, 1979 (really July 3rd, 1979), *i.e.* on or before September 1st, had not resulted. Thus the respondent had not completed by September 1st. He could not have done so. Not only had his representatives stated that they could not complete on the relevant date but they had substituted

or rather put forward another prospective purchaser. The respondent had been guilty of a fundamental breach and this relieved the appellant of any further obligation to perform what he had, for his part, undertaken. If delaying until September 1st was regarded as an obligation under the contract, then the appellant was relieved of waiting until September 1st. But I do not rest my decision on any such view of the law.

This clause, if given its ordinary grammatical meaning and if read together with the other clauses to which attention has been called, makes it plain that completion was to take place not *on* September 1st but *by* September 1st. There is a clear distinction between the two. The respondent did not complete by September 1st. More importantly, there was the significant finding that he could not have done so. The conduct of the respondent's representatives demonstrated beyond a peradventure an implied repudiation of the contract. There was not the least likelihood of the respondent performing any further obligations under the contract. It seems to me highly unreal and artificial to hold, as the Chief Justice did, that "the defendant's [appellant's] own act put an end to the operation of the contingent provisions of item 10." It is not in the least improbable that had the appellant delayed until September 1st, 1979, it would have been urged against him that, time being of the essence, July 1st had passed, and accordingly the respondent had waived the provisions in the original agreement which made time of the essence.

In my judgment there is nothing ambiguous about the clause which would require the *contra proferentem* rule to be invoked. All the licences had been obtained before September 1st and completion accordingly should have taken place before September 1st, not on September 1st. The circumstances for which the clause provided had occurred and accordingly the forfeiture sanction operated. I cannot agree that by rescinding the agreement, the appellant put an end to the operation of cl. 10. Where there has been a fundamental breach, as occurred in this case, the contract is not put out of existence; further performance of the agreement ceases. Clause 10 could not fairly be said to call for any further performance. The clause merely prescribed the measure of the liability for damages. It would be more accurate to say that the respondent by his own act, *viz.* failing to complete by September 1st, enabled the forfeiture term to become operational: see *Heyman* v. *Darwins Ltd.* (9).

In sum, I would hold that the learned Chief Justice's construction of cl. 10 failed to harmonise the other relevant clauses in the agreement with cl. 10. His interpretation plainly ignored these other provisions and treated cl. 10 as if it stood alone in the agreement. In this, in my judgment, his conclusions cannot be supported.

The next question is whether, granted the forfeiture clause holds good, there can be relief against this forfeiture. Mr. Alberga for the respondent submitted that the amount forfeited was in the nature of a penalty because no damage had been suffered and equity granted relief against forfeiture. It should be pointed out at once that the amount involved was approximately 1/10 of the purchase price, a figure which usually represents the deposit in sale of land transactions. I am not persuaded that this sum could be regarded as a penalty. But the argument advanced by Mr. Alberga fails for a more fundamental reason. There is a clear distinction between penalty cases, strictly so called, and forfeiture cases, such as the instant case. Lord Denning, M.R. in *Stockloser* v. *Johnson* (23) said this ([1954] 1 Q.B. at 448–489):

> " . . . [W]hen one party seeks to exact a penalty from the other, he is seeking to exact payment of an extravagant sum either by action at law or by appropriating to himself moneys belonging to the other party, as in *Commissioner of Public Works* v. *Hills* . . . . The claimant invariably relies, like Shylock, on the letter of the contract to support his demand, but the courts decline to give him their aid because they will not assist him in an act of oppression: see the valuable judgments of Somervell and Hodson L.JJ. in *Cooden Engineering Co.* v. *Stanford* . . . .
>
> In the present case, however, the seller is not seeking to exact a penalty. He only wants to keep money which already belongs to him. The money was handed to him in part payment of the purchase price and, as soon as it was paid, it belonged to him absolutely. He did not obtain it by extortion or oppression or anything of that sort, and there is an express clause—a forfeiture clause, if you please—permitting him to keep it. It is not the case of a seller seeking to enforce a penalty, but a buyer seeking restitution of money paid. If the buyer is to recover it, he must, I think, have recourse to somewhat different principles from those applicable to penalties, strictly so called."

Two of their Lordships adhered to the view that equity could intervene in certain circumstances to grant relief against a clause such as cl. 10. It is perhaps not without some significance that this view was held by two common law judges, Lord Denning, M.R. and Somervell, L.J., while Romer, L.J., an equity judge, maintained that there is no equity in favour of a purchaser who has failed to complete his contract through no fault of the vendor. It is quite unnecessary to determine which school of thought should prevail, for the reason that the conditions which the majority considered as applicable in the grant of relief can afford no help to the purchaser in this appeal.

According to Lord Denning (*ibid.*, at 490):

> "Two things are necessary: first, the forfeiture clause must be of a penal nature, in this sense, that the sum forfeited must be out of all proportion to the damage, and secondly, it must be unconscionable for the seller to retain the money."

The deposit of 10% of the purchase price is, as already noted, usual and normal. The damage which a vendor suffers in the normal course of events on non-completion is the loss of his bargain: the full purchase price has not been paid. The 10% which, as a deposit, becomes automatically forfeited," has always been accepted as reasonable in the trade. That acceptance the court could hardly fail to recognise and give effect to. For the same reasons, it can hardly be said with any degree of candour that an amount of 10% of the purchase price which is the amount customarily paid in sale of land transactions would be unconscionable for the vendor to retain. Equity will not come to succour the respondent in this case.

It is for these reasons that I concurred in the order of the President that the appeal should be allowed with costs both here and below.

ROBINSON, P. concurred with the judgment of **CAREY, J.A.**

Appeal allowed.

EXHIBIT 7

[COURT OF APPEAL.]

C. A.

1961
Oct. 30, 31;
Nov. 1, 2, 6;
Dec. 20.

Sellers,
Upjohn and
Diplock L.JJ.

HONGKONG FIR SHIPPING CO. LTD. *v.* KAWASAKI KISEN KAISHA LTD.

[1957 H. No. 2571.]

Shipping—Charterparty—Seaworthiness—Condition precedent, whether—Time charter—Vessel unseaworthy by reason of inadequate engine room staff—Breakdowns and delays—Vessel off hire for 5 *out of* $13\frac{1}{2}$ *weeks—Further* 15 *weeks required for repairs—Whether charterers entitled to rescind—Whether charter frustrated.*

Contract—Condition or warranty—Intermediate stipulation—Undertaking, character of depending on nature of breach—Carriage by sea—Undertaking of seaworthiness.

Contract — Frustration — Charterparty — Time charter — Delay — Time necessary to make vessel seaworthy.

Ships' Names—Hongkong Fir.

By a time charterparty, dated December 26, 1956, shipowners let and charterers hired the m.v. *Hongkong Fir*, built in 1931, for a period of 24 calendar months " . . . she being in every way fitted for "ordinary cargo service. . . ." Clause 3 of the charterparty provided that the owners should " . . . maintain her in a thoroughly "efficient state in hull and machinery during service. . . ." The vessel was delivered to the charterers on February 13, 1957, and on that day sailed in ballast from Liverpool to Newport News, Virginia, to pick up a cargo of coal and carry it to Osaka. The vessel's machinery was in reasonably good condition at Liverpool but by reason of its age needed to be maintained by an experienced, competent, careful and adequate engine room staff. When she sailed the chief engineer was inefficient and addicted to drink, and the engine room complement insufficient, and, chiefly for that reason, there were many serious breakdowns in the machinery. On the voyage from Liverpool to Osaka she was at sea eight and a half weeks, off hire for about five weeks and had about £21,400 spent on her for repairs. She reached Osaka on May 25 when a further period of about 15 weeks and an expenditure of £37,500 were required to make her ready for sea. In June, 1957, the charterers repudiated the charterparty: they had no reasonable grounds for thinking that the owners would be unable to make her seaworthy by mid-September, at the latest, and in fact the vessel sailed from Osaka on September 15 with an adequate and competent engine room staff and was then admittedly in all respects seaworthy. In an action by the owners for damages for wrongful repudiation of the charterparty in which the charterers contended, inter alia, that they were entitled to repudiate by reason of breach by the owners of their obligation to deliver a seaworthy vessel and that the charterparty was frustrated by the delays and breakdowns, Salmon J. held that although the shipowners were in breach of their obligation to deliver a seaworthy ship, seaworthiness was not a condition precedent to their rights under the charterparty and, as the charterparty had not been frustrated, they were entitled to damages. On appeal by the charterers:—

Held, (1) that, although the shipowners were admittedly in breach of clause 1 of the charterparty, the vessel being unseaworthy on delivery by reason of an insufficient and incompetent engine room staff, seaworthiness was not a condition of the charterparty a

breach of which entitled the charterer at once to repudiate (post, pp. 485, 487).

Havelock v. *Geddes* (1809) 10 East 555; *Davidson* v. *Gwynne* (1810) 12 East 381; *Tarrabochia* v. *Hickie* (1856) 1 H. & N. 183 and *Kish* v. *Taylor* [1912] A.C. 604; 28 T.L.R. 425, H.L. applied.

Dictum of Lord Atkinson in *Kish* v. *Taylor*, supra, p. 617 doubted.

Observations of Bramwell B. in *Tarrabochia* v. *Hickie*, supra, p. 188 considered.

Per Diplock L.J. The express or implied obligation of seaworthiness is neither a condition nor a warranty but one of that large class of contractual undertakings one breach of which might have the effect ascribed to a breach of "condition" under the Sale of Goods Act, 1893, and a different breach of which might have only the same effect as that ascribed to a breach of "warranty" (post, p. 495).

Jackson v. *Union Marine Insurance Co. Ltd.* (1874) L.R. 10 C.P. 125 considered.

(2) That the delays caused by the breakdowns and repairs were not so great as to frustrate the commercial purpose of the charterparty; and that, accordingly, the charterers' claim failed and the appeal must be dismissed (post, pp. 485, 489, 495).

Universal Cargo Carriers Corporation v. *Citati* [1957] 2 Q.B. 401; [1957] 2 W.L.R. 713; [1957] 2 All E.R. 70 approved and applied.

Per Upjohn L.J. It is open to the parties to a contract to make a particular stipulation a condition, but where, upon the true construction of the contract, they have not done so, it would be unsound and misleading to conclude that, being a warranty, damages is a sufficient remedy. The remedies open to an 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. As the stipulation as to seaworthiness is not a condition in the strict sense, the question is whether the unseaworthiness found by the judge went so much to the root of the contract that the charterers were entitled then and there to treat the charterparty as at an end. It could not be so treated and, accordingly, on that part of the case the charterer failed (post, pp. 488, 489).

Decision of Salmon J. [1961] 2 W.L.R. 716; [1961] 2 All E.R. 257 affirmed.

APPEAL from Salmon J.[1]

In December, 1956, the plaintiff shipowners, the Hongkong Fir Shipping Co. Ltd., a company registered in Hongkong, bought the m.v. *Antrim*, 5,395 tons gross, built in 1931, for £397,500 from the Avon Shipping Company Ltd., a subsidiary of the New Zealand Shipping Company Ltd. In the contract of sale the vessel was described as "classed at Lloyds 100 A1. Special "Survey passed July, 1955," and the contract provided that the vessel was to be delivered with its class maintained and that she should be taken with all faults and errors of description, but subject otherwise to the provisions of the contract. By a Baltime 1939 "uniform" time charter, dated December 26, 1956, the plaintiffs chartered the vessel to the defendants, Kawasaki Kisen Kaisha Ltd. a company registered in Japan. That charter, so far

[1] [1961] 2 W.L.R. 716; [1961] 2 All E.R. 257.

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as material provided: "It is this day mutually agreed between "Hongkong Fir Shipping Co. Ltd., Hongkong, owners of the "Vessel called 'Antrim' to be renamed 'Hongkong Fir' . . . "classed Lloyds 100 A1 and fully loaded capable of steaming about "12½ knots in good weather and smooth water . . . and Messrs. "Kawasaki Kisen Kaisha Ltd., Kobe, Japan:

"1. The owners let, and the charterers hire the vessel for a "period of 24 (with one month more or less at charterers' option) "calendar months from the time . . . the vessel is delivered and "placed at the disposal of the charterers at Liverpool . . . she "being in every way fitted for ordinary cargo service. The vessel "to be delivered not earlier than February 1, 1957 . . . 3. The "owners to provide and pay for all provisions and wages, for "insurance of the vessel, for all deck and engine-room stores and "maintain her in a thoroughly efficient state in hull and machinery "during service . . . 6. The charterers to pay as hire: 47s. per "deadweight ton on vessel's deadweight of 9,131 tons per 30 "days, commencing in accordance with clause 1 until her "redelivery to the owners. . . .

"11. (A) In the event of drydocking or other necessary "measures to maintain the efficiency of the vessel, deficiency "of men or owners' stores, breakdown of machinery, damage "to hull or other accident, either hindering or preventing the "working of the vessel and continuing for more than 24 con- "secutive hours, no hire to be paid in respect of any time lost "thereby during the period in which the vessel is unable to per- "form the service immediately required. Any hire paid in "advance to be adjusted accordingly . . . 12. Overhauling of "machinery whenever possible to be done during service, but "if impossible the charterers to give the owners necessary time "for overhauling. Should the vessel be detained beyond 48 hours "hire to cease until again ready. 13. The owners only to be "responsible for delay in delivery of the vessel or for delay "during the currency of the charter and for loss or damage to "goods on board, if such delay or loss has been caused by want "of due diligence on the part of the owners or their manager in "making the vessel seaworthy and fitted for the voyage or any "other personal act or omission or default of the owners or their "manager or their servants . . . 23. Any dispute arising under "the charter to be referred to arbitration in London . . . 32. "Any off-hire time by reason obtained in clause 11, charterers' "option to add off-hire time to vessel's period under this charter. "And such option to be declared one week after vessel is on hire "again before expiration of this charterparty. . . . 44. This "charterparty is also subject to the vessel being taken over by "Messrs. Hongkong Fir Shipping Co., Ltd, in Liverpool, "according to purchase agreement."

The vessel was delivered to and placed at the disposal of the charterers on February 13, 1957, and sailed in balast from Liverpool at 6 p.m. on that day on her intended voyage to Newport

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News, Virginia, there to pick up a cargo of coal and carry it to Osaka, Japan, which she was expected to reach in about two months, calling on the way at Cristobal in the Panama Canal Zone. The Atlantic crossing was stormy, but by no means exceptional for the time of year. She arrived at Newport News on February 28 where she loaded her cargo, and was off hire for 1 day 19 hours for repairs to her main engine attached pumps costing £1,180. She left Newport News on March 6 and arrived at Cristobal on March 15, having met with two serious accidents on the way. At Cristobal she was off hire for about 11 days. £8,220 was there spent in repairs, chiefly to No. 5 and No. 8 engines, and also to the bilge and general service pumps. The vessel left Cristobal on March 26 en route for Osaka. She sustained another accident to one of the engines (No. 5) on March 31, and also had a major breakdown of the scavenge pump on April 2. Temporary repairs were carried out to the scavenge pump at sea, but they would not have enabled her to cross the Pacific safely. Accordingly, she made for San Pedro, near Los Angeles, where she arrived on April 14. There she was off hire for about 22 days 16 hours, and a further £12,000 was spent on repairs. She left San Pedro on April 29 and eventually arrived at Osaka on May 25. It was there discovered that her main engine and auxiliaries were in a very bad state, due chiefly to corrosion. A further £37,500 was spent on repairs and she was not ready to put to sea until September 15. Thus, between Liverpool and Osaka she was at sea for about eight and a half weeks, off hire for about five weeks, and had £21,400 spent upon her for repairs. Whilst at Osaka a further period of about 15 weeks and an expenditure of £37,500 were required to make her ready for sea.

Meanwhile, on June 6, 1957, the charterers had written to the shipowners cancelling the charterparty because of the delay due, they alleged, to the unseaworthiness of the vessel and claiming damages for breach of contract. On August 8, 1957, the shipowners intimated that the cancellation was unjustifiable and said that they would treat it as a wrongful repudiation by the charterers of the charterparty and hold them liable in damages. The vessel was offered to the charterers as available to come on hire after the repairs in early September, 1957, but on September 11 the charterers again wrote repudiating the charterparty and the owners formally accepted that repudiation on September 13, 1957, so that by that date, if not before, the charterparty was at an end.

On November 8, 1957, the shipowners issued a writ against the charterers claiming damages for wrongful repudiation of the charterparty. By their defence the charterers, relying on clauses 1, 3, 11 and 13 of the charterparty, claimed that the shipowners were in breach of or had repudiated the charterparty in that the vessel was upon delivery at Liverpool unseaworthy and/or not fitted for ordinary cargo service; that they had failed to exercise due diligence to make the vessel seaworthy and fitted for the ballast voyage from Liverpool to Newport News and/or the voyage in

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cargo from Newport News to Osaka; that the description in the charterparty of the vessel's steaming capability was inaccurate. Further or alternatively, they claimed that the vessel was upon delivery at Liverpool or alternatively thereafter became unseaworthy and the shipowners had failed to take reasonable steps within a reasonable time to put her in a thoroughly efficient state; further or alternatively that the condition of the vessel's machinery was such that she could not be rendered seaworthy and/or fitted for ordinary cargo service and/or put into a thoroughly efficient state in respect of her machinery within a reasonable time or alternatively within such time as would not frustrate the commercial purpose of the charterparty. Alternatively, they claimed that the charterparty was frustrated prior to about August 12, 1957, or alternatively, prior to about September 13, 1957, by reason of the breakdowns and repairs and/or the delays consequent thereon.

At the hearing of the action Salmon J. rejected the charterers' allegation that the vessel's machinery was inefficient and defective and that the vessel was in that respect unseaworthy on delivery at Liverpool. He found that the vessel's machinery was in reasonably good condition on delivery at Liverpool but, by reason of its age, needed to be maintained by an experienced, competent, careful and adequate engine room staff, and held that the engine room staff was incompetent and insufficient and that in that respect the vessel was unseaworthy when handed over and on leaving Liverpool and throughout the voyage to Osaka where she was restaffed so as to fulfil completely her requirements. On delivery at Liverpool she had five engineers, three fitters and seven greasers whereas the previous owners had employed seven engineers and eight ratings, most of whom had been familiar with the machinery while those who sailed from Liverpool were new to it. If the staff on delivery had all been competent and efficient all might have been well notwithstanding the numerical deficiency of officers, but the chief engineer was addicted to drink and repeatedly neglected his duties. He found that the causes of the breakdowns and delays were as stated by the consulting engineer acting for the owners on taking over the vessel: "The engine room executive "appeared to lack the necessary experience and/or perspicacity "normally expected of them and in consequence the machinery "was deprived of the care and attention which it would otherwise have been afforded . . . the adverse condition of the "machinery disclosed . . . on the completion of the voyage is "attributable in part to heavy weather and in part to progressive "negligence through a combination of what appears to have been "gross dereliction of duty and inexperience on the part of the "engine room personnel." He held that the shipowners were in breach of their obligations under clause 1 of the charterparty to deliver a seaworthy ship and of the obligation under clause 3 to maintain the vessel in a thoroughly efficient state in hull and machinery and that they had not exercised due diligence and could not escape liability under clause 13 of the charterparty, but that

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the obligation to deliver a seaworthy ship was not a condition precedent to a shipowner's rights under a charterparty, and breach of that obligation did not by itself allow a charterer to escape liability under the charter unless the delays involved in making the vessel seaworthy were, or appeared likely at the date of the repudiation to be, so great as to frustrate the commercial purpose of the charter; that the charterparty had not been frustrated by the delays which had occurred and that the shipowners, accordingly, were entitled to damages.

The charterers appealed on the grounds, inter alia, that the judge had misdirected himself in holding that the shipowners' obligation under clause 1 to provide a competent and sufficient engine room staff for the vessel was not a condition the breach of which entitled the charterers to treat the shipowners as in repudiation of the charterparty; that the judge ought to have held that the charterparty had been repudiated by the shipowners by their failure to provide and/or by their failure to exercise due diligence to provide a competent or sufficient engine room staff for the vessel and/or by reason of the fact that the vessel's machinery became in consequence of such failure so defective that the vessel could not be made seaworthy within a reasonable time of her entry upon the chartered service or alternatively within a reasonable time of her arrival at Osaka or alternatively within such time as would not have frustrated the commercial purpose of the charterparty.

Ashton Roskill Q.C., *Basil Eckersley* and *Brian Davenport* for the charterers.

Stephen Chapman Q.C., *Michael Kerr Q.C.* and *C. S. Staughton* for the shipowners.

The following cases were cited in argument: *Bradford* v. *Williams* [2]; *Jackson* v. *Union Marine Insurance Co. Ltd.* [3]; *Geipel* v. *Smith* [4]; *Davis Contractors Ltd.* v. *Fareham Urban District Council* [5]; *Freeman* v. *Taylor* [6]; *Mount* v. *Larkins* [7]; *Clipsham* v. *Vertue* [8]; *Tarrabochia* v. *Hickie* [9]; *McAndrew* v. *Chapple* [10]; *Stanton* v. *Richardson* [11]; *Tully* v. *Howling* [12]; *Inverkip Steamship Co. Ltd.* v. *Bunge* [13]; *Compania Cantabrica de Navegacion* v. *Anglo-American Oil Co.* [14]; *"Snia" Societa di Navigazione Industria e Commercio* v. *Suzuki & Co.* [15]; *Universal Cargo Carriers Corporation* v. *Citati* [16]; *Lyon* v. *Mells* [17]; *Havelock* v. *Geddes* [18]; *New*

[2] (1872) L.R. 7 Ex. 259.
[3] (1874) L.R. 10 C.P. 125.
[4] (1872) L.R. 7 Q.B. 404.
[5] [1956] A.C. 696; [1956] 3 W.L.R. 37; [1956] 2 All E.R. 145, H.L.
[6] (1831) 8 Bing. 124.
[7] (1831) 8 Bing. 108.
[8] (1843) 5 Q.B. 265.
[9] (1856) 1 H. & N. 183.
[10] (1866) L.R. 1 C.P. 643.
[11] (1874) L.R. 9 C.P. 390.
[12] (1877) 2 Q.B.D. 182, C.A.
[13] [1917] 2 K.B. 193, C.A.
[14] (1923) 16 Ll.L.R. 235.
[15] (1923) 17 Ll.L.R. 78.
[16] [1957] 2 Q.B. 401; [1957] 2 W.L.R. 713; [1957] 2 All E.R. 70.
[17] (1804) 5 East 428.
[18] (1809) 10 East 555.

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York and Cuba Mail Steamship Co. v. *Erikson and Christensen* [19]; *Embiricos* v. *Sydney Reid & Co.* [20]; *The Europa* [21]; *Hain Steamship Co.* v. *Tate & Lyle Ltd.* [22]; *Kish* v. *Taylor* [23]; *Atlantic Shipping & Tradng Co.* v. *Dreyfus & Co.* [24]; *Smeaton Hanscomb & Co. Ltd.* v. *Sassoon I. Setty Son & Co.* [25]; *Pordage* v. *Cole* [26]; *Yeoman Credit* v. *Apps* [27]; *Boone* v. *Eyre* [28]; *Ritchie* v. *Atkinson* [29]; *Davidson* v. *Gwynne* [30]; *Heilbutt* v. *Hickson* [31]; *Bettini* v. *Gye* [32]; *Poussard* v. *Spiers and Pond* [33]; *Inman Steamship Co. Ltd.* v. *Bisschof* [34]; *Bentsen* v. *Taylor Sons & Co. (No. 2)* [35]; *Reardon Smith Line Ltd.* v. *Ministry of Agriculture, Fisheries & Food* [36]; *Port Line Ltd.* v. *Ben Line Steamers Ltd.* [37]; *Steel* v. *State Line Steamship Co.* [38]; *British & Benningtons Ltd.* v. *North Western Cachar Tea Co.* [39]

Cur. adv. vult.

Dec. 20. The following judgments were read.

SELLERS L.J. stated the facts and continued: During the currency of the charterparty the freight market had fallen steeply with the result that the judgment awarded the shipowners £184,743 damages.

There is no doubt that there were prolonged and aggravating delays due to breaches of contract by the shipowners, and at the outset of his argument counsel for the charterers relied strongly on the judge's findings of fact, which he submitted clearly showed the extent and the nature of the shipowners' breaches of contract and justified the charterers in terminating the charterparty.

The judge did not accept the charterers' allegations that the vessel's machinery was inefficient and defective and that the vessel was in that respect unseaworthy on delivery at Liverpool. From that finding there is no appeal, but it has been emphasised that although Salmon J. held that the diesel engines and other machinery were in reasonably good condition on February 13, 1957, he found that by reason of their age the engines needed to be maintained by an experienced, competent, careful and adequate engine room staff. It was held, however, and this has been

[19] (1922) 27 Com.Cas. 330.
[20] [1914] 3 K.B. 45; 30 T.L.R. 451.
[21] [1908] P. 84; 24 T.L.R. 151, D.C.
[22] (1936) 52 T.L.R. 617; [1936] 55 Lloyd's Rep. 159; [1936] 2 All E.R. 597, H.L.
[23] [1912] A.C. 604; 28 T.L.R. 425, H.L.
[24] [1922] 2 A.C. 250; 38 T.L.R. 534, H.L.
[25] [1953] 1 W.L.R. 1468; [1953] 2 All E.R. 1471.
[26] (1669) 1 Wm.Saund. 319.
[27] [1961] 3 W.L.R. 94; [1961] 2 All E.R. 281, C.A.
[28] (1789) 1 Hen.Bl. 273.
[29] (1808) 10 East 295.
[30] (1810) 12 East 381.
[31] (1872) L.R. 7 C.P. 438.
[32] (1876) 1 Q.B.D. 183.
[33] (1876) 1 Q.B.D. 410.
[34] (1882) 7 App.Cas. 670, H.L.
[35] [1893] 2 Q.B. 274; 9 T.L.R. 552, C.A.
[36] [1962] 1 Q.B. 42; [1961] 3 W.L.R. 110; [1961] 2 All E.R. 577, C.A.
[37] [1958] 2 Q.B. 146; [1958] 2 W.L.R. 551; [1958] 1 All E.R. 787.
[38] (1877) 3 App.Cas. 72, H.L.
[39] [1923] A.C. 48, H.L.

unchallenged by the shipowners in this appeal, that the engine room staff was incompetent and insufficient and in this respect the vessel was unseaworthy when handed over and on leaving Liverpool and throughout the voyage to Osaka where she was re-staffed so as to fulfil completely her requirements. She had on delivery five engineers, three fitters and seven greasers. The previous owners had employed seven engineers and eight ratings, and the judgment finds the complement of the engine room staff insufficient. If they had all been competent and efficient all might have been well notwithstanding the numerical deficiency of officers, but the chief engineer was addicted to drink and repeatedly neglected his duties. Incompetence stands out conspicuously in the events in the engine room which led to delays, and it is not surprising that the judgment finds that the owners were in breach of the obligations under clause 1 of the charter. The same facts and findings, he held, established a breach of the obligation under clause 3 of the charter to maintain the vessel in a thoroughly efficient state in hull and machinery. Although the judge recognised the difficulty of obtaining skilled officers and men for the engine room he found that the shipowners had not exercised due diligence and that they could not escape liability under clause 13 of the charterparty.

The charterers' position was alleviated somewhat by the vessel becoming off-hire under clause 11A from time to time and the duration of the charterparty could have been extended by the charterers under clause 32 by adding the off hire time to the period of the charter.

The judgment found against the charterers' contention that the delays frustrated the commercial purpose of the contract and this contention was not pressed before us. This is not a case of frustration of contract but it was submitted that the delay due to breach of contract by the shipowners was sufficient to entitle the charterers as innocent parties, that is, in no way to blame for what had happened, to have regard to their interests under the contract and that it was just in all the circumstances that they should be held free to terminate as they did.

The two main issues of law arising on the findings, formulated by Mr. Ashton Roskill for the charterers, were: (1) Is the seaworthiness obligation a condition the breach of which entitles the charterers to treat the contract as repudiated? (2) Where in breach of contract a party fails to perform it, by what standard does the ensuing delay fall to be measured for the purpose of deciding whether the innocent party is entitled to treat the contract as repudiated? Is that standard (as the judgment holds) such delay as is necessary to frustrate the contract or is it, as the charterers contend, unreasonable delay, that is, longer time than it would be reasonable in all the circumstances for a charterer to wait?

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

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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. If, in the present case, the inadequacy and incompetence of the engine room staff had been known to them, the charterers could have complained of the failure by the shipowners to deliver the vessel at Liverpool in accordance with clause 1 of the charterparty and could have refused to take her in that condition. The vessel was to be delivered not earlier than February 1, 1957, and not later than March 31, 1957, apparently. No evidence was directed to the provision " to be " narrowed to twenty days within the month of January 1957," but even that clause, if invoked, would have given the shipowners a week in which to bring the engine room staff into suitable strength and competency for the vessel's " ordinary cargo service." If the shipowners had refused or failed so to do, their conduct and not the unseaworthiness would have amounted to a repudiation of the charterparty and entitled the charterers to accept it and treat the contract as at an end. The time of delivery is clearly a condition of the contract and has often been held to be so. Unless a shipowner could in those circumstances have relied on clause 13, a charterer in addition to cancellation would be entitled to damages, if any were suffered, which would not have been so apparently in this case as the freight market had fallen about that time.

If what is done or not done in breach of the contractual obligation does not make the performance a totally different performance of the contract from that intended by the parties, it is not so fundamental as to undermine the whole contract. Many existing conditions of unseaworthiness can be remedied by attention or repairs, many are intended to be rectified as the voyage proceeds, so that the vessel becomes seaworthy; and, as the judgment points out, the breach of a shipowner's obligation to deliver a seaworthy vessel has not been held by itself to entitle a charterer to escape from the charterparty. The charterer may rightly terminate the engagement if the delay in remedying any breach is so long in fact, or likely to be so long in reasonable anticipation, that the commercial purpose of the contract would be frustrated.

Mr. Roskill recognised the weight of authority against him in seeking to make seaworthiness a condition of the contract the

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breach of which, in itself, was to be regarded as fundamental so as to entitle a charterer to accept it as a repudiation of the charterparty and to regard the charterparty as terminated, and he relied more strongly on his second argument.

We were referred to the whole range of authorities from the early 19th century to the present day in support of both contentions, and the judgment in my opinion very clearly and fairly deals with many of them, applying some and distinguishing others. In *Bradford* v. *Williams*,[1] a case in which a ship's captain refused to load at the place stipulated for the month of September, 1871, but was willing to load at a port he was permitted to select prior to that month and it was held that the breach of the charterparty by the shipowner went to the root of the contract and the charterer was right in his refusal to load, Martin B. said [2] with much point "Contracts are so various in their terms that it is really "impossible to argue from the letter of one to the letter of another. "All we can do is to apply the spirit of the law to the facts of "each particular case. Now I think the words 'conditions "'precedent' unfortunate. The real question, apart from all "technical expressions, is: what in each instance is the substance "of the contract." Some ninety years later those words seem as apt as they then were when the authorities relied on were but a fraction of those which have accumulated in the ensuing years.

This case calls for consideration of the charterparty obligations and the respective rights of the parties only where the vessel has been accepted and used. Here the charterers had in fact, though with much delay, taken the vessel in ballast across the Atlantic, collected the contemplated cargo and carried it to the intended destination, Osaka, where it was discharged commencing on May 29, 1957. In these circumstances it is not open to the charterers to rely on the obligation of seaworthiness as a condition precedent to an obligation on the charterers to pay freight or hire.

In the early part of the last century, before a counterclaim could be raised against a plaintiff's claim, sustained efforts were made, in the problems which arose in the increasing overseas trade, to resist a shipowner's claim by alleging a condition precedent unfulfilled. In *Ritchie* v. *Atkinson* [3] it failed. Lord Ellenborough C.J. held that the delivery of a complete cargo was not a condition precedent to the recovery of freight and relied on the reasoning of Lord Mansfield in the well-known decision in *Boone* v. *Eyre*.[4] Just as the shortage of one negro could not defeat the whole contract which stipulated for a fixed number of negroes to be transferred, no more would the shortage of some cargo defeat a claim for freight.

The same principle was applied in respect of seaworthiness in *Havelock* v. *Geddes* [5] where Lord Ellenborough C.J. pointed out [6] that if the obligation of seaworthiness were a condition

[1] (1872) L.R. 7 Ex. 259.
[2] Ibid. 261.
[3] (1808) 10 East 295.
[4] (1789) 1 Hen.Bl. 273.
[5] (1809) 10 East 555.
[6] Ibid. 563.

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precedent the neglect of putting in a single nail after the ship ought to have been made tight, staunch, etc., would be a breach of the condition and a defence to the whole of the plaintiff's demand.

By 1810, in *Davidson* v. *Gwynne* [7] Lord Ellenborough C.J. was saying that it was useless to go over the same subject again "which has so often been discussed of late" and held the sailing with the first convoy was not a condition precedent, the object of the contract was the performance of the voyage and that had been performed.

Tarrabochia v. *Hickie* [8] emphasises the same principle and I think is of no less effect because it relates to a voyage charter. Pollock C.B. whose succinct judgment [9] provides a complete answer to the appellants' case, cites Lord Ellenborough C.J. in *Davidson* v. *Gwynne* [10] "that unless the non-performance alleged "goes to the whole root and consideration of it, the covenant "broken is not to be considered as a condition precedent, but as a "distinct covenant, for the breach of which the party injured may "be compensated in damages" unless by the breach of the stipulation of the fitness of the vessel the object of the voyage is wholly frustrated.

This decision was approved in *Stanton* v. *Richardson* [11] where the shipowner had undertaken to carry a cargo of wet sugar and the ship was not fit to carry it and, as the jury had found, could not be made fit in such time as not to frustrate the object of the voyage. The molasses had drained from the wet sugar into the hold in large quantities and the ship's pumps were unable to deal with it. The cargo was unloaded and the charterers were held entitled to refuse to reload it or to provide any other cargo. If the defect had been or could have been remedied within a reasonable time so as not to frustrate the adventure it would seem that the charterer's right would not have been to terminate the charterparty but to have claimed damages for any loss occasioned by the delay.

Kish v. *Taylor* [12] affirms that a contract of affreightment, in that case a voyage charter, is not put an end to by a breach of the stipulation of seaworthiness. The passage in Lord Atkinson's speech [13] on which the appellants relied—"The fact that a ship "is not in a fit condition to receive her cargo, or is from any cause "unseaworthy when about to start on her voyage, will justify the "charterer or holder of the bill of lading in repudiating his contract "and refusing to be bound by it"—does not undermine the principle applied in the case. It applies in terms to the commencement of the voyage and it was not relevant to the case to consider the extent and nature of the unfitness or the time and circumstances in which it could be rectified.

[7] (1810) 12 East 381.
[8] (1856) 1 H. & N. 183.
[9] Ibid. 187.
[10] 12 East 381.
[11] (1874) L.R. 9 C.P. 390, C.A.
[12] [1912] A.C. 604; 28 T.L.R. 425, H.L.
[13] [1912] A.C. 604, 617.

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Tully v. *Howling*,[14] although in favour of the charterer, gives no support to the appellants here whether it was decided on the ground of the majority that time was the essence of the contract and that the charterer who had a contract for twelve months' service was not bound to ten months' service, or, as Brett J. held on appeal,[15] that the ship was not fit for the purpose for which she was chartered and could not be made fit within any time which would not have frustrated the object of the adventure.

The argument for the appellants contrasted the decisions on deviation with those on unseaworthiness and submitted that the latter was at least as grave as the former. But deviation amounts to a stepping out of the contract, or may do, and as such it is a repudiation of it and a substitution of a different voyage or engagement.

The formula for deciding whether a stipulation is a condition or a warranty is well recognised; the difficulty is in its application. It is put in a practical way by Bowen L.J. in *Bentsen* v. *Taylor, Sons & Co.*[16]: "There is no way of deciding that question except "by looking at the contract in the light of the surrounding circum-"stances, and then making up one's mind whether the intention "of the parties, as gathered from the instrument itself, will best "be carried out by treating the promise as a warranty sounding "only in damages, or as a condition precedent by the failure to "perform which the other party is relieved of his liability."

In my judgment authority over many decades and reason support the conclusion in this case that 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.

The appellants' argument on the second submission in my judgment equally fails and is to be rejected on many of the authorities already cited.

It was submitted that the doctrine of frustration is quite independent of rights arising out of a breach of contract. If a party by his breach induces delay he cannot claim frustration which would have been self-induced. It was said that a delay which would frustrate a contract was not in the minds of the nineteenth-century judges and that their language permits of a lesser period of delay being sufficient to justify an innocent party from continuing with his bargain after a reasonable delay due to the breach of contract. Reliance was placed on the judgment of Tindal C.J. in *Freeman* v. *Taylor*[17] which upheld the verdict of a jury in a deviation case where the jury had answered in the affirmative the question whether the deviation was of such a nature and description as to deprive the freighter of the benefit of the contract

[14] (1877) 2 Q.B.D. 182, C.A.
[15] Ibid. 188.
[16] [1893] 2 Q.B. 274, 281; 9 T.L.R. 552, C.A.
[17] (1831) 8 Bing. 124.

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into which he had entered. It was submitted that that should be the question here and that it should be answered in favour of the charterers.

In *Universal Cargo Carriers Corporation* v. *Citati* [18] a similar argument was advanced by Mr. Ashton Roskill (then appearing for shipowners who had cancelled a voyage charterparty because no cargo had been provided) and he relied on passages in the line of cases which he cited to us here and the statement in Scrutton on Charterparties in the earlier editions. After reviewing the authorities, including *Clipsham* v. *Vertue*,[19] to which I have not previously referred, Devlin J. said that those authorities were conclusive and with that I respectfully agree and with the opinion which they support stated by the judge [20]: "But a party to a "contract may not purchase indefinite delay by paying damages. ". . . When the delay becomes so prolonged that the breach "assumes a character so grave as to go to the root of the contract, "the aggrieved party is entitled to rescind. What is the yard-"stick by which this length of delay is to be measured? Those "considered in the arbitration can now be reduced to two:" (as in the present appeal) "first, the conception of a reasonable "time, and secondly, such delay as would frustrate the charter-"party . . . in my opinion the second has been settled as the "correct one by a long line of authorities."

In my judgment Salmon J. was clearly right in the answers he gave to both of the contentions of the charterers relied on in this court, supported as the answers were by established authority and good commercial reason.

I would dismiss the appeal.

UPJOHN L.J. I agree entirely with the judgment which has just been delivered. I shall not recite any of the facts, and propose only to add a few words upon the two main submissions so meticulously argued before us by Mr. Ashton Roskill for the appellants.

Logically his first submission, as he recognised, was that the obligation to provide a seaworthy vessel was a condition for breach of which the charterer was at once entitled to treat the contract as repudiated.

The charterparty (which, incidentally, was dated December 26, 1956, though it is common ground that it must in fact have been executed some weeks later for the plaintiff company was not incorporated at that date) contained the seaworthiness clause in these terms: "She being in every way fitted for ordinary "cargo service." At first sight that would seem to be a basic term underlying the whole of the charterparty, for how could the vessel perform the tasks which the owners warranted that she was fit to perform unless she was in fact fit to meet the perils of the sea? So basic is this obligation in a charterparty that unless

[18] [1957] 2 Q.B. 401; [1957] 2 W.L.R. 713; [1957] 2 All E.R. 70.
[19] (1843) 5 Q.B. 265.
[20] [1957] 2 Q.B. 401, 430.

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there is an express clause of exclusion, it will be implied where not expressed.

Yet with all respect to Mr. Roskill's argument, it seems to me quite clear that the seaworthiness clause is not in general treated as a condition for breach of which the charterer is at once entitled to repudiate. This is established by a number of authorities over a long period of years and I mention them without quoting from them: *Havelock* v. *Geddes* [21]; *Tarrabochia* v. *Hickie* [22]; *Kish* v. *Taylor*.[23]

With regard to the last-mentioned case, Sellers L.J. has referred to certain observations in the speech of Lord Atkinson.[24] These words were, of course, strongly relied upon by Mr. Roskill to support his argument. In my judgment, either they must be regarded as made per incuriam, for they are quite inconsistent with the plain decision of the House in that case and with the speech of the same noble Lord on the previous page; or it is possible that his speech may have been misreported and that the phrase "will justify" should have read "*may* justify," a suggestion made by Diplock L.J. during the course of the argument.

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, to take examples from the judgments in some of the cases I have mentioned above, 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.

The classification of stipulations in a contract into conditions and warranties is familiar, and in connection with the sale of goods these phrases have statutory definition. These phrases, however, came into being in connection with the ancient system of pleadings before the Common Law Procedure Act, 1852, and when considering the remedies to which one party may be entitled for breach of a stipulation by the other the decision whether the stipulation is a condition or warranty may not provide a complete answer.

A condition, or a condition precedent, to give it its proper title under the old system of pleading, was a condition performance of which had to be averred by the plaintiff in the declaration in order to establish his claim against the defendant. It was decided in the great plantation case of *Boone* v. *Eyre*,[25] however, that it was only necessary to aver as a condition precedent a condition

[21] 10 East 555.
[22] 1 H. & N. 183.
[23] [1912] A.C. 604.
[24] Ibid. 617.
[25] 1 Hen.Bl. 273.

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which went to the whole consideration of both sides. The rule is, I think, best stated by Lord Ellenborough C.J. in *Davidson* v. *Gwynne* [26]: "The principle laid down in *Boone* v. *Eyre* [27] has "been recognised in all the subsequent cases, that unless the non-"performance alleged in breach of the contract goes to the whole "root and consideration of it, the covenant broken is not to be "considered as a condition precedent, but as a distinct covenant, "for the breach of which the party injured may be compensated in "damages."

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 is to be determined as a question of the proper interpretation of the contract. Bramwell B. in *Tarrabochia* v. *Hickie* [28] has warned against the dangers of too ready an implication of such a condition. He said [29]: "No doubt it is "competent for the parties, if they think fit, to declare in express "terms that any matter shall be a condition precedent, but when "they have not so expressed themselves, it is necessary for those "who construe the instrument to see whether they intended to "do it. Since, however, they could have done it, those who "construe the instrument should be chary in doing for them that "which they might, but have not done for themselves." Where, however, upon the true construction of the contract, the parties have not made a particular stipulation a condition, it would be unsound and misleading to conclude that, being a warranty, damages is 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 never 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

[26] 12 East 380, 389.
[27] 1 Hen.Bl. 273.
[28] 1 H. & N. 183.
[29] Ibid. 188.

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sounds in damages only. This is a question of fact fit for the determination of a jury.

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 Mr. Roskill necessarily fails.

I turn therefore to the second point: where there have been serious and repeated delays due to the inability of the owner to perform his part of the contract, is the charterer entitled to treat the contract as repudiated after a reasonable time or can he do so only if delays are such as to amount to a frustration of the contract? Some of my earlier observations on the remedy available for breach of contract are relevant here but I do not repeat them.

I agree with the conclusions reached by the judge and by my Lord. I think that Devlin J. came to clearly the right conclusion after an exhaustive review of the authorities in *Universal Cargo Carriers Corporation* v. *Citati*.[30] See also for a much earlier and very clear case *Clipsham* v. *Vertue*.[31] I only desire to add this. Apart altogether from authority, it would seem to be wrong to introduce the idea that the innocent party can treat the contract as at an end for delays which, however, fall short of a frustration of the contract. Subject to the terms of the contract, of course, neither contracting party can unilaterally withdraw from the contract. If, however, one party by his conduct frustrates the contract, the law says that the other party may treat the contract as at an end. For breaches of stipulation which fall short of that, the innocent party can only sue for damages. I do not see on principle how he can have some unilateral right to withdraw from the contract when the conduct of the other falls short of frustrating the contract. References in some of the earlier cases to reasonable time and so forth are readily explained by the fact that those words were used as synonymous with a frustrating time, that is to say a time by which the further commercial performance of the contract became impossible.

Mr. Roskill has not seriously urged that in the circumstances of this case the delays, serious though they were, were such as to amount to a frustration of the contract. I think, therefore, that his argument fails on this point also.

Accordingly, I agree that this appeal must be dismissed.

[30] [1957] 2 Q.B. 401.

[31] 5 Q.B. 265.

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DIPLOCK L.J. The contract, the familiar "Baltime 1939" charter, and the facts upon which this case turns have been already stated in the judgment of Sellers L.J., who has also referred to many of the relevant cases. With his analysis of the cases, as with the clear and careful judgment of Salmon J., I am in agreement, and I desire to add only some general observations upon the legal questions which this case involves.

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 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, marine insurance, contracts of affreightment evidenced by bills of lading and those between parties to bills of exchange, 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 performance of his own undertaking. 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 Mr. Ashton Roskill's 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

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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, probably ever since assumpsit emerged as a form of action distinct from covenant and debt and long before even the earliest cases which we have been invited to examine; but until the rigour of the rule in *Paradine* v. *Jane* [32] was mitigated in the middle of the last century by the classic judgments of Blackburn J. in *Taylor* v. *Caldwell* [33] and Bramwell B. in *Jackson* v. *Union Marine Insurance Co. Ltd.*[34] 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.

In the earlier cases before the Common Law Procedure Act, 1852, the problem tends to be obscured to modern readers by the rules of pleading peculiar to the relevant forms of action—covenant, debt and assumpsit—and the nomenclature adopted in the judgments, which were mainly on demurrer, reflects this. It was early recognised that contractual undertakings were of two different kinds: those collateral to the main purpose of the parties as expressed in the contract and those which were mutually dependent so that the non-performance of an undertaking of this class was an event which excused the other party from the performance of his corresponding undertakings. In the nomenclature of the eighteenth and early nineteenth centuries undertakings of the latter class were called " conditions precedent " and a plaintiff under the rules of pleading had to aver specially in his declaration his performance or readiness and willingness to perform all those contractual undertakings on his part which constituted conditions precedent to the defendant's undertaking for non-performance of which the action was brought. In the earliest cases such as *Pordage* v. *Cole* [35] and *Thorpe* v. *Thorpe* [36] the question whether an undertaking was a condition precedent appears to have turned upon the verbal niceties of the particular phrases used in the written contract and it was not until 1773 that Lord Mansfield, in the case which is a legal landmark, *Boone* v. *Eyre*,[37] swept away these arid technicalities. " The distinction," he said,[38] " is " very clear, *where mutual covenants go to the whole of the con-* " *sideration on both sides, they are mutual conditions, the one* " *precedent to the other.* But where they go only to a part, where " a breach may be paid for in damages, there the defendant has a " remedy on his covenant, and shall not plead it as a condition " precedent."

This too was a judgment on demurrer but the principle was the same when the substance of the matter was in issue. Other

[32] (1647) Aleyn 26.
[33] (1863) 3 B. & S. 826.
[34] (1874) L.R. 10 C.P. 125.
[35] (1669) 1 Wm.Saund. 319; 1 Sid. 423.
[36] (1701) 12 Mod. 455.
[37] 1 Hen.Bl. 273.
[38] Ibid.

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phrases expressing the same idea were used by other judges in the cases which have already been cited by Sellers L.J., and I would only add to his comments upon them that when it is borne in mind that until the latter half of the nineteenth century the only event that could be relied upon to excuse performance by one party of his undertakings was a default by the other party no importance can be attached to the fact that in occasional cases, and there may be others besides *Freeman* v. *Taylor*,[39] the court has referred to the object or purpose of the party not in default rather than to the object or purpose of the contract, for the relevant object or purpose of the party not in default is that upon which there has been a consensus ad idem of both parties as expressed in the words which they have used in their contract construed in the light of the surrounding circumstances.

The fact that the emphasis in the earlier cases was upon the breach by one party to the contract of his contractual undertakings, for this was the commonest circumstance in which the question arose, tended to obscure the fact that it was really the event resulting from the breach which relieved the other party of further performance of his obligations; but the principle was applied early in the nineteenth century and without analysis to cases where the event relied upon was one brought about by a party to a contract before the time for performance of his undertakings arose but which would make it impossible to perform those obligations when the time to do so did arrive: for example, *Short* v. *Stone* [40]; *Ford* v. *Tiley* [41]; *Bowdell* v. *Parsons*.[42] It was not, however, until *Jackson* v. *Union Marine Insurance Co. Ltd.*[43] that it was recognised that it was the happening of the event and not the fact that the event was the result of a breach by one party of his contractual obligations that relieved the other party from further performance of his obligations.

" There are the cases," said Bramwell B.,[44] " which hold that, " where the shipowner has not merely broken his contract, but " has so broken it that the condition precedent is not performed, " the charterer is discharged: . . . Why? Not merely because " the contract is broken. If it is not a condition precedent, " what matters it whether it is unperformed with or without " excuse? Not arriving with due diligence, or at a day named " is the subject of a cross-action only. But not arriving in time " for the voyage contemplated, but at such a time that it is " frustrated, is not only a breach of contract, but discharges the " charterer. And so it should, though he has such an excuse that " no action lies."

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

[39] 8 Bing. 124.
[40] (1846) 8 Q.B. 358.
[41] (1827) 6 B. & C. 325.
[42] (1808) 10 East 359.
[43] L.R. 10 C.P. 125.
[44] Ibid. 147.

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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*.[45] (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 the historical reasons which I have already mentioned and partly because Parliament itself adopted it in the Sale of Goods Act, 1893, as respects a 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 L.J. in *Bentsen* v. *Taylor Sons & Co.*[46] 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

[45] [1957] 2 Q.B. 401, 434.

[46] [1893] 2 Q.B. 274, 280; 9 T.L.R. 552, C.A.

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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.*[47] 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.

In 1874 when the doctrine of frustration was being foaled by "impossibility of performance" out of "condition precedent" it is not surprising that the explanation given by Bramwell B. should give full credit to the dam by suggesting that in addition to the express *warranty* to sail with all possible dispatch there was an implied *condition precedent* that the ship should arrive at the named port in time for the voyage contemplated. In *Jackson* v. *Union Marine Insurance Co. Ltd.*[47] there was no breach of the express warranty; but if there had been, to engraft the implied condition upon the express warranty would have been merely a more complicated way of saying that a breach of a shipowner's undertaking to sail with all possible dispatch may, but will not necessarily, give rise to an event which will deprive the charterer of substantially the whole benefit which it was intended that he should obtain from the charter. Now that the doctrine of frustration has matured and flourished for nearly a century and the old technicalities of pleading "conditions precedent" are more than a century out of date, it does not clarify, but on the contrary obscures, the modern principle of law where such an event *has* occurred as a result of a breach of an express stipulation in a contract, to continue to add the now unnecessary colophon "Therefore it was an implied *condition* of the contract that a particular kind of breach of an express *warranty* should not occur." The common law evolves not merely by breeding new principles but also, when they are fully grown, by burying their ancestors.

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

[47] L.R. 10 C.P. 125, 142.

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 Mr. Ashton Roskill's 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. The cases referred to by Sellers L.J. illustrate this and I would only add that in the dictum which he cites from *Kish* v. *Taylor* [48] it seems to me from the sentence which immediately follows it as from the actual decision in the case and the whole tenor of Lord Atkinson's speech itself that the word "will" was intended to be "may."

What the 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, 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.

One turns therefore to the contract, the Baltime 1939 charter, of which Sellers L.J. has already cited the relevant terms. Clause 13, the "due diligence" clause, which exempts the shipowners from responsibility for delay or loss or damage to goods on board due to unseaworthiness unless such delay or loss or damage has been caused by want of due diligence of the owners in making the vessel seaworthy and fitted for the voyage, is in itself sufficient to show that the mere occurrence of the events that the vessel was in some respect unseaworthy when tendered or that such unseaworthiness had caused some delay in performance of the charterparty would not deprive the charterer of the whole benefit which it was the intention of the parties he should obtain from the performance of his obligations under the contract—for he undertakes to continue to perform his obligations notwithstanding the occurrence of such events if they fall short of frustration of the contract and even deprives himself of any remedy in damages unless such events are the consequence of want of due diligence on the part of the shipowner.

[48] [1912] A.C. 604, 617.

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The question which the 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.

Appeal dismissed with costs.
No order on plaintiffs' cross-notice.
Leave to appeal to House of Lords refused.
Stay of execution until January 19, 1962, to enable defendants to apply to House of Lords for leave to appeal.
Provided petition lodged within the appropriate time, stay continued until the hearing of the application.

Solicitors: *Constant & Constant; William A. Crump & Son.*

E. M. W.

[COURT OF CRIMINAL APPEAL.]

C. C. A.
1961
Dec. 18.
Lord Parker C.J., Slade, Barry, Stevenson and Widgery JJ.

REGINA v. PATTERSON.

Crime—Housebreaking implements, possession of—Direction to jury—Implement capable of innocent use—Whether for defence to prove lawful excuse—Larceny Act, 1916 (6 & 7 *Geo.* 5, *c.* 50), *s.* 28 (2).
Burden of Proof—Criminal case—Possession of housebreaking implements by night—Implement capable of innocent use—Whether for defence to prove lawful excuse—Larceny Act, 1916, *s.* 28 (2).

The appellant, a floor-layer's labourer, was found by night in a shop with one hand on the till and with a hammer in the other. A screw-driver was found in his pocket and an open razor up his right sleeve. He was charged, inter alia, with being found by night with implements of housebreaking contrary to section 28 (2) of the

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[Reported by T. C. BARKWORTH, Esq., Barrister-at-Law.]

EXHIBIT 8

[2002 CILR 1]

GOLFCO LIMITED

v.

BORDEN

Grand Court

(Kellock, Ag. J.)

21 January 2002

Land Law—contract of sale—inconsistent remedies—on purchaser's substantial default, vendor may either (a) terminate contract in reliance on clause permitting retention of deposit and paid instalments, or (b) enforce contract and sue for unpaid instalments as damages in lieu of specific performance—may not do both, even if option to terminate expressly without prejudice to other remedies

The plaintiff brought proceedings to recover damages for the defendant's breach of a contract for the sale of land.

By a written contract drafted by the defendant, the parties agreed that the defendant and her husband would purchase an apartment block, by payment of a deposit, instalments and a final "balloon" payment. Under the contract the purchasers took immediate possession and had responsibility for outgoings as well as the right to income from rents. Clause 11(1) of the contract provided that, in the event of any default of payment or breach of the contract, and without prejudice to any other remedy the plaintiff might have, it could require payment of the balance of the price within 28 days, failing which it would keep the deposit and instalments already paid as damages, together with interest. If the plaintiff exercised this right, the contract would terminate and neither party would have further rights against the other in respect of it.

During the life of the contract, the defendant's husband assigned his interest to her, and the time scale of payments was revised. When the defendant fell into arrears with the instalments for a second time, the plaintiff, by its attorneys, demanded payment of the arrears within five days and required her to account to the plaintiff for rents received in respect of the property. Those rents were to be held in escrow by the plaintiff and applied towards payment of the sums owed, or returned to the defendant upon her payment of those sums. Future rents were then to be applied toward payment of other debts under the contract. The plaintiff required details from the defendant of the tenants of the property and the state of their accounts. Finally, the plaintiff required evidence that stamp duty on the transfer of the property to the defendant had been paid (since the property remained registered in the plaintiff's name) and threatened to institute criminal proceedings in respect of the defendant's "theft" of rents received as a non-owner and her failure to pay stamp duty.

At the same time, the plaintiff notified the tenants that the defendant no longer had authority to act on its behalf and that they should in future pay rents to its attorneys, failing which their tenancies would be terminated.

The defendant made no payment in response to the demand, and the plaintiff's attorney wrote to her requiring payment of the outstanding balance within 28 days in accordance with cl. 11(1) of the contract. When the demand was not complied with, the plaintiff regarded the contract as terminated and brought proceedings to recover damages for breach. It had received rents in the defendant's stead for one month. The defendant applied for summary dismissal of the plaintiff's claims and leave to counterclaim in respect of misrepresentations by the plaintiff regarding the rental income from the property.

It submitted that (a) it was entitled under the contract to receive payment of the unpaid instalments of the purchase price as well as to keep the deposit and instalments paid to date, since the defendant had so far mainly paid only interest on the outstanding balance; (b) it was entitled to payment of unpaid outgoings for which the defendant was responsible under the contract and the repayment of the tenants' deposits paid to the defendant; (c) the remedy available to it under cl. 11(1) was expressed to be without prejudice to other remedies, and its election to terminate the contract therefore did not preclude its present claims; and (d) the rents it had received from tenants prior to its termination of the contract could be set off against damages awarded to it.

The defendant submitted in reply that (a) since the plaintiff had elected, under cl. 11(1), to keep the deposit and instalments already paid and to terminate the contract rather than enforcing it, it had forfeited the right to claim payment of unpaid instalments or other moneys due under the contract as damages; (b) the phrase "without prejudice to any other remedy" referred to the plaintiff's right to sue for damages under the contract or to terminate the contract without reference to cl. 11(1) on the basis of her default, but did not permit it to pursue inconsistent remedies; (c) the plaintiff had had no right to repossess the property or receive rents from the tenants prior to terminating the contract, and should be ordered to repay those moneys to her; and (d) since the plaintiff had itself breached the contract by retaking possession, was guilty of compounding offences by requesting payment in return for concealing alleged criminal offences, and had misrepresented the likely rental income from the property, she was entitled to aggravated damages from the plaintiff.

Held, dismissing the plaintiff's claims:

(1) The plaintiff's threat to have criminal proceedings instituted in respect of the wrongful receipt of rents and non-payment of stamp duty unless the contract was complied with was tantamount to compounding the offence, contrary to s.106 of the Penal Code, since it had attempted to obtain a benefit on the understanding that alleged offences would be concealed. However, this aspect of the case did not assist in resolving the parties' contractual rights (paras. 13–14).

(2) The plaintiff was not entitled to claim any unpaid sums (whether instalments of the purchase price or other moneys) under the contract, having elected to enforce cl. 11(1) by terminating the contract and retaining the deposit and paid instalments. The sub-clause clearly stated that only payments already made could be forfeited, and whether this benefited the vendor depended on how much of the purchase price had been paid at the time of the purchaser's default. The plaintiff could equally have chosen to insist on the continued performance of the contract and sued for the outstanding payments by way of damages in lieu of specific performance, or to terminate the contract without reference to cl. 11, in which case it might have been required to refund the instalments already paid. The phrase "without prejudice to any other remedy," however, did not allow the plaintiff to pursue inconsistent remedies (paras. 16–17; paras. 20–30).

(3) Furthermore, the plaintiff had had no right to retake possession of the property or to collect rents from the tenants prior to terminating the contract. Its conduct in doing so had been tortious, and the rents should be repaid to the defendant with interest, subject, possibly, to a set-off for expenses it had paid in respect of the property during the relevant time. The plaintiff's application for summary judgment would be dismissed and the defendant's application for summary judgment under O.14, r.12, dismissing the plaintiff's claims, would be granted (para. 19; para. 31; para. 33; paras. 38–39).

(4) The defendant was not prevented by cl. 11(1) from claiming damages in contract or tort (*i.e.* for trespass or conversion) from the plaintiff for retaking possession, since that sub-clause precluded only claims to enforce the contract and could not have been intended to prevent a claim for damages for breach (para. 32).

(5) However, the defendant's counterclaim alleging misrepresentation as to the rental income appeared to be misconceived. Having taken possession of the property four years before the plaintiff commenced proceedings against her, she had waited until then to raise the claim that the income from rents was not as represented to her. There was no evidence before the court on which to calculate the difference between the value of the property had the income stream been as represented and the price she had paid. Had she brought her claim whilst the contract was still extant, she might have claimed an abatement of the purchase price in equity, but could not now do so. Leave would be given to proceed with the claim, but amendments were likely to be needed to allow the real issues in controversy to be determined (paras. 36–39).

(6) The defendant would not be awarded her costs, since she had consistently filed documents in incorrect form and delayed the progression of the proceedings in the main action and her own counterclaim (para. 40).

Cases cited:

(1) *Haynes v. Hirst* (1927), 27 S.R. (N.S.W.) 480; 44 W.N. (N.S.W.) 138, *dicta* of Long Innes, J. applied.

(2) *R. v. Burgess* (1885), 16 Q.B.D. 141; 55 L.J.M.C. 97, referred to.

(3) *Stockloser v. Johnson*, [1954] 1 Q.B. 476; [1954] 1 All E.R. 630, referred to.

Legislation construed:

Grand Court Rules, O.14, r.12(1):

"Where in an action to which this rule applies a defence has been served by any defendant, that defendant may, on the ground that the plaintiff's claim has no prospect of success or that the plaintiff has no prospect of recovering more than nominal damages, apply to the Court for the plaintiff's claim to be dismissed and judgment entered for that defendant."

O.15, r.2(3): "A counterclaim may be proceeded with notwithstanding that judgment is given for the plaintiff in the action or that the action is stayed, discontinued or dismissed."

O.20, r.13(1): "In all cases in which a writ, pleading or other document is amended, the amended copy which is filed should make it clear what has been deleted and what has been added or altered so that the Court, when reading the amended document, shall be able to see at once the exact nature and extent of the amendments made."

G. Giglioli for the plaintiff;

C.H. Allen for the defendant.

1. **KELLOCK, Ag. J.:** By writ of summons issued on July 18th, 2001 the plaintiff, Golfco Ltd., claims against the defendant, Angel Borden (whose full name is Brycelynne Angel Borden), *inter alia*, $97,918.37 for payments required to be made pursuant to a purchase and sale agreement made in or about July 1997. (It is dated "the . . . day of July, 1997").

2. Until quite recently, the action has been defended by Mrs. Borden in person. A defence which takes the form of an affidavit was prepared and filed by Mrs. Borden on August 1st, 2001. On September 7th, 2001, Golfco issued a summons seeking summary judgment, supported by an affidavit of Ida Brown, the sole surviving shareholder of Golfco, a company formed by Mrs. Brown and her husband for the purpose of acquiring rental properties. In response to this summons, Mrs. Borden filed a document entitled "Petition," seeking, *inter alia*, an adjournment of the summons.

3. The hearing of Golfco's summons was adjourned on October 17th, 2001 by Graham, J., on Mrs. Borden's assurance to the court that she was then in a financial position to instruct an attorney. Graham, J.'s order adjourning Golfco's summons for 14 days also included leave to amend the defence and, if so advised, to bring a counterclaim. Mrs. Borden was ordered to pay the costs of that day, fixed at $200.

4 The Golfco summons came on again for hearing before me on December 18th, 2001. On that date, Mrs. Borden sought a further adjournment which was granted on terms including the payment of costs fixed at $500. I adjourned the matter to January 8th, 2002, to enable Mr. Allen to consult English counsel and provide a proper amendment to the defence. I suggested that Mr. Allen might consider launching a cross-motion for summary judgment. That suggestion was made on the theory that if, as Golfco's application suggested, this case could be disposed of summarily, the court should be in a position to dispose of it in its entirety.

5. At 9.30 a.m. on January 8th, 2002, I was presented with a summons by the defendant seeking (i) an amendment to the defence, (ii) leave to bring a counterclaim, and (iii) summary judgment in the defendant's favour. The new defence is in fact a fresh statement of defence and counterclaim replacing the "affidavit" and "petition." Mr. Giglioli objected to this, submitting that the provisions of O.20, r.13 ought to be applied. In my judgment, a strict adherence to that rule was not appropriate and, accordingly, leave to withdraw the earlier documents and replace them with Mr. Allen's defence and counterclaim was granted.

6. I can now come to the merits of the applications. It appears that the contract which lies at the root of the dispute was prepared by Mrs. Borden and signed by Mrs. Brown on behalf of Golfco. The contract was also signed by the purchasers, Mr. and Mrs. Borden. Mr. Borden subsequently assigned his interest in it to his wife and there is no indication that Golfco considers that he has any continuing obligations under it. In other words, Golfco appears to have agreed to look to Mrs. Borden alone for performance. The contract provides for the sale by Golfco to the Bordens of the property therein described, which is referred to by both vendor and purchaser as "the Sunshine Apartments."

7. It appears that the property consists of some 17 apartments. The purchase price was US$1.3m., payable by a deposit of US$1,000, with the balance payable by instalments over the period extending to March 5th, 2001, when the then outstanding balance was payable. The instalments were structured so that for the first six months a payment of US$7,577.50 was required each month to cover interest on the unpaid portion of the purchase price, calculated at the rate of 7%. Thereafter, the contract called for 36 monthly instalments of US$1,200 for principal and interest. On March 5th, 2001, a final "balloon payment" was required.

8. The purchasers were entitled to take possession of the property as of the date of the agreement. The contract also included the following paragraphs or clauses:

"11.(1) If the purchaser fails to complete in accordance with cl. 4 or if the purchaser is in breach of any other term of this agreement

the vendor may at any time, without prejudice to any other remedy which it may have, serve notice on the purchaser of [*sic*] his attorneys-at-law to pay the balance of the price within 28 days after the date of service of that notice, and if the purchaser fails to pay the balance of the price within those 28 days (in respect of which time shall be of the essence) the vendor may, without prejudice to any other remedy which it may have, keep the deposit and any further instalments paid to that date absolutely as liquidated damages together with any interest that may have accrued or been earned on it, and if it does so this agreement shall forthwith end and neither party shall have any further rights of action or claim of any nature against the other in respect of it.

...

12. Failure to pay any amount due and the applicable late fee within ten (10) days of the date due will result in the vendor having the right to regain immediate possession of the property. Any and all costs incurred to enforce collection of the outstanding amount and regain possession of the property will be due and payable by the purchaser.

...

14. This agreement constitutes the entire agreement between the parties and may be varied only by agreement in writing."

9. The agreement does not contain any express warranties or representations. In particular, there is no information provided in the document as to the rent payable or being paid. Clause 5 of the contract obliges the purchaser (after taking possession) to "be responsible for all outgoings" and entitles the purchaser "to any income in respect of the property." It appears that the contract was signed and put into effect by the vendor and the purchasers without the intervention or assistance of lawyers.

10. I can find no evidence in the record as to exactly when the contract was signed or when the Bordens took possession of the property. The statement of claim indicates that the agreement was made "on a day unknown in July 1997," and the defendant has not taken issue with that statement. Mrs. Borden pleads in her defence that Ida Brown advised her in March 1997 that the rental income from the property was about CI$13,600 each month. Mrs. Borden also relies on a letter dated May 7th, 1997 that purports to be written on Mrs. Brown's behalf, in which it is stated that as of that date the total rent was CI$13,950 per month.

11. Mrs. Brown's affidavit evidence is that the Bordens fell into arrears "quite early" and, as a result, in September 1998, it was agreed that the interest-only payments would be extended to August 1998, completion

would be deferred from March 2001 to September 2001, and Mr. Borden would assign his interest in the property to Mrs. Borden. Based on Mrs. Brown's evidence, I can conclude that there was no further complaint about Mrs. Borden's performance until "the latter part of 2000," when "Mrs. Borden started to pay instalments late." Mrs. Brown's evidence is that no payments were made after November 2000.

12. It is at this point that the problems this litigation is intended to solve arose. In March 2001, Golfco consulted Mr. Giglioli and on March 29th, 2001 he wrote to Mrs. Borden on Mrs. Brown's instructions. I believe it is important to set out this letter in full.

"Re: Golfco Ltd.: Sunshine Apartments

I gather that Mrs. Brown has previously been in touch with you regarding the arrears of the payments due in respect of your purchase of Sunshine Apartments. I am instructed that although she has attempted to contact you on a number of occasions you have neglected to reply to her letters or call her back.

My instructions are that you are now six months in arrears with the payments and therefore owe Golfco Ltd. CI$59,040 as of the date of this letter. A further payment will be due next week. There is, additionally, an unpaid insurance premium of US$6,083 in respect of the property, which Golfco paid.

This letter serves as a formal demand to you to remedy the outstanding default of the agreement entered into by you and your husband in July 1997 (and subsequently assigned to you alone). You are to make payment of the outstanding amount of US$64,028.06 within five days of the date of this letter.

In the light of the amount outstanding, the period over which the arrears have arisen and your refusal to contact Mrs. Brown, we also require you to bring all rents received by you into this office. Any rent brought and paid to us by you within the next five days will be held in escrow and released to you upon remedy of the outstanding default. In the event that you fail to make any payment to Golfco Ltd. then the rents shall be applied firstly towards payment of the outstanding monies owing to Golfco Ltd. Once that amount has been paid, then the future rents will be applied towards any other indebtedness due to Golfco on account of this matter before being released to you.

We also require you to provide us, upon receipt of this letter, with a schedule setting out the names and contact details of each tenant; the terms upon which they hold the apartment (including rents); an indication of whether the tenants are current with their rents or in

arrears, and if in arrears, the amount of the arrears together with copies of any leases which may have been granted.

We note from the Land Register that this property is still registered to Golfco Ltd. We would draw your attention to the provisions of the Stamp Duty Law (a copy of the relevant section is enclosed). We should be grateful if you would provide us with a copy of the receipt evidencing that stamp duty has been paid by you in respect of the agreement between you and Golfco. Failing production of that receipt we shall have to make enquiry of the Registrar of Lands to establish whether or not stamp duty has been paid. Obviously, if stamp duty has not been paid then you are not entitled to receive rents from the tenants. If you disregard this instruction regarding payment of the rents to Golfco Ltd., criminal proceedings will be instituted both in respect of the theft of the rents from Golfco and the failure to pay stamp duty."

13. The content of the first three paragraphs of that letter is appropriate, given Mr. Giglioli's understanding of the circumstances. The statement in the fourth paragraph, purporting to require Mrs. Borden to "bring all rents received by [her]" to Mr. Giglioli's office, and the content of the fifth paragraph might be politely described as an attempt at over-reaching. The sixth paragraph is another matter entirely. The Penal Code of the Cayman Islands (1995 Revision) provides by s.106 that—

"whoever asks, receives or obtains, or agrees or attempts to receive or obtain any property or benefit of any kind for himself or any other person upon any agreement or understanding that he will compound or conceal an offence or will abstain from . . . a prosecution for an offence . . . is guilty of an offence."

Section 106 is a modern restatement of a common law offence which was referred to by Coke and Blackstone as "theft-bote." It was described by Lord Coleridge, C.J. in *R.* v. *Burgess* (2) (16 Q.B.D. at 147–148) as "compounding a felony."

14. Mr. Giglioli complained to me about Mrs. Borden's conduct of this litigation and those complaints are justified, but Golfco's conduct is also properly subject to criticism. I believe, however, that the consequences of the less than appropriate conduct of both parties cannot assist in the determination of the proper disposal of these applications for judgment, and may have to be left to be dealt with on another occasion. There can be no doubt that Mr. Giglioli's letter to Mrs. Borden of March 29th, 2001 was an attempt to persuade Mrs. Borden to pay the arrears of instalments (to which Golfco was probably entitled) and to induce Mrs. Borden to turn over the rents (to which Golfco was not entitled) by a threat of criminal prosecution.

15. Mrs. Brown tells us at para. 10 of her affidavit what happened next:

"Whilst Mrs. Borden replied to Giglioli & Co.'s letter of March 29th, she failed to remedy the breach that that letter spoke of. In the circumstances, on April 4th, 2001, Giglioli & Co. wrote to Mrs. Borden, requiring her, pursuant to the provisions of cl. 11(1) of the sale agreement, to pay the outstanding balance within 28 days of that letter. That period expired on May 2nd, and no payment was made by Mrs. Borden. Neither did she come up with any proposal as to how the debt might be provided for. In the circumstances, Golfco Ltd. took the position that the agreement was at an end as at May 2nd, 2001, at which date there were now eight unpaid instalments owing to Golfco Ltd."

16. As at April 4th, 2001, when Golfco/Mrs. Brown had concluded that the Giglioli letter was not bearing fruit, Golfco had a decision to make as to what remedies it would pursue. Clearly, it could have sued for payment of the unpaid instalments (and the other moneys alleged to be owing) and a declaration that Mrs. Borden was obliged to fulfil all of her obligations under the contract, including the obligation to make a final balloon payment. In other words, Golfco could have elected to keep the contract on foot and enforce it. Instead, Golfco elected to pursue the remedy provided for in cl. 11(1), that is, to keep all of the money Mrs. Borden had paid, treat the contract as at an end, and resume possession of the property free and clear of any interest or title on Mrs. Borden's part.

17. That election made it impossible for Golfco to claim any unpaid sums, whether instalments of the purchase price or otherwise. Mr. Giglioli argued that this was an unfair result, as most of Mrs. Borden's payments were of interest only. That fact was known to Golfco as at April 4th, 2001 and on May 2nd, 2001 as well, when, as Mrs. Brown clearly understood, "the agreement was at an end" due to Golfco's election to invoke the provisions of cl. 11(1).

18. Unfortunately for Golfco, on March 29th, 2001 (two months prior to May 2nd, 2001) Mr. Giglioli caused to be delivered to Mrs. Borden's tenants a very formal notice advising them, *inter alia*, that Mrs. Borden no longer had authority to act on behalf of Golfco and that "your next rent payment must be made to [Golfco's] attorney at Giglioli & Company." The notice further advised each of Mrs. Borden's tenants that if they continued to pay rent to Mrs. Borden "your right to remain in the apartment will be terminated and proceedings shall be instituted to recover the debt due to Golfco Ltd." In case that statement was not clear enough, the notice concluded as follows:

"Mrs. Borden has no authority to do anything in connection with Sunshine Apartments. To ensure your right to remain in the property

you should contact Golfco Ltd.'s attorneys before Tuesday, April 3rd, 2001, *otherwise your tenancy will be terminated and, if necessary, proceedings instituted to obtain possession of your apartment.*" [Emphasis supplied.]

19. As at March 29th, 2001 Golfco clearly had no right to retake possession of the property and require Mrs. Borden's tenants to deal with it free and clear of Mrs. Borden's rights. I have no difficulty in concluding that any and all sums received by Golfco from those tenants between March 29th, 2001 and May 2nd, 2001 were and are Mrs. Borden's money and should be repaid to her with interest. I would also say that Golfco's high-handed conduct might well lead to an award of aggravated damages in Mrs. Borden's favour. Whether or not Golfco is entitled to a set-off for any property expenses it may have paid during this period of time is a question for argument at a later time.

20. Mr. Giglioli argued that the provisions of cl. 11(1) of the contract, properly interpreted, permitted Golfco to terminate the contract and at the same time to insist on the payment of the instalments of the purchase price which had become due, but which Mrs. Borden had not paid prior to May 2nd, 2001, when, by the terms of cl. 11(1), the contract was properly terminated and Mrs. Borden's interest therein extinguished. I should set out the relevant portion of cl. 11(1) again:

"The vendor may, without prejudice to any other remedy which it may have, keep the deposit and any further instalments paid to that date absolutely, as liquidated damages, together with any interest that may have accrued or been earned on it, and if it does so this agreement shall forthwith end and neither party shall have any further rights of action or claim of any nature against the other in respect of it."

21. This provision states clearly that the vendor may "keep the deposit and any further instalments paid to that date absolutely, as liquidated damages . . ." It does not say that the vendor may keep the instalments paid and sue for the instalments which have become due but which have not been paid. Clause 11(1) provides for a remedy which the vendor alone might choose to enforce. Had Mrs. Borden paid all of the instalments save the last balloon payment, the court might then have been faced with a claim by her for relief from forfeiture, but that is not this case.

22. Whether the cl. 11(1) remedy will favour the vendor or purchaser cannot be determined in advance and depends entirely upon how the instalments have been structured by the contract and when, in the course of the performance of the contract, the default occurs. However, it is important to understand that the vendor, Golfco, was not obliged to proceed pursuant to cl. 11(1), and that, I think, points to the meaning of

the words "without prejudice," which appear therein. I do not believe that the parties intended by these words that the vendor would be entitled to recover unpaid instalments when the clause speaks explicitly of *paid* instalments: *Expressio unius exclusio alterius.*

23. Before making the election to terminate, Golfco had the right to enforce the contract and insist on Mrs. Borden's continuing performance of it. The parties could not have intended that the purchaser would be liable to lose her right to acquire title to the property and, in addition, be obliged to pay for it.

24. In *Haynes* v. *Hirst* (1), an Australian case, Long Innes, J. put the matter as follows (27 S.R. (N.S.W.) at 489):

"A party cannot, except in a strictly limited class of cases, protect himself against the legal consequences of his acts by stating that he does them without prejudice. No one, for instance, would suggest that a person could protect himself against liability for a breach of promise of marriage by taking the precaution of making the offer without prejudice. Nor can a debtor, who gives notice that he is about to suspend payment of his debts, protect himself against the consequences flowing from the commission of this act of bankruptcy, by giving such notice 'without prejudice': *In re Daintrey*; *Ex part Holt* . . . Nor, in my view, could a person, having a right to sue either in tort or in contract in respect of a claim arising out of one transaction, preserve his right to sue in tort after suing in contract, by prefacing his declaration by the averment that he sued in *assumpsit* without prejudice to his right to sue in tort. For similar reasons it appears to me that a purchaser, having the option of either repudiating the contract by reason of a defect in title, or of keeping it alive for the benefit of the other party as well as his own, cannot, while electing to treat the contract as subsisting and requiring the vendor to remove the objection and to alter his position to his detriment in attempting to do so, avoid the consequences flowing from this exercise of his election by stating that he does so without prejudice to his right to repudiate. In plain language a man can only elect once, and when once he has elected he is bound by his election and cannot again avail himself of his former option, merely because he claimed in the first instance to exercise his election without prejudice. A man, having eaten his cake, does not still have it, even though he professed to eat it without prejudice."

That passage seems to me to dispose of the plaintiff's case. By electing to terminate the contract Golfco voluntarily decided to eat the cake. It cannot now have it.

25. In my judgment, cl. 11(1) contains the words "without prejudice to any other remedy it may have" to make it clear that the remedy provided

for in that clause was not to be regarded as the vendor's only remedy. If Golfco had elected to ignore the provisions of cl. 11 and exercise its right at law to terminate the contract by reason of Mrs. Borden's default (which would have had to be regarded as a fundamental breach) Golfco would not, in those circumstances, have been entitled, in addition, to any remedy based on the theory that the contract remained on foot. That is to say, Golfco cannot pursue inconsistent remedies, as Long Innes, J. has clearly explained.

26. If Golfco had elected to terminate, without reference to cl. 11(1), it might have been required to refund the money which Mrs. Borden had paid by way of instalments, subject to Golfco's right to damages if the property were then resold at a lower price (see *Stockloser* v. *Johnson* (3) ([1954] 1 Q.B. at 489–490, *per* Denning, L.J. (as he then was) and the cases there cited)).

27. As mentioned, whether or not a court would be moved to relieve a purchaser in Mrs. Borden's position from the forfeiture of instalments prior to the vendor's termination of the contract would be decided by determining whether or not the forfeiture was unconscionable in the circumstances. Clause 11(1) of the contract characterizes the instalments retained as "liquidated damages" for the purpose of demonstrating that the purchaser has agreed in advance that the forfeiture provided for in cl. 11 was not considered to be unconscionable. As I have said, Golfco had a decision to make once Mrs. Borden defaulted, including whether it would be better off treating the paid instalments as liquidated damages or seeking its actual damages in an action instituted for that purpose.

28. The editors of 42 *Halsbury's Laws of England*, 4th ed. Reissue, make it clear (para. 255, at 181) that "damages for breach of contract [for the sale of land] are in the nature of compensation, not of punishment, and the measure of damages is the amount of injury sustained by reason of the breach of contract." In no way can the instalments owing at the time Golfco elected to terminate the contract be regarded as damages unless such are regarded as damages in lieu of specific performance. Specific performance was not claimed and is entirely inconsistent with the decision to invoke cl. 11(1) and terminate the contract. Specific performance requires that the plaintiff be ready, willing and able to perform the contract, and is not available when the plaintiff has terminated the contract.

29. In conclusion, I am of the opinion that cl. 11(1) cannot be construed so as to allow Golfco to pursue fundamentally inconsistent remedies, let alone to succeed in so doing.

30. In addition to the plaintiff's claim for the instalments owing but not paid as at the date of the termination of the contract, the plaintiff also

claims for "unpaid outgoings." This claim is for $25,918.37, together with an accounting for deposits paid by tenants of $4,880, which the plaintiff paid to Mrs. Borden, presumably at the time Mr. and Mrs. Borden took possession of the property. The claim in respect of outgoings is made pursuant to cll. 5 and 6 of the contract. Clause 5 states that the purchaser was to be "responsible for all outgoings and entitled to any income in respect of the property" while she was in possession of it. Clause 6 concerns the apportionment of insurance costs and utilities, and provides that Mrs. Borden was to pay US$6,085 on account of insurance in monthly instalments of US$1,000. I am of the opinion that these claims must suffer the same fate as the claims for unpaid instalments.

31. Lastly, the statement of claim acknowledges that Golfco collected $14,035 by way of rent from the tenants from April 1st, 2001 to May 2nd, 2001, and offers that amount as a credit against the damages claimed. As I have found that there are no amounts owing to the plaintiff for damages, the question arises as to whether Golfco is, in these circumstances, entitled to retain these moneys. The answer to that question is "No." I am of the view that this $14,035, or whatever amount is subsequently found to have been received by Golfco pursuant to the notice to tenants of March 29th, 2001, is the property of Mrs. Borden. It was received by Golfco by reason of its tortious conduct.

32. While the retaking of possession by Golfco on April 1st, 2001 was, in addition, a breach of the contract, there is no reason why cl. 11(1) should be interpreted as a bar to a claim by Mrs. Borden sounding either in contract or in tort—whether the tort be trespass or conversion. In my view, the provisions of cl. 11(1) do not present an obstacle to this claim, as it is not a claim "in respect of the contract," which I interpret to mean a claim to enforce the contract. Clause 11(1) could not have been intended to prevent the purchaser from successfully claiming damages for breach of contract in a proper case.

33. In the result, Golfco's application for summary judgment must be dismissed.

34. I will turn now to the defendant's application made by a summons dated January 8th, 2002. That application sought leave to amend the defence and enter a counterclaim and that leave was granted. In addition, the summons seeks by para. 3, "that this Honourable Court do dismiss the plaintiff's claim on the ground that it has no prospect of success and judgment be entered for the defendant."

35. The content of the affidavit in support of this summons is entirely related to the plaintiff's claim. It does not purport to support summary judgment on the counterclaim. The counterclaim is based on alleged misrepresentations as to the amount and quality of the rental income stream as at the date of the contract, and seeks damages, being the

amounts Mrs. Borden states that she was forced to invest out of her own pocket (*i.e.* her salary) in order to make up for the fact that the rental income was less than she had been led to believe.

36. The material before me suggests that this complaint is suspect because it does not seem to have been advanced initially or indeed at any time before the Golfco writ was issued in July of 2001. I say that because I assume Mrs. Borden would have known the true state of affairs very shortly after she took possession in July 1997. The claim is also misconceived for another reason. If Mrs. Borden has a legitimate claim it is a claim for damages, not the loss of her salary. The normal measure of such damages would be the difference between the price she (and her husband) paid and the value of the property had the income stream been as advertised. There is no evidence before me to establish that such was the case.

37. Had she acted while the contract was on foot, Mrs. Borden might have been able to claim an abatement of the purchase price, calculated directly by reference to the actual income stream when compared with the advertised income stream (see Spry, *Equitable Remedies*, 4th ed., at 304 (1990)), but she did not see fit to do so and cannot do so now.

38. In any event, the defendant's summons seeks summary judgment dismissing the plaintiff's claims, and that seems to be appropriate. The counterclaim must be left to be determined by trial or otherwise as a separate action (see O.15, r.2(3)). I fear that further amendments to the counterclaim will be required if the purpose of the Grand Court Rules—which is to facilitate the determination of the real question in controversy (see 1 *The Supreme Court Practice 1999*, para. 20/0/2, at 369)—is to be fulfilled.

39. As there do not appear to be any significant facts that require to be determined by a trial in relation to the merits of the plaintiff's claims, a judgment dismissing the action is warranted under the provisions of O.14,

r.12. There will therefore be judgment dismissing the action and giving leave to proceed with the counterclaim.

40. As noted earlier, Mrs. Borden's conduct of this litigation has been characterized by the filing of documents, intended (I assume) to be statements of defence, which were not in the proper form, and by delay. In addition, she was ordered to pay the costs of the day on two occasions and despite being granted leave to amend the defence and bring a counterclaim in October 2001, that pleading was not provided until January 2002. In the circumstances, she deserves to be deprived of costs. There will therefore be no costs of the action or of any of the steps taken to date on the counterclaim to either party.

Orders accordingly.

Giglioli & Co. for the plaintiff; *Woodward, Terry & Co.* for the defendant.

EXHIBIT 9

[2004–05 CILR 498]

IN THE MATTER OF INDIES SUITES LIMITED

Grand Court

(Smellie, C.J.)

5 August 2005

Companies—compulsory winding up—creditors—no locus standi for contingent or prospective creditors to petition under Companies Law (2004 Revision), s.96—claims for quantified or readily quantifiable and ascertainable pecuniary amounts arising from breach of contract not contingent or prospective but represent liquidated damages—petition usually granted even if actual amount owing disputed

Companies—compulsory winding up—petition—locus standi to oppose petition—sole shareholder has standing as contributory to oppose winding up of company—affirmative resolution of shareholders required for board of company to have authority to oppose petition

Companies—compulsory winding up—grounds for winding up—inability to pay debts—s.95(c) provides recourse, in urgent circumstances (e.g. if assets apparently deliberately stripped) if criteria in sub-ss. (a) and (b) cannot be met, if after separate objective assessment of state of affairs court concludes company unable to pay debts as fall due

Companies—compulsory winding up—grounds for winding up—"just and equitable"—under Companies Law (2004 Revision), s.94(d) winding up "just and equitable" if essential substratum of company gone proving impossibility of its carrying on business even if not insolvent—"just and equitable" ground available to creditors and contributories or shareholders alike

The petitioners, whose status as creditors was in question, petitioned for the winding up of a company, which was opposed by the sole shareholder on the grounds of lack of standing and that the requirements of the Companies Law had not been met.

The petitioners sought the winding up of the company, on the ground that it would be just and equitable so to order, as they were owed a debt by the company. The petitioners were two (joined in support by 175) of some 500 persons who purchased timeshare units in the Indies Suites Resort, owned and operated by the company, entitling each unit holder to use of the apartments and other amenities for a specific period—usually for one week each year—for 99 years.

The property was provided to a proprietary club, formed and owned by

the company, to be operated as club premises. The timeshare entitlements were sold as memberships in the club. Members were required to pay a one-off membership fee and annual maintenance dues. Over 10 years, members paid $5–6m. in membership fees. The rules of the club provided that in the event of destruction of the club, the company was obliged to repair or restore the property, the works had to commence within two years and the property was to be fully insured for those purposes.

In breach of the rules, the property was not kept insured and was severely damaged in the hurricane of September 2004. It was not restored but sold, arguably at an under-value, without the petitioners' or other members' knowledge or consent. The proceeds of sale and of the insurance coverage were then divested to a separate but related company.

The petitioners alleged that their contract with the company, in the form of the club rules, had been breached and that they were immediately entitled to the return of their membership fees, if not in full then *pro rata* with regard to the number of years left in entitlement.

The petitioning creditors submitted that (a) they had standing, within the Companies Law (2004 Revision), s.96, to petition as they were actual and not contingent or prospective creditors because the company owed them a contractual debt for a liquidated sum of money or a sum which could be readily quantified and ascertained, which they ought to be allowed to prove in the liquidation; (b) they had a pecuniary claim for debt within s.94(c) of the Law which the company was unable to pay and they were therefore creditors for the purposes of s.96; (c) the company should be deemed unable to pay its debts and wound up under s.95(c); (d) the sole shareholder had no standing to challenge the winding up, since only the company itself as respondent had standing to appear in opposition; and (e) even if they were only contingent creditors, they might still be entitled to petition on the just and equitable ground given the conduct of the directors and shareholders of the company.

The sole shareholder submitted in reply that (a) the petitioners had no *locus standi* to bring the petition because they did not come within the classes of persons granted standing under s.96 of the Law as they did not qualify as creditors, being merely prospective or contingent creditors; and (b) it had a *bona fide* defence to the petitioners' claims that it was unable to pay its debts, *i.e.* the frustration of the timeshare agreements, which could only be resolved by court action, and until the issue was resolved the petitioners were owed only prospective or contingent debts, meaning that the requirements of s.95(c) were not satisfied; and (c) it would not be just and equitable to wind up the company where the petitioners were unable, by having failed to present a statutory demand or otherwise, to show that the company was unable to pay its debts.

Held, granting the winding-up petition and confirming the appointment of the official liquidator:

(1) The petitioners were creditors within the meaning of the Companies Law (2004 Revision), s.96, which gave them standing to

bring the petition. Whilst the absence of the words "contingent" and "prospective" from s.96 in relation to creditors operated to exclude contingent or prospective creditors from bringing a winding-up petition, the creditors' claims, which arose from the company's breaches of contract, were not prospective or contingent. The company had elected to treat the contract as at an end and sold the subject-matter, and there was then substituted an obligation on its part to pay monetary compensation to the petitioners for the future non-performance of the contract. The petitioners were claiming pecuniary amounts (return of at least membership fees, *pro rata*) which, if not already quantified, were readily quantifiable and ascertainable and so represented liquidated damages. Even if the actual amount owing were disputed, the petition would normally still be granted (paras. 17–23; para. 26).

(2) The sole shareholder, and not just the company itself, had standing to oppose the winding up of the company. As a contributory could petition to wind up, it followed logically that it could oppose such a petition. The board of a company could only have authority to oppose by an affirmative resolution of the shareholders, who were contributories. Whilst it was unclear whether the contributory or only the creditors had a real financial interest in the liquidation (*i.e.* whether the company was solvent or insolvent), the contributory had a *prima facie* interest and therefore standing to be heard (paras. 28–29).

(3) The company did not have a *bona fide* defence of frustration to the debts it owed to the petitioners, as it was subject to express contractual provisions in respect of the frustrating event that had occurred, namely, to have properly insured the property and to have it restored. Whilst the requirements for the applicability of the doctrine of frustration were not present in this case, if the analogy with leases were apposite, in exceptional and rare cases it might be possible for a timeshare agreement to be frustrated. Even if, however, the defence of frustration had been properly raised, ss. 4 and 5 of the Contracts Law (1996 Revision) would probably have operated to create a statutory debt in favour of the petitioners for which they could claim in winding up (para. 25; para. 49; paras. 51–52; paras. 55–57).

(4) The grounds for winding up in s.95 of the Law were alternative. Section 95(c) provided appropriate recourse in urgent circumstances which did not require the service of a statutory demand for repayment or a separate action for judgment on which to ground a claim. The petition for winding up would be granted, given the urgent circumstances to which the petitioners were required to respond (the company's assets were apparently being stripped away), as there was good reason to conclude that the company had been placed in a position where it would most probably be unable to pay the debts it owed to the petitioners, to which it did not have a *bona fide* defence (paras. 42–43; paras. 45–46).

(5) The "just and equitable" ground for winding up was also established by the creditors, given the conduct of the directors and shareholders of the company and that the essential substratum of the company had gone—its only tangible asset having been sold by those who controlled it—proving the impossibility of its carrying on business even if it were not insolvent. It was irrelevant that there was no precedent of creditors, as distinct from contributories or shareholders, having successfully petitioned on this ground (paras. 59–61).

Cases cited:

(1) *Banco Economico S.A. v. Allied Leasing & Finance Corp.*, [1998] CILR 102, applied.

(2) *Capital Annuities Ltd., In re*, [1979] 1 W.L.R. 170; [1978] 3 All E.R. 704, *dictum* of Slade, J. applied.

(3) *Ebrahimi v. Westbourne Galleries Ltd.*, [1973] A.C. 360; [1972] 2 All E.R. 492, *dictum* of Lord Wilberforce applied.

(4) *Emmadart Ltd., In re*, [1979] Ch. 540; [1979] 1 All E.R. 599; applied.

(5) *Globe New Patent Iron & Steel Co., In re* (1875), L.R. 20 Eq. 337, referred to.

(6) *Joseph Constantine S.S. Line Ltd. v. Imperial Smelting Corp. Ltd.*, [1942] A.C. 154; [1941] 2 All E.R. 165, applied.

(7) *National Carriers Ltd. v. Panalpina (Northern) Ltd.*, [1981] A.C. 675; [1981] 1 All E.R. 161, *dictum* of Lord Simon of Glaisdale applied.

(8) *Pen-y-Van Colliery Co., In re* (1877), 6 Ch. D. 477, distinguished.

(9) *Photo Production Ltd. v. Securicor Transport Ltd.*, [1980] A.C. 827; [1980] 1 All E.R. 556, referred to.

(10) *Steel Wing Co. Ltd., In re*, [1921] 1 Ch. 349; [1920] All E.R. Rep. 292, referred to.

(11) *Suburban Hotel Co., In re* (1867), L.R. 2 Ch. App. 737, applied.

(12) *Union Accident Co. Ltd., In re*, [1972] 1 W.L.R. 640; [1972] 1 All E.R. 1105, not followed.

Legislation construed:

Companies Law (2004 Revision) (Laws of the Cayman Islands, 1963, *cap.* 22, revised 2004), s.94: The relevant terms of this section are set out at para. 4.

s.95: The relevant terms of this section are set out at para. 32.

s.96: The relevant terms of this section are set out at para. 3.

Contracts Law (1996 Revision) (Law 11 of 1979, revised 1996), s.4: The relevant terms of this section are set out at para. 56.

s.5: The relevant terms of this section are set out at para. 56.

Companies Act 1907 (7 Edw. VII, c.50), s.28: The relevant terms of this section are set out at para. 15.

R.D. Alberga, Q.C. and *W.L. DaCosta* for the sole shareholder;

A. Turner for the provisional liquidator.

1. **SMELLIE, C.J.:**

Standing to petition

This is the hearing of the petition for the winding up of the company. A point of objection has been taken *in limine* by Mr. Alberga, Q.C. on behalf of Brac Construction Ltd., which is the sole shareholder of the company, that the petitioners have no *locus standi* to bring this petition because they do not come within the classes of persons granted standing by the Companies Law. Sections 94, 95 and 96 of the Companies Law are in issue, in particular s.96, which defines the classes of persons who may petition to wind up.

2. The petitioners obtained an order from Henderson, J. on June 7th, 2005, appointing Mr. Christopher Johnson as provisional liquidator on the basis that they are owed a debt by the company, citing the ground in the petition that it was just and equitable to so order. If Mr. Alberga is right, that order of June 7th must be set aside and Mr. Johnson's appointment discharged.

3. In the circumstances of the case, the only class within which the petitioners could claim or do claim to come is that of "creditors" but, says Mr. Alberga, they do not qualify because they are merely prospective or contingent creditors and that class of creditor is not included in the Law. Section 96 reads:

"Any application to the Court for the winding up of a company shall be by petition which may be presented by the company, or by any one or more than one creditor or contributory of the company, or by all or any of the above parties, together or separately; and every order which may be made on any such petition shall operate in favour of all creditors and all the contributories of the company in the same manner as if it had been made upon the joint petition of a creditor and a contributory."

4. A petition to wind up may only be presented if the requirements of s.94 are also met:

"A company may be wound up by the Court if—

(a) the company has passed a special resolution requiring the company to be wound up by the Court;

(b) the company does not commence its business within a year from its incorporation, or suspends its business for a whole year;

(c) the company is unable to pay its debts; or

(d) the Court is of opinion that it is just and equitable that the company should be wound up."

5. Here the petitioners rely on paras. (c) and (d) above to ground their petition, although the petition actually cites only the "just and equitable" ground. They say, for the purpose of para. (c), that they are creditors because the company owes them a contractual debt for a liquidated amount of money or an amount which can readily be quantified and ascertained, and in respect of which they may and ought to be allowed to prove in the liquidation. That they are thus to be regarded not as contingent or prospective but as actual creditors.

6. Their claim arose as follows. The petitioners are two of some 500 persons who had purchased timeshare entitlements in the Indies Suites Resort, which was owned and operated by the company. Each timeshare unit was purchased for a fixed sum of money and entitled the unit holder to the use of the Indies Suites apartments and other amenities for a specified period—usually for one week each year—for 99 years.

7. The property, while owned by the company, was provided to a proprietary club which was also formed and owned by the company, to be operated as club premises. The timeshare entitlements were sold as memberships in the club. In addition to the one-time membership fee paid as a stipulated sum, members were required to pay annual maintenance dues.

8. A further 175 members have given notice and have joined the petitioners in support of the petition, and are also represented by Mr. Turner. I am told that over the last 10 years or so, members have paid some $5–6m. in membership fees and the petitioners and those in support claim debts for repayment of significant portions of those amounts.

9. The rules of the club provide, importantly for present purposes, that in the event of destruction of the club premises, the company will be obliged to repair or restore the property and such works must commence within two years. The company is further obliged by the rules to keep the property fully insured for those purposes.

10. The property was severely damaged by the hurricane of last September. It appears, however, not to have been insured in keeping with the rules and, instead of restoration, the property has been sold. This is said to have happened without the petitioners' or other members' knowledge or consent.

11. The petitioners, not surprisingly, allege that their contract with the company, expressed in the form of the rules of the club, has been breached, and that they are immediately entitled to damages by way of the return of their membership fees. If the fees are not to be entirely repaid, at least *pro rata* by reference respectively to the amount of time each has already enjoyed the benefit of membership, as against the number of years of the 99-year membership terms left to run.

12. It seems no claim is to be otherwise made for general damages in respect of the loss of the benefit of use of the premises or for annual fees and dues, although such claims may as yet be unarticulated. In other words, say the petitioners, they have a pecuniary claim for a debt within the meaning of s.94(c) of the Companies Law which, for reasons they say are apparent from the evidence, the company is unable to pay and thus they are constituted as creditors for the purposes of s.96.

13. It is accepted by Mr. Turner that unless they come properly within the class of "creditors" under the Law, they have no standing as persons entitled to petition to wind up, although he did raise an argument—which he did not press—that even if they are only contingent creditors, they are entitled to petition.

14. In support of his *in limine* objection, Mr. Alberga embarked upon a brief excursion into the history of the English Companies and Insolvency Acts and our Companies Law, which clearly show that while the words "contingent or prospective creditor" have ever since 1907 been included in the English legislation in order to broaden the categories of creditors who may petition, those words were never included in the local Law as is apparent from the wording of s.96 above.

15. The additional words were first expressed in s.28 of the Companies Act of 1907 in England in this way:

"In determining whether a company is unable to pay its debts within the meaning of section eighty of the Companies Act, 1862, the court shall take into account the contingent and prospective liabilities of the company and any contingent or prospective creditor shall be a creditor entitled to present a petition for winding up the company under section eighty-two of that Act [the equivalent of the local section 94]: Provided that the court shall not give a hearing to a petition for winding up the company by such a creditor, until such security for costs has been given as the court thinks reasonable, and until a primâ facie case for winding up has been established to the satisfaction of the court."

16. The local Companies Law is based upon the English Companies Act 1862 which contained, prior to that amendment by s.28 of the 1907 Companies Act, wording identical to s.96 of the local Law.

17. The fact that the absence of the wording would operate, in the context of the local Law as it stands, to exclude prospective and contingent creditors, must be regarded as settled beyond dispute having regard to the pronouncements of Jessel, M.R. in *In re Pen-y-Van Colliery Co.* (8). It is a case upon which Mr. Alberga strongly relied.

18. There Jessel, M.R. held (6 Ch. D. at 477) that—

"a claim against a company for unliquidated damages on account of alleged fraudulent misrepresentation does not constitute the claimant a creditor, so as to entitle him to petition either for a winding-up order or a supervision order: before he can so petition must make himself a creditor by changing his claim for damages into a judgment."

Until that was done he could not petition as a creditor under the Act. However, the full context of the decision in that case must be understood. Reflecting further upon the particular circumstances of the claim in that case, Jessel, M.R. said this (6 Ch. D. at 483):

"Now the claim which the company brings forward is not a claim of debt, as I understand the meaning of it. It is a claim of a very singular kind. It is hardly possible to state it much more shortly than it is stated in the petition itself. [His Lordship then described the allegations in the petition in respect of alleged fraudulent misrepresentation and continued:] What possible claim there can be against anybody upon these statements I cannot understand. It is quite sufficient to say that the Respondents dispute the allegations . . . [of fraudulent misrepresentation]."

19. So while that case must be regarded as settled authority for the propositions for which it still stands after 120-odd years, it must also be noted for present purposes that Jessel, M.R. regarded the claim for the debt sought to be advanced in it as being of "a very singular kind." Precisely because of the speculative, prospective or contingent nature of the allegations of fraud, it was decided in that case that the claimants were not properly constituted creditors within the meaning of the Act as it was then framed and so had no standing to petition to wind up the Pen-Y-Van company. Jessel, M.R.'s parting advice was that they needed to change their claim into a debt—a liquidated sum—and in order to do so they first needed to obtain a judgment, their allegations being so steadfastly denied by the directors of that company.

20. What may not be attributed to the pronouncements of Jessel, M.R., is a proposition that in all circumstances where the claim is for a contract or tortious debt which is yet to be transformed into a judgment debt, the claimant remains only a prospective or contingent creditor and so unqualified to petition.

21. In this case the claims may not, in my view, be described as being merely speculative, prospective or contingent. They are described as debts arising from breach of contract by the deliberate decision of those responsible for the company not to restore the property, but to sell it instead. A claim may have arisen as well from the probable earlier breach in having failed adequately to insure the property.

22. As the result of these breaches, the petitioners (joined in by some 175 other claimants) say that the company is immediately liable to repay at least their membership fees *pro rata* having regard to the number of years left in their entitlement. Those are pecuniary amounts which, if not already quantified, can be readily quantified and ascertained and so represent liquidated damages. The contract having been breached and the innocent parties having elected to treat the contract as at an end—the subject-matter having been sold—I accept there is substituted an obligation on the part of the defaulter to pay monetary compensation to the innocent party for the loss sustained by him in consequence of the non-performance of the contract in the future. For this proposition, Mr. Turner cited *Photo Production Ltd.* v. *Securicor Transport Ltd.* (9), cited in *Chitty on Contracts*, 28th ed., para. 25–046, at 1247–1248 (1999).

23. Here, far from being disputed, the evidence points to the members' claims having been acknowledged by the company, subject only to the settlement of amounts. A sum of $885,000 has been recorded in these proceedings as having been set aside to meet the claims. And, moreover, far from defences being raised against the claims, efforts have been made to negotiate settlements. In this context, I pause to note also that where the dispute is only as to the amount which may be owing, the petition will usually be granted: 3 *Palmer's Company Law*, para. 15.214, at 15067–15068, citing, *inter alia*, *In re Steel Wing Co. Ltd.* (10).

24. Against the present factual background, it is hardly surprising that no readily identifiable defence has been asserted on behalf of the company and when asked by me what such a defence might be, Mr. Alberga being, as it is his custom to be, cautious before venturing, responded that there could possibly be a defence of frustration having regard to the massive damage caused by Act of God to the property.

25. As such issues which may be raised in defence do not arise for my decision now, I think I need only note in order to deal with the present point, that frustration would of course provide no defence in these circumstances if it is proved (as appears to be the case) that the company was contractually bound to make provisions by way of insurance and to restore the property if it were destroyed: *Joseph Constantine S.S. Line Ltd.* v. *Imperial Smelting Corp. Ltd.* (6) ([1942] A.C. at 163) and *Chitty on Contract*s (*op. cit.*, para. 24–003, at 1168).

26. For the foregoing reasons, while I accept Mr. Alberga's argument that mere prospective or contingent creditors have no standing to petition to wind up a company under the Companies Law as it is presently framed, I conclude that the petitioners have shown for the purposes of their standing to petition that they have claims for money within the meaning of the Law which they might prove in a liquidation and that they are properly constituted creditors for those purposes.

27. While it is rendered moot by that finding, Mr. Turner did raise the counter-argument that Mr. Alberga had no standing to challenge the petition acting as he was, not on behalf of the company itself, but on behalf of the sole shareholder/contributory—Brac Construction Ltd. Mr. Turner's argument was simply that only the company itself, Indies Suites Ltd., as respondent to the petition, had the right to appear in opposition. He pointed out that the board of a company has residuary powers for those purposes, notwithstanding the appointment of the provisional liquidator. He cited *In re Union Accident Co. Ltd.* (12) which is authority for the proposition that where a provisional liquidator is appointed, the company, through its board of directors, retains residuary power to oppose a petition to wind it up. That case was, however, not followed by this court in *Banco Economico S.A.* v. *Allied Leasing & Finance Corp.* (1) where it was held, following *In re Emmadart Ltd.* (4), that the board of directors of a company in provisional liquidation has no power to act to oppose the winding up without an affirmative resolution of the shareholders in general meeting.

28. It was, in any event, accepted by Mr. Turner that a contributory could petition to wind up and that a creditor, as a person having a financial interest in a company could not only petition, but also appear to oppose a petition. That being so, I was unable, as a matter of logic, to accept the argument that a shareholder, who could petition, could not oppose. As shown above, it is the affirmative resolution of the shareholders who are the contributories that gives the board its authority to oppose.

29. While it remains unclear in this case whether the contributory or only the creditors will have the real financial interest in the liquidation (that is, whether the company is insolvent or solvent) the contributory at this stage has a *prima facie* interest and so must have standing to be heard.

Upon the hearing of the petition

30. Having been informed of the foregoing decision as to *locus standi*, Mr. Alberga confirms for the record that he and Mr. DaCosta are now instructed by Brac Construction Ltd. to oppose the petition itself. The petitioners having been found to have standing, he does so primarily on the basis that the requirements of s.94(c) of the Companies Law have not been met. Section 94(c) provides that a company may be wound up if it is unable to pay its debts.

31. Mr. Turner has, however, confirmed that the petitioners also rely upon the just and equitable ground in s.94(d) and so I am obliged to consider the petition from the point of view of both provisions of the Law.

32. For the purposes of s.94(c), s.95 defines the circumstances under which a company may be regarded as being unable to pay its debts in these terms:

"A company shall be deemed to be unable to pay its debts if—

(a) a creditor by assignment or otherwise to whom the company is indebted at law or in equity in a sum exceeding one hundred dollars then due, has served on the company by leaving at its registered office a demand under his hand requiring the company to pay the sum so due, and the company has for the space of three weeks succeeding the service of such demand, neglected to pay such sum, or to secure or compound for the same to the satisfaction of the creditor;

(b) execution of other process issued on a judgment, decree or order obtained in the Court in favour of any creditor at law or in equity in any proceedings instituted by such creditor against the company, is returned unsatisfied in whole or in part; or

(c) it is proved to the satisfaction of the Court that the company is unable to pay its debts."

33. Of those three alternative sets of circumstances, it is the case, as Mr. Alberga said, that the circumstances most often relied upon by creditors before this court are those described in para. (a), *viz.*: where a creditor has served the statutory demand for payment and the debt is not paid or otherwise settled within 21 days.

34. No statutory demand has been served here by the petitioning creditors, or by those joining in support of the petition. They explain the reason for that omission as being the urgency of the situation arising from the conduct of the directors and shareholders of the company. In this regard they point to the following factors:

(i) the conduct of the director, Mr. Foster, in having assured the time-share owners at a meeting last year after the hurricane that the property would be restored despite the hurricane damage and in keeping with the contract. They assert that this happened even while he was, unknown to them, negotiating to sell the property;

(ii) the subsequent sale of the property arguably at a significant under-value;

(iii) the divestment of the sale proceeds from the company to Brac Development Ltd., ostensibly in satisfaction of a wholly undocumented earlier loan from Brac Development Ltd. to the company;

(iv) the divestment of the proceeds of the insurance coverage from the company to Brac Development Ltd. on the same ostensible basis;

(v) the retention of the sum of US$885,000 not by the company but by the law firm of Myers & Alberga to the order of Brac Development Ltd.,

although it has been said that the sum is held and is to be used for no other purpose but to repay the timeshare owners; and

(vi) the allocation of the same sum on the stated basis (*per* Mr. Ronald Foster, the shareholder of Brac Development Ltd.) that it represents the entire interest of the timeshare owners at 20% of the total timeshare value of the property, even though the combined value of all the time-share owners' claims is said to amount to a great deal more, in the order of millions of dollars.

35. These factors are raised not only in the evidence of the petitioners themselves, but also by the provisional liquidator's preliminary report filed with this court on July 26th, 2005. There the provisional liquidator goes on to raise his own concerns about the destruction of many of the company's records by those in charge of the company and the lack of co-operation he has experienced with his enquiries into the general affairs of the company.

36. The provisional liquidator has been able to compile a report only because he has had access to records from the company's bankers, the company's insurers and from its property appraisers. Such records as were made available by the management of the company were wholly inadequate for the purposes.

37. Among the several areas of concern listed by the provisional liquidator at pages 30–31 of his report (some of which are mentioned above at items (i) to (vi)), the provisional liquidator cites the company's own contention that "the facility was never able to operate on a profitable basis and incurred significant operating losses on a yearly basis which were subsidized by the owner."

38. This, a contention not accepted by the provisional liquidator for being unsubstantiated by the financial statements which are available, is nonetheless some evidence coming from those opposing the petition of the company's insolvency and therefore of its inability to pay its debts.

39. At all events, a comparison by the provisional liquidator of the financial position of the company between the May 31st, 1999 balance sheet and the date of his appointment, shows a loss over that period of $4,856,637. This is largely represented by the fact that its only tangible asset, the resort premises, has been sold for much less than the book value and the proceeds of sale as well as the insurance proceeds, divested to Brac Development Ltd.

40. The only "asset" which the provisional liquidator records is the sum of US$885,000, but that is not held in the name of the company itself and so can only be regarded as a receivable due from Brac Development Ltd. or from Mr. Foster as the person who controls Brac Development Ltd.

The grounds of the petition

41. The first question to be resolved, given all those circumstances and the absence of a statutory demand for repayment of the petitioners' debts, must therefore be, in the words of s.95(c) (paras. (a) and (b) not being relied upon by the petitioners), has it been ". . . proved to the satisfaction of the Court that the company is unable to pay its debts"?

42. Before proceeding further to examine that question as a matter of law and fact, it is important that I should note that the grounds set out in s.95 are alternative grounds for winding up.

43. As to s.95(c), it is a condition precedent of the exercise of the court's jurisdiction that the company shall have been "proved to be unable to pay its debts"—*In re Capital Annuities Ltd.* (2) ([1979] 1 W.L.R. at 181, *per* Slade, J.). It also follows that, if as a matter of the separate objective assessment of the state of affairs of the company, it is to be concluded that the company is unable to pay its debts as they fall due, the petition may be granted, even if, as here, the petitioners have served no statutory demand and have not given the 21 days' notice required by s.95(a).

44. This alternative recourse under s.95(c) must therefore be seen as recognizing that creditors may be presented with circumstances so urgent in nature as to render the 21-day notice period otiose or so as to render futile any basis for thinking that a statutory demand for repayment will be duly considered and honoured by the company. Urgency of that kind would also preclude, as a prerequisite, recourse to the courts by way of a separate action for a judgment upon which to ground the claim, which is the further alternative ground under s.95(b).

45. I conclude that that sort of urgency attended the circumstances here under which the petitioners, and those who support the petition, were required to respond. I find that they had every good reason to conclude that the company had been placed in a position where it would most probably be unable to pay its debts owed to them. And these are debts which, for reasons earlier explained, I find are not merely prospective or contingent, but actual debts capable of being proven in a liquidation.

46. Moreover, I find that this is not a case where—to adopt the cautionary words of Slade, J. in *In re Capital Annuities Ltd.* (2) ([1979] 1 W.L.R. at 187–188)—the evidence merely shows that the company "has for the time being insufficient liquid assets to pay all its presently owing debts, *whether or not payment of such debts has been demanded.*" Here the evidence available to the provisional liquidator and to the petitioners shows that the assets of the company have apparently been deliberately stripped away for the purpose of what the provisional liquidator describes as "making significant preferential payments from property sale and insurance recovery proceeds to a related-party company." Thus it is fairly apprehended that the state of affairs is not merely temporary or passing.

Bona fide dispute or defence

47. Mr. Alberga further submitted that before it can be open to me to find that the company is unable to pay its debts in the sense contemplated by s.95(c), I am obliged to bear in mind that the company has raised a *bona fide* defence to the petitioners' claims. It is the defence adumbrated only earlier during the *in limine* arguments, which now upon the hearing of the petition Mr. Alberga seeks to raise in earnest. It is that the timeshare agreement(s) was or were frustrated by the event of the hurricane of last September having destroyed the resort property. That, in light of that defence, which can only be resolved by court action, it cannot be concluded at this stage that the petitioners are owed actual and absolute debts, but only prospective or contingent debts and so the requirements of s.95(c) of the Law are not satisfied.

48. For the proposition of law as to the effect of a *bona fide* defence rendering a claim moot, Mr. Alberga cited 3 *Palmer's Company Law*, para. 15.211, at 15064–15065 where it is written:

"As to inability to pay debts, proof by a creditor that his particular debt has not been paid within a reasonable time is prima facie evidence that the company is insolvent, provided that the company has no bona fide basis on which to dispute the debt in question [citing *In re Globe New Patent Iron & Steel Co.* (5) and other cases] . . . It is an abuse of process to present a winding up petition against a solvent company as a means of putting pressure on it to pay money which is bona fide disputed, instead of applying for summary judgment under RSC Order 14 . . ."

49. The defence of frustration is said to arise here as a proposition of law by analogy with a lease, and on the basis which was incontrovertibly declared by the House of Lords in the case cited by Mr. Alberga, *viz.*: that a contract comprised in a lease of land can, in exceptional and rare circumstances, be frustrated: *National Carriers Ltd.* v. *Panalpina (Northern) Ltd.* (7).

50. Having so presented the framework for the company's defence, Mr. Alberga did, however, in his usual frank and helpful manner, acknowledge that it is for this court hearing the petition to decide whether a *bona fide* defence to the claim exists. This is only consistent with the passage cited from *Palmer* that the petition may be granted provided the company has no *bona fide* basis on which to dispute the debt(s) in question. Further, as is also stated at *Palmer* (*loc. cit.*, para. 15.214, at 15068–15068/1):

". . . To fall within the general principle the dispute must be bona fide in both a subjective and an objective sense. Thus the reason for not paying the debt must be honestly believed to exist and must be

based on substantial or reasonable grounds. 'Substantial' means having substance and notfrivolous [*sic*], which disputes the court should ignore. There must be so much doubt and question about the liability to pay the debt that the court sees that there is a question to be decided. The onus is on the company 'to bring forward a prima facie case which satisfies the court that there is something which ought to be tried either before the court itself or in an action, or by some other proceedings.'"

51. So what then is to be made of the defence which has been raised? It was already dealt with, if only in an anticipatory manner, when considering Mr. Alberga's *in limine* objection above. In that earlier context it was also necessary to consider whether the claims may have been rendered moot by such a possible defence, but then rejected. Having heard Mr. Alberga's fuller submissions here in opposition to the petition, I do not accept that it can objectively constitute a *bona fide* dispute.

52. As pointed out earlier in the ruling on the point *in limine*, it may not lie in the mouths of those directing the affairs of the company to say that the agreements have been frustrated if only because in order so to do, they must invite the court to ignore their express contractual obligations to have properly insured the property and to have restored it for the continued benefit of the members, including the petitioners. And that is even if, as a matter of principle, they could properly cite the events of last September as an event of frustration which the law could recognize. I do not objectively think it is open to them to do so—far from having been destroyed, the premises were sold to St. Mathews University Facilities Ltd. who no doubt will restore it to be used as teaching or housing facilities.

53. As Mr. Turner submitted, *dicta* from the House of Lords in *Panalpina* (7) underscore the nature of the difficulty in the path of this defence: ([1981] A.C. at 700, *per* Lord Simon of Glaisdale):

"Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance."

54. No doubt the words in parenthesis in that passage reflect their Lordships' recognition of the principle enunciated in the earlier decision of their House in *Joseph Constantine S.S. Line Ltd.* v. *Imperial Smelting*

Corp. Ltd. (6) which the report of *Panalpina* (7) shows was cited to their Lordships in the arguments. Although obvious, it is just as well to reflect upon the sort of rare and exceptional circumstances which their Lordships would regard as capable of frustrating a lease.

55. So even if the analogy here between the timeshare agreements and a lease is apposite, the requirements for the applicability of the doctrine of frustration are, in my view, clearly not present.

56. Finally, as to whether there is shown to be a *bona fide* defence or dispute, I am obliged to note the provisions of the local Contracts Law (1996 Revision), ss. 4 and 5. They show that even in the event of the defence of frustration being properly raised, they would likely operate, in the circumstances of this case, to create a statutory debt in favour of the petitioners:

"4. Where a contract governed by the law of the Islands has become impossible of performance or been otherwise frustrated, and the parties thereto have for that reason been discharged from the further performance thereof, this Part shall have effect in relation thereto.

5. All sums paid or payable to any party in pursuance of the contract before the time when the parties were so discharged (in this Part referred to as 'the time of discharge') shall, in the case of sums so paid, be recoverable from him as money received by him for the use of the party by whom the sums were paid, and, in the case of sums so payable, cease to be so payable:

Provided that, if the party to whom the sums were so paid or payable incurred expenses before the time of discharge in, or for the purpose of, the performance of the contract, the court may, if it considers it just so to do, having regard to all the circumstances of the case, allow him to retain or, as the case may be, recover the whole or any of the sums so paid or payable, not being an amount in excess of the expenses so incurred."

57. Accordingly, in any event, there would be pecuniary debts for which the petitioners could claim. The only remaining question would be whether they should be able to claim in the context of winding up the company, or otherwise by action through the courts.

"Just and equitable"

58. Mr. Alberga also argued that it could hardly be just and equitable to wind up the company where the petitioners are unable, for having failed to present a statutory demand or otherwise, to show that the company is unable to pay its debts.

59. Given the difficult circumstances described above which confronted the petitioners when they sought to preserve their rights, which have only

been compounded since then and which continue to attend their efforts to discover the true position, I consider the case for winding up to be self-evident.

60. As a matter only of further explanation of my reasons for holding that the just and equitable ground is also established, I also regard the case as one where the essential substratum of the company is gone, its only tangible asset—the resort and adjoining properties—having been sold away by those who controlled it. Such circumstances have been a basis for the making of an order for winding up ever since the pronouncements of Lord Cairns in *In re Suburban Hotel Co.* (11). It is stated in the headnote to that case in the *Law Reports* (L.R. 2 Ch. App. at 737) ". . . proof of impossibility of carrying on the contemplated business would justify a winding-up order, even in the absence of insolvency." And it is clear from the definitive speeches in the House of Lords in *Ebrahimi* v. *Westbourne Galleries Ltd.* (3) that it is wrong to attempt to create categories or headings under which cases must be brought if the "just and equitable" clause in the Companies Acts is to apply ([1973] A.C. at 374–375, *per* Lord Wilberforce).

61. That being so, it would be wrong in an otherwise proper case such as I find this to be, to refuse an order because, as Mr. Alberga also suggests, the cases do not show any instances before where creditors, as distinct from shareholders or contributories, have successfully petitioned on this ground.

62. For all the foregoing reasons, I grant the petition and confirm the appointment of Mr. Johnson as official liquidator. In deference to repeated expressions of concern from Mr. Alberga that the available resources not be consumed by the costs of the liquidation, I record the court's advice to the liquidator that every effort be made to conserve resources, to minimize expenses and to attempt as quickly as possible to resolve the creditors' claims.

Order accordingly.

Turner & Roulstone for the provisional liquidator; *W.L. DaCosta* for the sole shareholder. [*November 18th, 2005: The Court of Appeal (Zacca, P., Taylor and Forte, JJ.A.) allowed the company's appeal.*]

EXHIBIT 10

A

[HOUSE OF LORDS]

PHOTO PRODUCTION LTD. . . . . RESPONDENTS

AND

SECURICOR TRANSPORT LTD. . . . . APPELLANTS

B

1979 Nov. 12, 13, 14;
1980 Feb. 14,

Lord Wilberforce, Lord Diplock, Lord Salmon, Lord Keith of Kinkel and Lord Scarman

Contract—Exceptions clause—Fundamental breach of contract—Contract providing night security patrol for factory—Security company under no circumstances to be liable for unforeseeable acts of employee—Employee deliberately starting fire destroying factory—Whether fundamental breach terminating contract rule of law—Whether exceptions clause covering deliberate acts

C

The plaintiffs contracted with the defendants for the provision of a night patrol service for their factory of four visits a night. The main perils which the parties had in mind were fire and theft. The contract was on the defendants' printed form incorporating standard conditions which provided: "1. Under no circumstances shall the company be responsible for any injurious act or default by any employee of the company unless such act or default could have been foreseen and avoided by the exercise of due diligence on the part of the company as his employer; nor, in any event, shall the company be held responsible for: (*a*) Any loss suffered by the customer through . . . fire or any other cause, except insofar as such loss is solely attributable to the negligence of the company's employees acting within the course of their employment." Condition 2 limited the defendants' potential liability under the terms of the contract "or at common law."

D

E

On a Sunday night one of the defendants' employees entered the factory on duty patrol and then lit a fire which burned down the factory. The employee, who had satisfactory references and had been employed by the defendants for some three months, later said that he had only meant to start a small fire but that it had got out of control.

F

The plaintiffs claimed damages, particularised at over £648,000, based on breach of contract and/or negligence. MacKenna J. rejected allegations against the defendants of want of care and failure to use due diligence as employers, and held that condition 1 of the contract excluded them from responsibility for his act in setting fire to the factory and that the doctrine of fundamental breach did not prevent judgment being given for the defendants. The Court of Appeal reversed his decision.

G

On appeal by the defendants:—

Held, allowing the appeal, (1) that the doctrine of fundamental breach by virtue of which the termination of a contract brought it, and, with it, any exclusion clause to an end was not good law; that the question whether and to what extent an exclusion clause was to be applied to any breach of contract was a matter of construction of the contract and normally when the parties were bargaining on equal terms they should be free to apportion the risks as they thought fit, making

H

provision for their respective risks according to the terms they chose to agree (post, pp. 841D, 842E–G, H—843A, E, 848E–G, 849A–B, 850A—851A, 853B–C, E–F). A

Suisse Atlantique Société d'Armement Maritime S.A. v. *N.V. Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, H.L.(E.) explained.

Charterhouse Credit Co. Ltd. v. *Tolly* [1963] 2 Q.B. 683, C.A.; *Harbutt's "Plasticine" Ltd.* v. *Wayne Tank and Pump Co. Ltd.* [1970] 1 Q.B. 447, C.A. and *Wathes (Western) Ltd.* v. *Austins (Menswear) Ltd.* [1976] 1 Lloyd's Rep. 14, C.A. overruled. B

(2) That the words of the exclusion clause were clear and on their true construction covered deliberate acts as well as negligence so as to relieve the defendants from responsibility for their breach of the implied duty to operate with due regard to the safety of the premises (post, pp. 846C, E–F, 850D–F, 851D–E, 852E–G, 853E–F).

Decision of the Court of Appeal [1978] 1 W.L.R. 856; [1978] 3 All E.R. 146 reversed. C

The following cases are referred to in their Lordships' opinions.

Alderslade v. *Hendon Laundry Ltd.* [1945] K.B. 189; [1945] 1 All E.R. 244, C.A.

Boston Deep Sea Fishing and Ice Co. v. *Ansell* (1888) 39 Ch.D. 339, C.A. D

Charterhouse Credit Co. Ltd. v. *Tolly* [1963] 2 Q.B. 683; [1963] 2 W.L.R. 1168; [1963] 2 All E.R. 432, C.A.

Hain Steamship Co. Ltd. v. *Tate and Lyle Ltd.* (1936) 155 L.T. 177; [1936] 2 All E.R. 597, H.L.(E.).

Harbutt's "Plasticine" Ltd. v. *Wayne Tank and Pump Co. Ltd.* [1970] 1 Q.B. 447; [1970] 2 W.L.R. 198; [1970] 1 All E.R. 225, C.A.

Hardwick Game Farm v. *Suffolk Agricultural Poultry Producers Association* [1966] 1 W.L.R. 287; [1966] 1 All E.R. 309, C.A.; [1969] 2 A.C. 31; [1968] 3 W.L.R. 110; [1968] 2 All E.R. 444, H.L.(E.). E

Heyman v. *Darwins Ltd.* [1942] A.C. 356; [1942] 1 All E.R. 337, H.L.(E.).

Hongkong Fir Shipping Co. Ltd. v. *Kawasaki Kisen Kaisha Ltd.* [1962] 2 Q.B. 26; [1962] 2 W.L.R. 474; [1962] 1 All E.R. 474, C.A.

Johnson v. *Agnew* [1980] A.C. 367; [1979] 2 W.L.R. 487; [1979] 1 All E.R. 883, C.A. F

Karsales (Harrow) Ltd. v. *Wallis* [1956] 1 W.L.R. 936; [1956] 2 All E.R. 866, C.A.

Kenyon, Son & Craven Ltd. v. *Baxter Hoare & Co. Ltd.* [1971] 1 W.L.R. 519; [1971] 2 All E.R. 708.

Lep Air Services Ltd. v. *Rolloswin Investments Ltd.* [1973] A.C. 331; [1972] 2 W.L.R. 1175; [1972] 2 All E.R. 393, H.L.(E.).

Levison v. *Patent Steam Carpet Cleaning Co. Ltd.* [1978] Q.B. 69; [1977] 3 W.L.R. 90; [1977] 3 All E.R. 498, C.A. G

Morris v. *C. W. Martin & Sons Ltd.* [1966] 1 Q.B. 716; [1965] 3 W.L.R. 276; [1965] 2 All E.R. 725, C.A.

Suisse Atlantique Société d'Armement Maritime S.A. v. *N.V. Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361; [1966] 2 W.L.R. 944; [1966] 2 All E.R. 61, H.L.(E.).

Trade and Transport Inc. v. *Iino Kaiun Kaisha Ltd. (The Angelia)* [1973] 1 W.L.R. 210; [1973] 2 All E.R. 144. H

U.G.S. Finance Ltd. v. *National Mortgage Bank of Greece and National Bank of Greece S.A.* [1964] 1 Lloyd's Rep. 446, C.A.

Ward (R. V.) Ltd. v. *Bignall* [1967] 1 Q.B. 534; [1967] 2 W.L.R. 1050; [1967] 2 All E.R. 449, C.A.
Wathes (Western) Ltd. v. *Austins (Menswear) Ltd.* [1976] 1 Lloyd's Rep. 14, C.A.

The following additional cases were cited in argument:

Alexander v. *Railway Executive* [1951] 2 K.B. 882; [1951] 2 All E.R. 442.
Canada Steamship Lines Ltd. v. *The King* [1952] A.C. 192; [1952] 1 All E.R. 305, P.C.
Carter (John) (Fine Worsteds) Ltd. v. *Hanson Haulage (Leeds) Ltd.* [1965] 2 Q.B. 495; [1965] 2 W.L.R. 553; [1965] 1 All E.R. 113, C.A.
Cheshire v. *Bailey* [1905] 1 K.B. 237, C.A.
Evans v. *Glasgow District Council,* 1979 S.L.T. 270.
Farnworth Finance Facilities Ltd. v. *Attryde* [1970] 1 W.L.R. 1053; [1970] 2 All E.R. 774, C.A.
Gillespie Bros. & Co. Ltd. v. *Roy Bowles Transport Ltd.* [1973] Q.B. 400; [1972] 3 W.L.R. 1003; [1973] 1 All E.R. 193, C.A.
Gibaud v. *Great Eastern Railway Co.* [1921] 2 K.B. 426, C.A.
Hollier v. *Rambler Motors (A. M. C.) Ltd.* [1972] 2 Q.B. 71; [1972] 2 W.L.R. 401; [1972] 1 All E.R. 399, C.A.
Port Swettenham Authority v. *T. W. Wu & Co. (M.) Sdn. Bhd.* [1979] A.C. 580; [1978] 3 W.L.R. 530; [1978] 3 All E.R. 337, P.C.
Smith v. *South Wales Switchgear Co. Ltd.* [1978] 1 W.L.R. 165; 1978 S.C.(H.L.) 1; [1978] 1 All E.R. 18, H.L.(Sc.).
Tesco Supermarkets Ltd. v. *Nattrass* [1972] A.C. 153; [1971] 2 W.L.R. 1166; [1971] 2 All E.R. 127, H.L.(E.).

APPEAL from the Court of Appeal.

This was an appeal from the Court of Appeal (Lord Denning M.R., Shaw and Waller L.JJ.) dated March 15, 1978, whereby the appeal of the present respondents, Photo Production Ltd., was allowed and the judgment of MacKenna J. dated April 7, 1976, was set aside and in lieu thereof judgment was entered for the respondents for £615,000 with interest to be agreed and costs, and it was further ordered that the present appellants, Securicor Transport Ltd., should pay the respondents' costs of the appeal.

The material facts which gave rise to the questions involved in this appeal, and which were either admitted or proved, were as follows:

(1) The respondents were the owners of factory premises at Gillingham in Kent where they made cards including Christmas cards. (2) The appellants and the respondents entered into a written agreement dated January 2, 1968, by paragraph 1 of which the respondents requested the appellants to carry out in respect of their premises the service described in paragraph 2 of the agreement at the agreed charge of £8.15.0. per week. (3) Paragraph 2 of the agreement described the service to be provided by the appellants in the following words: "The company shall provide their night patrol service whereby four visits per night shall be made seven nights per week and two visits shall made during the afternoon of Saturday and four visits shall be made during the day of Sunday."

(4) Paragraph 4 of the agreement provided that the standard conditions printed on its reverse were incorporated therein. (5) The

standard conditions printed on the reverse of the agreement included the following (so far as is material): A

" 1. Under no circumstances shall the company be responsible for any injurious act or default by any employee of the company unless such act or default could have been foreseen and avoided by the exercise of due diligence on the part of the company as his employer; nor, in any event, shall the company be held responsible for: (a) Any loss suffered by the customer through burglary, theft, fire or any other cause, except B insofar as such loss is solely attributable to the negligence of the company's employees acting within the course of their employment . . . (b) Any failure by the company to carry out the service by reason of strikes, lockouts, labour disputes, weather conditions, traffic congestion, mechanical breakdown, obstruction of any public or private road or highway or other cause beyond the company's control. . . . 2. If, not- C withstanding the foregoing provision, any liability on the part of the company shall arise (whether under the express or implied terms hereof or at common law) for any injury to or loss or damage of whatsoever nature sustained by the customer, such liability shall under all circumstances be confined to claims of which written notification is received by the secretary of the company at its head office within one month of the happening of the default by the company alleged to give rise to such D liability; and subject thereto, shall be limited to the payment by the company by way of damages of a sum not exceeding £1,000 (inclusive of costs) in respect of any one claim arising from any duty assumed by the company which involves the operation, testing, examination or inspection of the operational condition of any machine, plant or equipment in or about the customer's premises, or which involves the provision of any E service unrelated solely to the prevention or detection of fire or theft; and shall be otherwise limited to a maximum of £25,000 for the consequences of each incident involving fire or explosion; and shall be further limited to a maximum of £250,000 (inclusive of costs) in respect of the aggregate of all claims of whatsoever nature arising during any consecutive period of twelve months."

F

(6) In June 1970 the appellants employed George Andrew Musgrove as a patrolman at their branch in Chatham in Kent. Musgrove was then 23 years old, unmarried, came of a respectable family, had a good work record, and lived with his parents. He provided satisfactory references. (7) On the night of Sunday, October 18, 1970, Musgrove was sent by the appellants to carry out their nightly patrol service at the respondents' premises. (8) At about 11.50 p.m. Musgrove arrived G at the respondents' premises and entered the main factory building. He there deliberately started a fire by lighting a match and throwing it into a cardboard box or other material. The fire spread and a large part of the factory was destroyed. MacKenna J. was unable to decide whether Musgrove intended to light only a small fire (which was the very least he intended to do) or whether he intended to cause much more serious H damage, and in either case what was the reason for his act. Musgrove subsequently pleaded guilty to the offence of maliciously damaging a building, stock and machinery, contrary to section 51 of the Malicious

A Damage Act 1861, and was sentenced to three years' imprisonment. (9) As a result of the fire the respondents suffered loss amounting to the agreed sum £615,000. (10) After the fire the appellants and the respondents entered into a new written agreement dated October 27, 1970, which related to the respondents' office block only, and which incorporated special conditions differing from that of the contract in question in the action.

B

Richard Yorke Q.C., Anthony Machin Q.C. and *Roger Toulson* for the appellants. The Law Commission's report on exemption clauses, 1975 (Law Com. No. 69), p. 18, para. 43; p. 78, para. 209, provides the Law Commission's view on the point here in issue.

If the appellants fail to establish that *Harbutt's "Plasticine" Ltd.* v. C *Wayne Pump and Tank Co. Ltd.* [1970] 1 Q.B. 447 was wrongly decided they may succeed on another ground. If they succeed further questions may arise as to liability and limitation of damages.

Ten propositions of law may be derived from *Suisse Atlantique Société d'Armement Maritime S.A.* v. *N.V. Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361 and certain other cases, all in the House of Lords:

(1) Unless an exclusion clause in a contract is so wide that to give literal D effect to it would deprive the so-called contract of any meaning it falls to be construed as does any other clause in the contract: pp. 398G, 432B–C.

(2) Corollary: There is no rule of law that an exclusion clause, as such, will not be given effect according to its tenor in any particular circumstances: pp. 392E, 399C–E, 405G, 425E—426A. (Quaere, save where the performance is totally different from that which the contract con- E templates: p. 431A–B.)

(3) It is always a question of construction, and there are established canons of construction; among them, such clauses will be construed strictly normally, not applying to a situation created by a fundamental breach of contract (pp. 398F, 406G, 410C, E–F) because they are not intended to give exemption from the consequences of fundamental breach: pp: 392F, 427E. F

(4) An exclusion clause may have the effect of either preventing what would otherwise be a breach of contract from being a breach or relieve the party in default from the obligation to pay damages, either in whole or in part: pp. 420E, 431G.

(5) But if sufficiently clear and unambiguous terms are used (and the more radical the clause the clearer must be the language) such a clause G may even apply to breach of what would otherwise be a fundamental term or what would otherwise be a fundamental breach, either because it makes the "breach" not a breach at all or because it prevents the breach or term from being regarded as fundamental in which case it may also modify the obligation to pay damages: pp. 392E, 398—399, 428F, 431F.

H (6) What is meant by fundamental is something which the innocent party would be entitled to regard as a repudiation and elect whether to accept it or not, as a fundamental term, because the contract stipulates expressly or by necessary implication for it to be a fundamental breach

and the parties must be taken to have contemplated that, if such an event occurred the innocent party would be entitled to be relieved from further performance: pp 397E, 410A–B, 421G—422A, C–D. A

(7) The innocent party always has a choice to accept the repudiation or to affirm and continue the contract. If he accepts, the contract "ceases to exist" or is "at an end." (This includes the case where he has no choice and he "accepts" by issuing his writ.) If he affirms, the contract continues with its exclusion clauses: *Hain Steamship Co. Ltd.* v. *Tate and Lyle Ltd.* (1936) 155 L.T. 177, 179–180; *Suisse Atlantique* [1967] 1 A.C. 361, 398C, 400A, 425F–G. B

(8) That the contract "ceases to exist" or is "at an end" does not mean that the terms have no application. It means: (1) The innocent party is relieved from his obligation as to further performance. (2) The guilty party's obligations and right to further performance are also at an end. But they are replaced by a secondary obligation to pay money to the innocent party in compensation for loss resulting from failure to perform the primary obligations: the *Hain Steamship* case, 155 L.T. 177, 179–180; *Suisse Atlantique* [1967] 1 A.C. 361, 391–392 and *Lep Air Services Ltd.* v. *Rolloswin Investments Ltd.* [1973] A.C. 331, 345G—346A, 350C–E. C

(9) Those damages can only be measured against the terms of the primary obligation. If the contract ceased to exist there would be nothing by which to measure the damages. Therefore the expressions "cease to exist" and "at an end" can only refer to the further performance of the primary obligation: the *Lep* case at pp. 345G—346A and *Heyman* v. *Darwins Ltd.* [1942] A.C. 356, 379, 399. D

(10) Conclusion: An exclusion clause has no effect after an accepted repudiation (for fundamental breach in either sense) as regards any matters after the breach. As to matters leading up to the breach, including the breach itself, it is a question of construction of the contract whether the clause applies and, if so, with what effect: *Heyman* v. *Darwins Ltd.* at pp. 371—372, 379, 398—399. E

It is to be noted that: (1) There is no suggestion in any of the speeches cited that, after the affirmation of a contract by the innocent party, exclusion clauses are somehow excised from the continuing contract. (2) None of their Lordships said that on the acceptance of repudiation by fundamental breach, an exclusion clause necessarily ceased to apply, whatever its terms. F

The development of this branch of the law has been bedevilled by well meaning concessions made by counsel in the reported cases which do not bind the courts. The decision in the present case cannot be supported on the grounds in any of the judgments in the Court of Appeal. G

All the opinions in *Suisse Atlantique* [1967] 1 A.C. 361 support the appellants' propositions: Viscount Dilhorne, pp. 390—395; Lord Reid, pp. 397—401, 405—406; Lord Hodson, pp. 409—412; Lord Upjohn, pp. 420—422, 425, 427—428 and Lord Wilberforce, pp. 430, 432, 434—435. See also the *Lep* case [1973] A.C. 331, 345—346, 350 *per* Lord Reid and Lord Diplock and *Heyman* v. *Darwins Ltd.* [1942] A.C. 356, 371—372, 379, 398–399, *per* Lord Macmillan, Lord Wright and Lord Porter respectively. H

A *Harbutt's* case [1970] 1 Q.B. 447, 462, 464, 466, 470—472, 474—475, was wrongly decided. Nothing in the report of the argument expressly supports the statement of Widgery L.J. at p. 470H that it was not disputed that if there was a fundamental breach which the plaintiffs accepted as amounting to repudiation that put an end to the whole contract depriving the defendants of the protection of clause 15: see p. 458F–G. To see whether a breach is fundamental one must look at the facts after the B event and not merely at the breach itself. It does not follow that, in considering an exemption clause, that answers the question whether it was in the contemplation of the parties that there should be liability for the damage in question. *Harbutt's* case [1970] 1 Q.B. 447 is discussed in the Law Commission's report in 1975 (Law Com. No. 69 pp. 77–78, paras. 206—207). *Charterhouse Credit Co. Ltd.* v. *Tolley* [1963] 2 Q.B. C 683, 693, 702—705, 707—710, 713—714, was rightly decided on its facts but not for the reasons given.

Harbutt's case [1970] 1 Q.B. 447 was considered in *Farnworth Finance Facilities Ltd.* v. *Attryde* [1970] 1 W.L.R. 1053, 1058, 1060; *Wathes (Western) Ltd.* v. *Austins (Menswear) Ltd.* [1976] 1 Lloyd's Rep. 14, 18 20—22. 23, 25 and *Levison* v. *Patent Steam Carpet Cleaning Co. Ltd.* [1978] Q.B. 69, 79—81, 82G–H, 83A–B. See also *Trade and Transport Inc.* D v. *Iino Kaiun Kaisha Ltd. (The Angelia)* [1973] 1 W.L.R. 210, 232, 236 and *Kenyon, Son & Craven Ltd.* v. *Baxter Hoare & Co. Ltd.* [1971] 1 W.L.R. 519.

The true question which arises is: "what was the contract in the present case?" One cannot spell out of it an enlarged general duty, imposing liability on the appellants simply because an employee has done E something which he should not have done. What this man did had nothing to do with what he was employed to do. The trial judge correctly applied his mind to the provisions of the contract in holding that it excluded the appellants' liability. The man's act was not to be attributed to his employers. In any event, he did not deliberately burn down the factory. His plea of guilty did not amount to that; he was not convicted of arson. The language of condition 1 was enough to protect the F appellants from liability.

There is no ambiguity in condition 1 and it can only be read to limit the appellants' liability. This was not a case where a man was put in to patrol the factory who was not up to it because he was not trained or where the company failed to take up references which would have revealed that he was temperamentally unsuitable. The appellants would not have G been liable if the respondents' managing director working on a Saturday had gone away leaving open a door by which burglars got in, since his negligence would have been the real cause of the loss.

Gibaud v. *Great Eastern Railway Co.* [1921] 2 K.B. 426, 437—438, and *Gillespie Bros. & Co. Ltd.* v. *Roy Bowles Transport Ltd.* [1973] Q.B. 400, 416—417, 418—421 show that under condition 1 the appellants were H accepting liability for acts of the patrolman if they could have reasonably been foreseen by them. Otherwise the customer takes the risks. But if they were at fault the liability would be limited as set out in condition 2.

As to the concession referred to by Lord Denning M.R. in the Court

of Appeal [1978] 1 W.L.R. 856, 861, it was only made because it was in no one's interest to argue the point. The House of Lords is not now invited to approve the concession as a statement of the law that the patrolman was acting in the course of his employment even though he started the fire deliberately. The appellants had contracted to provide a service on the premises. The patrolman while there went off on a frolic of his own.

The appellants have exempted themselves by clear and unambiguous language from vicarious liability for the deliberate act of their servant: *John Carter (Fine Worsteds) Ltd.* v. *Hanson Haulage (Leeds) Ltd.* [1965] 2 Q.B. 495, 513, 524, 533. As to *Morris* v. *C. W. Martin & Sons Ltd.* [1966] 1 Q.B. 716, 725, 727—728, 729—730, 732—733, 738, 740, the mind of the patrolman cannot be attributed to the appellants and so it cannot be said that they deliberately burnt down the factory in fundamental breach of their contract.

The Unfair Contract Terms Act 1977 was passed after this contract was entered into but Schedule 2 records a series of objective tests of unfairness. To apply them it would be necessary to plead them and call evidence with regard to them. Here no such matters were raised on the pleadings, so it was not open to the Court of Appeal to consider them. See also sections 3 and 11.

In this exemption clause one must distinguish between misconduct of the authority and misconduct of its servant: *Port Swettenham Authority* v. *T. W. Wu & Co. (M.) Sdn. Bhd.* [1979] A.C. 580, 592.

Michael Wright Q.C. and *John Crowley* for the respondents. It is necessary to decide the nature and purpose of the contract entered into by the parties and what obligations were undertaken by the appellants. This contract was to provide a service, a patrol service. The purpose of the visits was to safeguard (so far as the skill and ability of the appellants' servants could) the property of their customers against (inter alia) fire. It was clearly contemplated that one of the major purposes of the patrol service was protection against fire and theft. The appellants' duty was not limited to using reasonable care in recruiting their staff, training them and giving them instructions to carry out the visits. Even if a man were properly recruited, "vetted", trained and directed, it would be idle to suggest that, if he went home to bed, he would not be involving the appellants in a breach of duty to their customers, since there must be an attendance at the premises by a man whose purpose was to preserve them from fire.

It was a fundamental term of the contract that, while the appellants' employees were on the premises to discharge their contractual obligation, they would not do any deliberate act calculated to do damage to the customers' property; it matters not whether the fire is large or small. If this security service had been a one-man business in which the contractor was carrying out the work he had undertaken to do a negligent breach would be a breach of contract and no more, but, if he did deliberate damage, that would be a fundamental breach and if a representative of the customers saw him deliberately drop a match on combustible materials, he would have been entitled to order him off the premises

A and to have no more to do with him. The act of setting fire to the customers' property is to be properly described as a total breach of contract, akin to deliberate misdelivery or theft in the bailment cases, an act wholly inconsistent with the purpose of the contract. It is not necessary to attribute the deliberateness of the act to the employers, but its deliberateness fixes its quality, enabling the innocent party to say that there is a total breach. If the act of the servant is to be described as a B total breach, there is a rule of law that an exceptions clause will not apply. A total breach is a fundamental breach: *Suisse Atlantique* [1967] 1 A.C. 361, 432.

The contract was to safeguard the customers' property within certain limits. An act was committed by the appellants' servant who deliberately started a fire, wholly contrary to the purposes of the contract and C destructive of the customers' property.

Kenyon's case [1971] 1 W.L.R. 519 was a case of purported performance of the contract and therefore turned on construction of the contract. The breach in the present case went to the root of the contract: the *Hain Steamship* case, 155 L.T. 177, 179, 182. An essential part of the contract was to safeguard the premises and the fundamental breach of it brought the contract to an end: *Alexander* v. *Railway* D *Executive* [1951] 2 K.B. 882, 887, 888.

It is also necessary to look at the relevant clause itself and establish whether or not it modifies the basic obligations of the parties or limits liability for the breach. In clause 1 there is a subclause which modifies the obligations and relates to an exclusion of liability: clause 1 (b). The essential core of the contract was that the appellants should send a E patrolman into the premises and clause 1 was contemplating that if he committed an injurious act, that was prima facie a breach of their obligations under the contract, but that they would not be responsible unless certain conditions were fulfilled. If the patrolman did not turn up, that would be a default, and if, in his absence, the factory burnt, that would be a default too. What the draftsman of the contract achieved was to provide for a duty to give a patrol service and to limit the F consequences of a breach. Clause 1 must be read as in any event imposing on the parties sufficient duties to give some meaning to the contract. At the very least the customer could withhold payment for a visit which did not take place, since it is fundamental to the contract that the appellant should see that a man is on the premises to prevent fire or theft. On any view an exceptions clause which purports to relieve a party of the con- G sequences of his breach of contract must be construed strictly and its words must be clear. One can never construe a contract so as to remove the substance of it. One should never construe an exceptions clause so as to exclude a major breach if the clause has enough content in excluding a minor breach: *Alderslade* v. *Hendon Laundry Ltd.* [1945] K.B. 189, 192, 194; *Canada Steamship Lines Ltd.* v. *The King* [1952] A.C. 192, 207—208, 211—212, and *Gillespie's* case [1973] Q.B. 400, 414, 420—421. H The words of an exceptions clause will not protect a party from liability for negligence unless they are express. Similarly where the act is one of deliberate wrongdoing such a clause should not be interpreted as affording

protection unless the words are express. The more extensive the scope of the conduct against which protection is sought, the more explicit the language must be to cover it. Even assuming that negligence is covered, as well as innocent, though injurious, conduct by the patrolman, the clause should not be used to protect the appellant from liability for the wilful wrongdoing of their servants.

Carter's case [1965] 2 Q.B. 495 may need to be reconsidered in the light of *Morris's* case [1966] 1 Q.B. 716. When it was decided *Cheshire* v. *Bailey* [1905] 1 K.B. 237 was still regarded as good law. Now we know that a master may be liable for the criminal wrongdoing of his servant if it is within the scope of the task entrusted to him. *Carter's* case [1965] 2 Q.B. 495 cannot be regarded as an authority for the proposition for which it is cited. This patrolman was dealing with the security of the premises and his employers were liable for the way in which he carried out his duties.

In *Smith* v. *South Wales Switchgear Co. Ltd.* [1978] 1 W.L.R. 165, 168—169, 172—175, 177—180, *Gillespie's* case [1973] Q.B. 400 was explained in favour of the respondents' submissions and effectively limits its scope, so that it appears that the word "whatsoever" is not of an all embracing character. See also *Evans* v. *Glasgow District Council*, 1979 S.L.T. 270.

It is not necessary to examine *Harbutt's* case [1970] 1 Q.B. 447 because on the true construction of the clause in the present case the appellants cannot succeed and therefore no point of principle arises. The words "any injurious act" in clause 1 must refer to an act falling within the class of negligence and not to a deliberate act. But *Harbutt's* case can be reconciled with *Suisse Atlantique* [1967] 1 A.C. 361. In the latter case *Hain Steamship Co. Ltd.* v. *Tate and Lyle Ltd.*, 155 L.T. 177 was relied on as an authority and is good law. The language of Lord Atkin at p. 179 is unequivocal that if there is a breach of contract (a deviation in that case) the innocent party can say that he is not bound by the contract, and that includes an exceptions clause. He is entitled to treat the deviation as a repudiation. In *Suisse Atlantique* [1967] 1 A.C. 361 both Lord Reid and Lord Upjohn accepted what Lord Atkin said and took it to its logical conclusion. At pp. 397–398 Lord Reid described fundamental breach as being that which entitled the innocent party to rescind the contract. He did not say "breach of a fundamental term." This branch of the law is bedevilled by confusion in the use of terms. What Lord Upjohn said at p. 425E–G as to the guilty party in the case of fundamental breach not being able to rely on any special term of the contract, is the language not of construction but of a rule of law. See also pp. 419–420, 425–427, (Lord Upjohn). For the different approach of Viscount Dilhorne, Lord Hodson and Lord Wilberforce: see pp. 390, 392, 410–412, 431–436.

Harbutt's case [1970] 1 Q.B. 447 can be regarded either as a case of a breach of a fundamental term or a radical or total breach of contract. Without reference to the consequences the innocent customer here is entitled to reject or not to be bound by the exceptions clause. *Kenyon's* case [1971] 1 W.L.R. 519, 529–530 indicates how *Suisse*

A *Atlantique* [1967] 1 A.C. 361 and *Harbutt's* case [1970] 1 Q.B. 447 can be reconciled.

One must always bear in mind the difference between "breach of a fundamental term" and "fundamental breach." The latter corresponds to a performance totally different from that which the contract contemplates: Lord Wilberforce in *Suisse Atlantique* [1967] 1 A.C. 361, 431. The *Charterhouse* case [1963] 2 Q.B. 683 does not appear to fit into B his categorisation.

The fundamental content of this contract is that the appellants were agreeing to patrol the premises, not just to provide staff; they were undertaking a duty to do that. The fundamental purpose of the contract was to afford protection to the premises. The servants to whom the task was entrusted must not deliberately hazard the property, whether C by starting a fire or conspiring with thieves. The breach here was in its quality a breach of a fundamental term. The fact that it was committed by a servant is irrelevant. A company can only act through servants. As a result of that breach the contract went and with it the exceptions clauses.

The theory of interdependent promises promulgated by Francis Dawson in "Fundamental Breach of Contract" (1975) 91 L.Q.R. 380 is D consistent with the *Hain Steamship* case, 155 L.T. 177, which illustrates the corollary.

On the facts of the present case Lord Denning M.R. was fully entitled to approach it as he did. The *Hain Steamship* case, 155 L.T. 177, was authority for saying that the exceptions clause did not apply. Waller L.J. was correct in his analysis [1978] 1 W.L.R. 856, 872. It is E a question of fact and degree in each case. The language of Shaw L.J. at p. 867 shows that he regarded the parties as having stepped right outside the contract. The situation was that of performance totally different from that contemplated by the contract. Lord Wilberforce in *Suisse Atlantique* [1967] 1 A.C. 361, 431.

What Diplock L.J. said in *Morris's* case [1966] 1 Q.B. 716, 732–733, F shows that the master is stamped with the act of his servant and in the case of a dishonest servant cannot say that only his servant, and not he, was dishonest: see too *Chitty on Contracts,* 24th ed. (1977), vol. 2, para. 2820, pp. 319–320, note 15.

The appellants say that they are not liable for the acts of the patrolman if they have been duly diligent in supplying the service, but clause 1 does not bear that out. If a typist fails to put the customers' G premises on the right list for patrol or if the man was not vetted by the local manager in employing him, both these omissions would be "injurious acts" and the appellants would not be absolved from liability because the default was not at managerial level. Otherwise the contract would be stripped of any benefit or content.

The owners of a factory are at risk from fire, flood and theft. The H question is: who should bear the risk created by the introduction to the premises of strangers, outside their control, coming in when the owners are not present and cannot control them, nor have the owners any part in their employment, training or instruction. The owners are

obliged to hand over their keys to them. In the London area fire insurers will not insure factories unless a security system is provided and the purpose of the contract is to diminish the risks. But it carries with it the seeds of another risk and that risk should be borne by those who can control the men and make sure they are not criminal or careless or mad. The problem only arises when the men introduced are entrusted with the safety of the premises.

For malicious damage by a patrolman his employers are liable. The essential quality of the act which would entitle the customers to resile from the contract meant that they could have terminated the contract the moment the man dropped the match. All the loss for which the claim is brought was then in futuro. Any question of election is otiose. The contract was discharged by force majeure.

Condition 2 is dependent on condition 1. Before it can come into operation in the ordinary case the claim will have to be started off by condition 1, because the claimant will have to prove an injurious act by the patrolman which could have been avoided by the appellants and is the cause of the loss. Condition 2 contemplates negligence, but not a deliberate act by the patrolman.

In summary: (1) The basic purpose of the contract is to provide a service, i.e. to patrol the premises. To treat clause 1 as modifying the obligation ignores this fact and treats the appellants as suppliers of trained manpower without obligation for the way the men discharge their duties.

(2) It is necessary that the patrolmen should so act as to safeguard the property for which they are responsible while patrolling, and the corollary of that is that they must not deliberately damage the property in their charge.

(3) A breach of that duty, which must be wilful, falls within *Suisse Atlantique* [1967] 1 A.C. 361, 432B, and a guilty party cannot rely on an exclusion clause as a rule of law: *Hain Steamship* case, 155 L.T. 177. If that is wrong, then as a result of the rule of construction, which would describe the exception as repugnant to the purpose of the contract, it should be struck out.

(4) In any event the effect of the breach was fundamental and in such a case if the " interdependent promises " theory is right the innocent party is not bound by the exceptions clause.

(5) The Court of Appeal was right in attributing the quality of the patrolman's act to the appellants because that is the only logical consequence of *Morris's* case [1966] 1 Q.B. 716 and any other answer would seriously diminish the responsibility of the employers for the conduct of their employees. Further, the deliberateness of the patrolman's act is also relevant.

(6) Such secondary obligations as might survive the collapse of the contract are not here material.

(7) In any event, on the proper construction of conditions 1 and 2 these are interdependent and only cover negligence and not deliberate wrongdoing. (8) The contractual relations, as so interpreted, are reasonable.

Yorke Q.C. in reply. Under the Hague Rules one cannot attribute the wicked mind of the master of a ship to his owners, e.g., in scuttling a ship or letting her be picked up by pirates, though one might ask: Did they check the master's references? Had he a long record of unfortunate happenings? Similarly the patrolman's wicked mind cannot be attributed to his employers, though the appellants accept that under condition 1 they are responsible if they have not themselves used due diligence.

Alexander v. *Railway Executive* [1951] 2 K.B. 882 does not help the respondents because the judge was only construing the relevant clause and not considering the mind of the Railway Executive.

In considering the responsibility of the company for the acts of employees one must see where the authority lies and who is in actual control. See *Tesco Supermarkets Ltd.* v. *Nattrass* [1972] A.C. 153, 187 (Viscount Dilhorne); but see also p. 199A–B (Lord Diplock). Here there is no question of the appellants thinking through the patrolman. Reliance is also placed on *Hollier* v. *Rambler Motors (A. M. C.) Ltd.* [1972] 2 Q.B. 71, 78–80. In *Gillespie's* case [1973] Q.B. 400 the court was dealing with a clause which did not include the word "negligence." Counsel at p. 407 referred to the tests propounded in *Canada Steamship Lines Ltd.* v. *The King* [1952] A.C. 192, 208, but on the facts and in the context of *Gillespie's* case the word "whatsoever" in the indemnity clause could have no other meaning than one including negligence. *Smith* v. *South Wales Switchgear Co. Ltd.* [1978] 1 W.L.R. 165, 169, 172–173 was a totally different case from the present. See also the article on "Exception Clauses as Dependent Promises" by Brian Coote (1977) 40 Modern Law Review, 41–46.

Two different things may be contemplated by "fundamental breach": *Suisse Atlantique* [1967] 1 A.C. 361, 431 (Lord Wilberforce). There may be a difference between Lord Wilberforce and Lord Upjohn (pp. 425–427).

The respondents are confusing two separate matters: (1) the test of reasonableness as a matter of construction, i.e., whether reasonable parties would have meant what is submitted, and (2) a separate test of reasonableness looking at a whole series of other matters to find whether they lead to a reasonable conclusion. But if the words of the condition can only have one meaning, the courts can go no further than that.

Their Lordships took time for consideration.

February 14, 1980. LORD WILBERFORCE. My Lords, this appeal arises from the destruction by fire of the respondents' factory involving loss and damage agreed to amount to £615,000. The question is whether the appellant is liable to the respondents for this sum.

The appellant is a company which provides security services. In 1968 it entered into a contract with the respondents by which for a charge of £8 15s. 0d. (old currency) per week it agreed to "provide their night patrol service whereby four visits per night shall be made seven nights per week and two visits shall be made during the afternoon of Saturday

and four visits shall be made during the day of Sunday." The contract incorporated printed standard conditions which, in some circumstances, might exclude or limit the appellant's liability. The questions in this appeal are (i) whether these conditions can be invoked at all in the events which happened and (ii) if so, whether either the exclusion provision, or a provision limiting liability, can be applied on the facts. The trial judge (MacKenna J.) decided these issues in favour of the appellant. The Court of Appeal decided issue (i) in the respondents' favour invoking the doctrine of fundamental breach. Waller L.J. in addition would have decided for the respondents on issue (ii).

What happened was that on a Sunday night the duty employee of the appellant was one Musgrove. It was not suggested that he was unsuitable for the job or that the appellant was negligent in employing him. He visited the factory at the correct time, but when inside he deliberately started a fire by throwing a match on to some cartons. The fire got out of control and a large part of the premises was burnt down. Though what he did was deliberate, it was not established that he intended to destroy the factory. The judge's finding was in these words:

> " Whether Musgrove intended to light only a small fire (which was the very least he meant to do) or whether he intended to cause much more serious damage, and, in either case, what was the reason for his act, are mysteries I am unable to solve."

This, and it is important to bear it in mind when considering the judgments in the Court of Appeal, falls short of a finding that Musgrove deliberately burnt or intended to burn the respondents' factory.

The condition upon which the appellant relies reads, relevantly, as follows:

> " Under no circumstances shall the company [Securicor] be responsible for any injurious act or default by any employee of the company unless such act or default could have been foreseen and avoided by the exercise of due diligence on the part of the company as his employer; nor, in any event, shall the company be held responsible for (a) any loss suffered by the customer through burglary, theft, fire or any other cause, except insofar as such loss is solely attributable to the negligence of the company's employees acting within the course of their employment. . . ."

There are further provisions limiting to stated amounts the liability of the appellant upon which it relies in the alternative if held not to be totally exempt.

It is first necessary to decide upon the correct approach to a case such as this where it is sought to invoke an exception or limitation clause in the contract. The approach of Lord Denning M.R. in the Court of Appeal was to consider first whether the breach was " fundamental." If so, he said, the court itself deprives the party of the benefit of an exemption or limitation clause ([1978] 1 W.L.R. 856, 863). Shaw and Waller L.JJ. substantially followed him in this argument.

Lord Denning M.R. in this was following the earlier decision of the Court of Appeal, and in particular his own judgment in *Harbutt's "Plasti-*

A *cine" Ltd.* v. *Wayne Tank & Pump Co. Ltd.* [1970] 1 Q.B. 447. In that case Lord Denning M.R. distinguished two cases (a) the case where as the result of a breach of contract the innocent party has, and exercises, the right to bring the contract to an end, (b) the case where the breach automatically brings the contract to an end, without the innocent party having to make an election whether to terminate the contract or to continue it. In the first case the Master of the Rolls, purportedly applying B this House's decision in *Suisse Atlantique Société d'Armement Maritime S.A.* v. *N.V. Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, but in effect two citations from two of their Lordships' speeches, extracted a rule of law that the " termination " of the contract brings it, and with it the exclusion clause, to an end. The *Suisse Atlantique* case in his view

> C " affirms the long line of cases in this court that when one party has been guilty of a fundamental breach of the contract . . . and the other side accepts it, so that the contract comes to an end . . . then the guilty party cannot rely on an exception or limitation clause to escape from his liability for the breach " (*Harbutt's* case [1970] 1 Q.B. 447, 467).

He then applied the same principle to the second case.

D My Lords, whatever the intrinsic merit of this doctrine, as to which I shall have something to say later, it is clear to me that so far from following this House's decision in the *Suisse Atlantique* it is directly opposed to it and that the whole purpose and tenor of the *Suisse Atlantique* was to repudiate it. The lengthy, and perhaps I may say sometimes indigestible speeches of their Lordships, are correctly summarised E in the headnote—holding No. 3 [1967] 1 A.C. 361, 362—" That the question whether an exceptions clause was applicable where there was a fundamental breach of contract was one of the true construction of the contract." That there was any rule of law by which exceptions clauses are eliminated, or deprived of effect, regardless of their terms, was clearly not the view of Viscount Dilhorne, Lord Hodson, or of myself. The passages invoked for the contrary view of a rule of law consist only F of short extracts from two of the speeches—on any view a minority. But the case for the doctrine does not even go so far as that. Lord Reid, in my respectful opinion, and I recognise that I may not be the best judge of this matter, in his speech read as a whole, cannot be claimed as a supporter of a rule of law. Indeed he expressly disagreed with the Master of the Rolls' observations in two previous cases (*Karsales (Harrow)* G *Ltd.* v. *Wallis* [1956] 1 W.L.R. 936 and *U.G.S. Finance Ltd.* v. *National Mortgage Bank of Greece and National Bank of Greece S.A.* [1964] 1 Lloyd's Rep. 446 in which he had put forward the " rule of law " doctrine. In order to show how close the disapproved doctrine is to that sought to be revived in *Harbutt's* case I shall quote one passage from *Karsales* [1956] 1 W.L.R. 936, 940:

> H " Notwithstanding earlier cases which might suggest the contrary, it is now settled that exempting clauses of this kind, no matter how widely they are expressed, only avail the party when he is carrying out his contract in its essential respects. He is not allowed to use

them as a cover for misconduct or indifference or to enable him to turn a blind eye to his obligations. They do not avail him when he is guilty of a breach which goes to the root of the contract."

Lord Reid comments at p. 401 as to this that he could not deduce from the authorities cited in *Karsales* that the proposition stated in the judgments could be regarded as in any way "settled law." His conclusion is stated on p. 405: "In my view no such rule of law ought to be adopted"—adding that there is room for legislative reform.

My Lords, in the light of this, the passage cited by Lord Denning M.R. [1970] 1 Q.B. 447, 465 has to be considered. For convenience I restate it:

> "If fundamental breach is established the next question is what effect, if any, that has on the applicability of other terms of the contract. This question has often arisen with regard to clauses excluding liability, in whole or in part, of the party in breach. I do not think that there is generally much difficulty where the innocent party has elected to treat the breach as a repudiation, bring the contract to an end and sue for damages. Then the whole contract has ceased to exist including the exclusion clause, and I do not see how that clause can then be used to exclude an action for loss which will be suffered by the innocent party after it has ceased to exist, such as loss of the profit which would have accrued if the contract had run its full term." (*Suisse Atlantique* [1967] 1 A.C. 361, 398).

It is with the utmost reluctance that, not forgetting the "beams" that may exist elsewhere, I have to detect here a mote of ambiguity or perhaps even of inconsistency. What is referred to is "loss which will be suffered by the innocent party after [the contract] has ceased to exist" and I venture to think that all that is being said, rather elliptically, relates only to what is to happen in the future, and is not a proposition as to the immediate consequences caused by the breach: if it were that would be inconsistent with the full and reasoned discussion which follows.

It is only because of Lord Reid's great authority in the law that I have found it necessary to embark on what in the end may be superfluous analysis. For I am convinced that, with the possible exception of Lord Upjohn whose critical passage, when read in full, is somewhat ambiguous, their Lordships, fairly read, can only be taken to have rejected those suggestions for a rule of law which had appeared in the Court of Appeal and to have firmly stated that the question is one of construction, not merely of course of the exclusion clause alone, but of the whole contract.

Much has been written about the *Suisse Atlantique* case. Each speech has been subjected to various degrees of analysis and criticism, much of it constructive. Speaking for myself I am conscious of imperfections of terminology, though sometimes in good company. But I do not think that I should be conducing to the clarity of the law by adding to what was already too ample a discussion a further analysis which in turn would have to be interpreted. I have no second thoughts as to the main proposition that the question whether, and to what extent, an exclusion clause is to be applied to a fundamental breach, or a breach

of a fundamental term, or indeed to any breach of contract, is a matter of construction of the contract. Many difficult questions arise and will continue to arise in the infinitely varied situations in which contracts come to be breached—by repudiatory breaches, accepted or not, by anticipatory breaches, by breaches of conditions or of various terms and whether by negligent, or deliberate action or otherwise. But there are ample resources in the normal rules of contract law for dealing with these without the superimposition of a judicially invented rule of law. I am content to leave the matter there with some supplementary observations.

1. The doctrine of " fundamental breach " in spite of its imperfections and doubtful parentage has served a useful purpose. There was a large number of problems, productive of injustice, in which it was worse than unsatisfactory to leave exception clauses to operate. Lord Reid referred to these in the *Suisse Atlantique* case [1967] 1 A.C. 361, 406, pointing out at the same time that the doctrine of fundamental breach was a dubious specific. But since then Parliament has taken a hand: it has passed the Unfair Contract Terms Act 1977. This Act applies to consumer contracts and those based on standard terms and enables exception clauses to be applied with regard to what is just and reasonable. It is significant that Parliament refrained from legislating over the whole field of contract. After this Act, in commercial matters generally, when the parties are not of unequal bargaining power, and when risks are normally borne by insurance, not only is the case for judicial intervention undemonstrated, but there is everything to be said, and this seems to have been Parliament's intention, for leaving the parties free to apportion the risks as they think fit and for respecting their decisions.

At the stage of negotiation as to the consequences of a breach, there is everything to be said for allowing the parties to estimate their respective claims according to the contractual provisions they have themselves made, rather than for facing them with a legal complex so uncertain as the doctrine of fundamental breach must be. What, for example, would have been the position of the respondents' factory if instead of being destroyed it had been damaged, slightly or moderately or severely? At what point does the doctrine (with what logical justification I have not understood) decide, ex post facto, that the breach was (factually) fundamental before going on to ask whether legally it is to be regarded as fundamental? How is the date of " termination " to be fixed? Is it the date of the incident causing the damage, or the date of the innocent party's election, or some other date? All these difficulties arise from the doctrine and are left unsolved by it.

At the judicial stage there is still more to be said for leaving cases to be decided straightforwardly on what the parties have bargained for rather than upon analysis, which becomes progressively more refined, of decisions in other cases leading to inevitable appeals. The learned judge was able to decide this case on normal principles of contractual law with minimal citation of authority. I am sure that most commercial judges have wished to be able to do the same: see *Trade and Transport Inc.* v. *Iino Kaiun Kaisha Ltd.* [1973] 1 W.L.R. 210, 232, *per* Kerr J. In my opinion they can and should.

2. The case of *Harbutt* [1970] 1 Q.B. 447 must clearly be overruled. It would be enough to put that upon its radical inconsistency with the *Suisse Atlantique* case [1967] 1 A.C. 361. But even if the matter were res integra I would find the decision to be based upon unsatisfactory reasoning as to the "termination" of the contract and the effect of "termination" on the plaintiffs' claim for damage. I have, indeed, been unable to understand how the doctrine can be reconciled with the well accepted principle of law, stated by the highest modern authority, that when in the context of a breach of contract one speaks of "termination," what is meant is no more than that the innocent party or, in some cases, both parties, are excused from further performance. Damages, in such cases, are then claimed under the contract, so what reason in principle can there be for disregarding what the contract itself says about damages—whether it "liquidates" them, or limits them, or excludes them? These difficulties arise in part from uncertain or inconsistent terminology. A vast number of expressions are used to describe situations where a breach has been committed by one party of such a character as to entitle the other party to refuse further performance: discharge, rescission, termination, the contract is at an end, or dead, or displaced; clauses cannot survive, or simply go. I have come to think that some of these difficulties can be avoided; in particular the use of "rescission," even if distinguished from rescission ab initio, as an equivalent for discharge, though justifiable in some contexts (see *Johnson* v. *Agnew* [1980] A.C. 367) may lead to confusion in others. To plead for complete uniformity may be to cry for the moon. But what can and ought to be avoided is to make use of these confusions in order to produce a concealed and unreasoned legal innovation: to pass, for example, from saying that a party, victim of a breach of contract, is entitled to refuse further performance, to saying that he may treat the contract as at an end, or as rescinded, and to draw from this the proposition, which is not analytical but one of policy, that all or (arbitrarily) some of the clauses of the contract lose, automatically, their force, regardless of intention.

If this process is discontinued the way is free to use such words as "discharge" or "termination" consistently with principles as stated by modern authority which *Harbutt's* case [1970] 1 Q.B. 447 disregards. I venture with apology to relate the classic passages. In *Heyman* v. *Darwins Ltd.* [1942] A.C. 356, 399 Lord Porter said:

> "To say that the contract is rescinded or has come to an end or has ceased to exist may in individual cases convey the truth with sufficient accuracy, but the fuller expression that the injured party is thereby absolved from future performance of his obligations under the contract is a more exact description of the position. Strictly speaking, to say that on acceptance of the renunciation of a contract the contract is rescinded is incorrect. In such a case the injured party may accept the renunciation as a breach going to the root of the whole of the consideration. By that acceptance he is discharged from further performance and may bring an action for damages, but the contract itself is not rescinded."

A And similarly Lord Macmillan at p. 373: see also *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (1888) 39 Ch.D. 339, 361, *per* Bowen L.J. In *Lep Air Services Ltd.* v. *Rolloswin Investments Ltd.* [1973] A.C. 331, 350, my noble and learned friend, Lord Diplock, drew a distinction (relevant for that case) between primary obligations under a contract, which on "rescission" generally come to an end, and secondary obligations which may then arise. Among the latter he includes an B obligation to pay compensation, i.e., damages. And he states in terms that this latter obligation "is just as much an obligation arising from the contract as are the primary obligations that it replaces." My noble and learned friend has developed this line of thought in an enlightening manner in his opinion which I have now had the benefit of reading.

These passages I believe to state correctly the modern law of contract in the relevant respects: they demonstrate that the whole foundation C of *Harbutt's* case [1970] 1 Q.B. 447 is unsound. A fortiori, in addition to *Harbutt's* case there must be overruled the case of *Wathes (Western) Ltd.* v. *Austins (Menswear) Ltd.* [1976] 1 Lloyd's Rep. 14 which sought to apply the doctrine of fundamental breach to a case where, by election of the innocent party, the contract had not been terminated, an impossible acrobatic, yet necessarily engendered by the doctrine. Similarly, *Charter-* D *house Credit Co. Ltd.* v. *Tolly* [1963] 2 Q.B. 683 must be overruled, though the result might have been reached on construction of the contract.

3. I must add to this, by way of exception to the decision not to "gloss" the *Suisse Atlantique* [1967] 1 A.C. 361 a brief observation on the deviation cases, since some reliance has been placed upon them, E particularly upon the decision of this House in *Hain Steamship Co. Ltd.* v. *Tate and Lyle Ltd.* (1936) 155 L.T. 177 (so earlier than the *Suisse Atlantique*) in the support of the *Harbutt* doctrine. I suggested in the *Suisse Atlantique* that these cases can be regarded as proceeding upon normal principles applicable to the law of contract generally viz., that it is a matter of the parties' intentions whether and to what extent clauses in shipping contracts can be applied after a deviation, i.e., a F departure from the contractually agreed voyage or adventure. It may be preferable that they should be considered as a body of authority sui generis with special rules derived from historical and commercial reasons. What on either view they cannot do is to lay down different rules as to contracts generally from those later stated by this House in *Heyman* v. *Darwins Ltd.* [1942] A.C. 356. The ingenious use by G Donaldson J. in *Kenyon, Son & Craven Ltd.* v. *Baxter Hoare & Co. Ltd.* [1971] 1 W.L.R. 519 of the doctrine of deviation in order to reconcile the *Suisse Atlantique* with *Harbutt's* case, itself based in part on the use of the doctrine of deviation, illustrates the contortions which that case has made necessary and would be unnecessary if it vanished as an authority.

4. It is not necessary to review fully the numerous cases in which H the doctrine of fundamental breach has been applied or discussed. Many of these have now been superseded by the Unfair Contract Terms Act 1977. Others, as decisions, may be justified as depending upon the construction of the contract (see *Levison* v. *Patent Steam Carpet*

Cleaning Co. Ltd. [1978] Q.B. 69) in the light of well known principles such as that stated in *Alderslade* v. *Hendon Laundry Ltd.* [1945] K.B. 189.

In this situation the present case has to be decided. As a preliminary, the nature of the contract has to be understood. Securicor undertook to provide a service of periodical visits for a very modest charge which works out at 26p. per visit. It did not agree to provide equipment. It would have no knowledge of the value of the plaintiffs' factory: that, and the efficacy of their fire precautions, would be known to the respondents. In these circumstances nobody could consider it unreasonable, that as between these two equal parties the risk assumed by Securicor should be a modest one, and that the respondents should carry the substantial risk of damage or destruction.

The duty of Securicor was, as stated, to provide a service. There must be implied an obligation to use due care in selecting their patrolmen, to take care of the keys and, I would think, to operate the service with due and proper regard to the safety and security of the premises. The breach of duty committed by Securicor lay in a failure to discharge this latter obligation. Alternatively it could be put upon a vicarious responsibility for the wrongful act of Musgrove—viz., starting a fire on the premises: Securicor would be responsible for this upon the principle stated in *Morris* v. *C. W. Martin & Sons Ltd.* [1966] 1 Q.B. 716, 739. This being the breach, does condition 1 apply? It is drafted in strong terms, "Under no circumstances" . . . "any injurious act or default by any employee." These words have to be approached with the aid of the cardinal rules of construction that they must be read contra proferentem and that in order to escape from the consequences of one's own wrongdoing, or that of one's servant, clear words are necessary. I think that these words are clear. The respondents in facts relied upon them for an argument that since they exempted from negligence they must be taken as not exempting from the consequence of deliberate acts. But this is a perversion of the rule that if a clause can cover something other than negligence, it will not be applied to negligence. Whether, in addition to negligence, it covers other, e.g., deliberate, acts, remains a matter of construction requiring, of course, clear words. I am of opinion that it does, and being free to construe and apply the clause, I must hold that liability is excluded. On this part of the case I agree with the judge and adopt his reasons for judgment. I would allow the appeal.

LORD DIPLOCK. My Lords, my noble and learned friend, Lord Wilberforce, has summarised the facts which have given rise to this appeal. The contract which falls to be considered was a contract for the rendering of services by the defendants ("Securicor") to the plaintiffs ("the factory owners"). It was a contract of indefinite duration terminable by one month's notice on either side. It had been in existence for some two-and-a-half years when the breach that is the subject matter of these proceedings occurred. It is not disputed that the act of Securicor's servant, Musgrove, in starting a fire in the factory which they had undertaken to protect was a breach of contract by Securicor; and since it

was the cause of an event, the destruction of the factory, that rendered further performance of the contract impossible it is not an unnatural use of ordinary language to describe it as a "fundamental breach."

It was by attaching that label to it that all three members of the Court of Appeal found themselves able to dispose of Securicor's defence based on the exclusion clause restricting its liability for its servants' torts in terms which Lord Wilberforce has already set out, by holding that where there had been a fundamental breach by a party to a contract, there was a rule of law which prevented him from relying upon any exclusion clause appearing in the contract, whatever its wording might be.

The Court of Appeal was, I think, bound so to hold by previous decisions of its own, of which the first was *Harbutt's "Plasticine" Ltd.* v. *Wayne Tank and Pump Co. Ltd.* [1970] 1 Q.B. 447. It purported in that case to find support for the rule of law it there laid down in the reasoning of this House in *Suisse Atlantique Société d'Armement Maritime S.A.* v. *N.V. Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361. I agree with Lord Wilberforce's analysis of the speeches in *Suisse Atlantique,* and with his conclusion that this House rejected the argument that there was any such rule of law. I also agree that *Harbutt's "Plasticine"* and the subsequent cases in which the so-called "rule of law" was applied to defeat exclusion clauses should be overruled, though the actual decisions in some of the later cases might have been justified on the proper construction of the particular exclusion clause on which the defendant relied.

My Lords, the contract in the instant case was entered into before the passing of the Unfair Contract Terms Act 1977. So what we are concerned with is the common law of contract—of which the subject matter is the legally enforceable obligations as between the parties to it of which the contract is the source. The "rule of law" theory which the Court of Appeal has adopted in the last decade to defeat exclusion clauses is at first sight attractive in the simplicity of its logic. A fundamental breach is one which entitles the party not in default to elect to terminate the contract. Upon his doing so the contract comes to an end. The exclusion clause is part of the contract, so it comes to an end too; the party in default can no longer rely on it. This reasoning can be extended without undue strain to cases where the party entitled to elect to terminate the contract does not become aware of the breach until some time after it occurred; his election to terminate the contract could not implausibly be treated as exercisable nunc pro tunc. But even the superficial logic of the reasoning is shattered when it is applied, as it was in *Wathes (Western) Ltd.* v. *Austins (Menswear) Ltd.* [1976] 1 Lloyd's Rep. 14, to cases where, despite the "fundamental breach," the party not in default elects to maintain the contract in being.

The fallacy in the reasoning and what I venture to think is the disarray into which the common law about breaches of contract has fallen, is due to the use in many of the leading judgments on this subject of ambiguous or imprecise expressions without defining the sense in which they are used. I am conscious that I have myself sometimes been guilty of this when I look back on judgments I have given in such cases as *Hongkong Fir Shipping Co. Ltd.* v. *Kawakasi Kisen Kaisha Ltd.* [1962] 2 Q.B. 26; *R. V. Ward Ltd.* v. *Bignall* [1967] 1 Q.B. 534; *Lep*

Air Services Ltd. v. *Rolloswin Investments Ltd.* [1973] A.C. 331; and in particular *Hardwick Game Farm* v. *Suffolk Agricultural Poultry Producers Association* [1966] 1 W.L.R. 287, when commenting unfavourably on the then budding doctrine of fundamental breach in a portion of my judgment in the Court of Appeal that did not subsequently incur the disapproval of this House.

My Lords, it is characteristic of commercial contracts, nearly all of which today are entered into not by natural legal persons, but by fictitious ones, i.e., companies, that the parties promise to one another that some thing will be done; for instance, that property and possession of goods will be transferred, that goods will be carried by ship from one port to another, that a building will be constructed in accordance with agreed plans, that services of a particular kind will be provided. Such a contract is the source of primary legal obligations upon each party to it to procure that whatever he has promised will be done is done. (I leave aside arbitration clauses which do not come into operation until a party to the contract claims that a primary obligation has not been observed.)

Where what is promised will be done involves the doing of a physical act, performance of the promise necessitates procuring a natural person to do it; but the legal relationship between the promisor and the natural person by whom the act is done, whether it is that of master and servant, or principal and agent, or of parties to an independent sub-contract, is generally irrelevant. If that person fails to do it in the manner in which the promisor has promised to procure it to be done, as, for instance, with reasonable skill and care, the promisor has failed to fulfil his own primary obligation. This is to be distinguished from "vicarious liability"—a legal concept which does depend upon the existence of a particular legal relationship between the natural person by whom a tortious act was done and the person sought to be made vicariously liable for it. In the interests of clarity the expression should, in my view, be confined to liability for tort.

A basic principle of the common law of contract, to which there are no exceptions that are relevant in the instant case, is that parties to a contract are free to determine for themselves what primary obligations they will accept. They may state these in express words in the contract itself and, where they do, the statement is determinative; but in practice a commercial contract never states all the primary obligations of the parties in full; many are left to be incorporated by implication of law from the legal nature of the contract into which the parties are entering. But if the parties wish to reject or modify primary obligations which would otherwise be so incorporated, they are fully at liberty to do so by express words.

Leaving aside those comparatively rare cases in which the court is able to enforce a primary obligation by decreeing specific performance of it, breaches of primary obligations give rise to substituted or secondary obligations on the part of the party in default, and, in some cases, may entitle the other party to be relieved from further performance of his own primary obligations. These secondary obligations of the contract breaker and any concomitant relief of the other party from his own

primary obligations also arise by implication of law—generally common law, but sometimes statute, as in the case of codifying statutes passed at the turn of the century, notably the Sale of Goods Act 1893. The contract, however, is just as much the source of secondary obligations as it is of primary obligations; and like primary obligations that are implied by law, secondary obligations too can be modified by agreement between the parties, although, for reasons to be mentioned later, they cannot, in my view, be totally excluded. In the instant case, the only secondary obligations and concomitant reliefs that are applicable arise by implication of the common law as modified by the express words of the contract.

Every failure to perform a primary obligation is a breach of contract. The secondary obligation on the part of the contract breaker to which it gives rise by implication of the common law is to pay monetary compensation to the other party for the loss sustained by him in consequence of the breach; but, with two exceptions, the primary obligations of both parties so far as they have not yet been fully performed remain unchanged. This secondary obligation to pay compensation (damages) for non-performance of primary obligations I will call the "general secondary obligation." It applies in the cases of the two exceptions as well.

The exceptions are: (1) Where the event resulting from the failure by one party to perform a primary obligation has the effect of depriving the other party of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract, the party not in default may elect to put an end to all primary obligations of both parties remaining unperformed. (If the expression "fundamental breach" is to be retained, it should, in the interests of clarity, be confined to this exception.) (2) Where the contracting parties have agreed, whether by express words or by implication of law, that *any* failure by one party to perform a particular primary obligation ("condition" in the nomenclature of the Sale of Goods Act 1893), irrespective of the gravity of the event that has in fact resulted from the breach, shall entitle the other party to elect to put an end to all primary obligations of both parties remaining unperformed. (In the interests of clarity, the nomenclature of the Sale of Goods Act 1893, "breach of condition" should be reserved for this exception.)

Where such an election is made (a) there is substituted by implication of law for the primary obligations of the party in default which remain unperformed a secondary obligation to pay monetary compensation to the other party for the loss sustained by him in consequence of their non-performance in the future and (b) the unperformed primary obligations of that other party are discharged. This secondary obligation is additional to the general secondary obligation; I will call it "the anticipatory secondary obligation."

In cases falling within the first exception, fundamental breach, the anticipatory secondary obligation arises under contracts of all kinds by implication of the common law, except to the extent that it is excluded or modified by the express words of the contract. In cases falling within the second exception, breach of condition, the anticipatory secondary

obligation generally arises under particular kinds of contracts by implication of statute law; though in the case of "deviation" from the contract voyage under a contract of carriage of goods by sea it arises by implication of the common law. The anticipatory secondary obligation in these cases too can be excluded or modified by express words.

When there has been a fundamental breach or breach of condition, the coming to an end of the primary obligations of both parties to the contract at the election of the party not in default, is often referred to as the "determination" or "rescission" of the contract or, as in the Sale of Goods Act 1893 "treating the contract as repudiated." The first two of these expressions, however, are misleading unless it is borne in mind that for the unperformed primary obligations of the party in default there are substituted by operation of law what I have called the secondary obligations.

The bringing to an end of all primary obligations under the contract may also leave the parties in a relationship, typically that of bailor and bailee, in which they owe to one another by operation of law fresh primary obligations of which the contract is the source; but no such relationship is involved in the instant case.

I have left out of account in this analysis as irrelevant to the instant case an arbitration or choice of forum clause. This does not come into operation until a party to the contract claims that a primary obligation of the other party has not been performed; and its relationship to other obligations of which the contract is the source was dealt with by this House in *Heyman* v. *Darwins Ltd.* [1942] A.C. 356.

My Lords, an exclusion clause is one which excludes or modifies an obligation, whether primary, general secondary or anticipatory secondary, that would otherwise arise under the contract by implication of law. Parties are free to agree to whatever exclusion or modification of all types of obligations as they please within the limits that the agreement must retain the legal characteristics of a contract; and must not offend against the equitable rule against penalties; that is to say, it must not impose upon the breaker of a primary obligation a general secondary obligation to pay to the other party a sum of money that is manifestly intended to be in excess of the amount which would fully compensate the other party for the loss sustained by him in consequence of the breach of the primary obligation. Since the presumption is that the parties by entering into the contract intended to accept the implied obligations exclusion clauses are to be construed strictly and the degree of strictness appropriate to be applied to their construction may properly depend upon the extent to which they involve departure from the implied obligations. Since the obligations implied by law in a commercial contract are those which, by judicial consensus over the years or by Parliament in passing a statute, have been regarded as obligations which a reasonable businessman would realise that he was accepting when he entered into a contract of a particular kind, the court's view of the reasonableness of any departure from the implied obligations which would be involved in construing the express words of an exclusion clause in one sense that they are capable of bearing rather than another, is a relevant consideration in deciding what meaning the words were intended

by the parties to bear. But this does not entitle the court to reject the exclusion clause, however unreasonable the court itself may think it is, if the words are clear and fairly susceptible of one meaning only.

My Lords, the reports are full of cases in which what would appear to be very strained constructions have been placed upon exclusion clauses, mainly in what to-day would be called consumer contracts and contracts of adhesion. As Lord Wilberforce has pointed out, any need for this kind of judicial distortion of the English language has been banished by Parliament's having made these kinds of contracts subject to the Unfair Contract Terms Act 1977. In commercial contracts negotiated between business-men capable of looking after their own interests and of deciding how risks inherent in the performance of various kinds of contract can be most economically borne (generally by insurance), it is, in my view, wrong to place a strained construction upon words in an exclusion clause which are clear and fairly susceptible of one meaning only even after due allowance has been made for the presumption in favour of the implied primary and secondary obligations.

Applying these principles to the instant case; in the absence of the exclusion clause which Lord Wilberforce has cited, a primary obligation of Securicor under the contract, which would be implied by law, would be an absolute obligation to procure that the visits by the night patrol to the factory were conducted by natural persons who would exercise reasonable skill and care for the safety of the factory. That primary obligation is modified by the exclusion clause. Securicor's obligation to do this is not to be absolute, but is limited to exercising due diligence in its capacity as employer of the natural persons by whom the visits are conducted, to procure that those persons shall exercise reasonable skill and care for the safety of the factory.

For the reasons given by Lord Wilberforce it seems to me that this apportionment of the risk of the factory being damaged or destroyed by the injurious act of an employee of Securicor while carrying out a visit to the factory is one which reasonable business-men in the position of Securicor and the factory owners might well think was the most economical. An analogous apportionment of risk is provided for by the Hague Rules in the case of goods carried by sea under bills of lading. The risk that a servant of Securicor would damage or destroy the factory or steal goods from it, despite the exercise of all reasonable diligence by Securicor to prevent it, is what in the context of maritime law would be called a " misfortune risk "—something which reasonable diligence of neither party to the contract can prevent. Either party can insure against it. It is generally more economical for the person by whom the loss will be directly sustained to do so rather than that it should be covered by the other party by liability insurance. This makes it unnecessary to consider whether a later exclusion clause in the contract which modifies the general secondary obligation implied by law by placing limits on the amount of damages recoverable for breaches of primary obligations, would have applied in the instant case.

For the reasons given by Lord Wilberforce and in application of the principles that I have here stated, I would allow this appeal.

LORD SALMON. My Lords, the contract with which this appeal is concerned is a very simple commercial contract entered into by two highly experienced business enterprises—the appellants whom I shall call Securicor and the respondents whom I shall call Photo Production.

This appeal turns in my view entirely upon certain words in the contract which read as follows:

> "Under no circumstances shall [Securicor] be responsible for any injurious act or default by any employee of [Securicor] unless such act or default could have been foreseen and avoided by the exercise of due diligence on the part of [Securicor] as his employer."

We are not concerned with the Unfair Contract Terms Act 1977 since the present contract was entered into before that Act was passed. Accordingly, I prefer to express no view about the effect of that Act as the result of this appeal depends solely on the common law.

The facts relevant to this case are very short. Indubitably, one of Securicor's servants called Musgrove committed an injurious act or default which caused Photo Production's factory to be burned down; and as a result, Photo Production suffered a loss of £615,000. This disaster occurred when Musgrove was visiting the factory on patrol one Sunday night and deliberately threw a lighted match on some cartons lying on the floor of one of the rooms he was inspecting. Whether Musgrove intended to light only a small fire or to burn down the factory, and what his motives were for what he did were found by the learned trial judge to be mysteries which it was impossible to solve.

No one has suggested that Securicor could have foreseen or avoided by due diligence the act or default which caused the damage or that Securicor had been negligent in employing or supervising Musgrove.

The contract between the two parties provided that Securicor should supply a patrol service at Photo Production's factory by four visits a night for seven nights a week and two visits every Saturday afternoon and four day visits every Sunday. The contract provided that for this service, Securicor should be paid £8 15s. a week. There can be no doubt that but for the clause in the contract which I have recited, Securicor would have been liable for the damage which was caused by their servant, Musgrove, whilst indubitably acting in the course of his employment: *Morris* v. *C. W. Martin & Sons Ltd.* [1966] 1 Q.B. 716. To my mind, however, the words of the clause are so crystal clear that they obviously relieve Securicor from what would otherwise have been their liability for the damage caused by Musgrove. Indeed the words of the clause are incapable of any other meaning. I think that any business-man entering into this contract could have had no doubt as to the real meaning of this clause and would have made his insurance arrangements accordingly. The cost to Photo Production for the benefit of the patrol service provided by Securicor was very modest and probably substantially less than the reduction of the insurance premiums which Photo Production may have enjoyed as a result of obtaining that service.

Clauses which absolve a party to a contract from liability for breaking it are no doubt unpopular—particularly when they are unfair. which incidentally, in my view, this clause is not. It is, I think, because of

A the unpopularity of such clauses that a so called "rule of law" has been developed in the Court of Appeal to the effect that what was characterised as "a fundamental breach of contract," automatically or with the consent of the innocent party, brings the contract to an end; and that therefore the contract breaker will then immediately be barred from relying on any clause in the contract, however clearly worded, which would otherwise have safeguarded him against being liable inter alia in B respect of the damages caused by the default; see, for example, *Karsales (Harrow) Ltd.* v. *Wallis* [1956] 1 W.L.R. 936, 940 *per* Denning L.J. and *Harbutt's "Plasticine" Ltd.* v. *Wayne Tank and Pump Co. Ltd.* [1970] 1 Q.B. 447.

I entirely agree with my noble and learned friend Lord Wilberforce's analysis of the *Suisse Atlantique* case [1967] 1 A.C. 361 which explains why the breach does not bring the contract to an end and why the so-C called "rule of law" upon which Photo Production rely is therefore non-existent. This proposition is strongly supported by the passage recited by Lord Wilberforce in Lord Porter's speech in *Heyman* v. *Darwins Ltd.* [1942] A.C. 356, 399.

Any persons capable of making a contract are free to enter into any contract they may choose: and providing the contract is not illegal or D voidable, it is binding upon them. It is not denied that the present contract was binding upon each of the parties to it. In the end, everything depends upon the true construction of the clause in dispute about which I have already expressed my opinion.

My Lords, I would accordingly allow the appeal.

E LORD KEITH OF KINKEL. My Lords, I agree with the speech of my noble and learned friend, Lord Wilberforce, which I have had the advantage of reading in draft and to which I cannot usefully add anything. Accordingly I too would allow the appeal.

LORD SCARMAN. My Lords, I have the advantage of reading in draft the speech delivered by my noble and learned friend, Lord Wilberforce. I F agree with it. I would, therefore, allow the appeal.

I applaud the refusal of the trial judge, MacKenna J., to allow the sophisticated refinements into which, before the enactment of the Unfair Contract Terms Act 1977, the courts were driven in order to do justice to the consumer to govern his judgment in a commercial dispute between parties well able to look after themselves. In such a situation what the parties agreed (expressly or impliedly) is what matters; and the duty of G the courts is to construe their contract according to its tenor.

Appeal allowed.

Solicitors: *Berrymans; Stanleys & Simpson, North.*

H F. C.

EXHIBIT 11

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FSD CAUSE NO. 125 of 2012

BETWEEN

TEMPO GROUP LIMITED

and others

plaintiffs

And

FORTUNA DEVELOPMENT CORPORATION

and others

defendants

Mr. M. Green, QC instructed by
Mr. M. Imrie & Ms. L. Kuehl
of Maples & Calder for the Plaintiffs

Mr. R. Hacker, QC & Mr. R. Fisher instructed by
Mr. P. McMaster, QC & Ms. A. Gilbert
of Appleby for the Defendants

Henderson, J.

Trial: September 1 – 5, 8 – 12, 15 – 19, 22 – 23, 30; October 1 – 3; November 26 – 28; December 1 – 2, 2014

Judgment: March 31, 2015

JUDGMENT

Contents **Page**

1. After an amicable relationship lasting many years, the three principal owners of Fortuna Development Corporation became embroiled in an acrimonious and bitter dispute which is now in its second decade of litigation. In this judgment I am to determine whether the three men agreed that Dr. Chen Ching Chih was to be guaranteed a seat on the board of directors and whether his subsequent removal from the board is valid.

Pleadings

2. The first Defendant Fortuna Development Corporation ("Fortuna") is a Cayman Islands entity incorporated as a holding company in 1994 to hold various substantial Vietnamese investments including a power plant, a large land development and other infrastructure near Ho Chi Minh City. Its three major shareholders are holding companies owned by Dr. Chen Ching Chih ("Dr. Chen", the second Plaintiff), Mr. Lawrence Ting ("Mr. Ting") and Mr. Ferdinand Tsien ("Mr. Tsien").

3. The amended statement of claim alleges a "mutual understanding and agreement" between the three men that the Vietnamese investments "would be owned and operated as a joint venture and quasi-partnership between the three of them, and that each of them would be entitled to participate equally in the management of the venture, and that no party would be excluded from management without his consent." It is alleged that this agreement was reflected in a joint venture agreement dated September 20, 1989 between the three men and the Central Investment Corporation of

the Kuomintang ("the KMT") political party in Taiwan. The three men had agreed that each would be entitled to designate a director of a predecessor company known as CT & D Taiwan. It is alleged that when Fortuna was incorporated in February 1994 the three men, acting on behalf of their respective nominee companies Tempo Group Limited ("Tempo"), Wynner Group Limited ("Wynner") and New Frontier Development Corporation ("New Frontier"), agreed that these companies would be the registered shareholders of Fortuna. The plaintiffs say it was an express or implied term of this agreement that the personal rights and obligations of each of the three men would be accepted and assumed by the nominee companies. The result was that there came into existence an agreement between the three companies that they should "be entitled to participate equally in the management of Fortuna, and in particular to have equal representation on its board of directors, and that none of them would be excluded from the management of Fortuna without its consent".

4. Mr. Green said in his opening that the plaintiffs do not allege a novation but assert an entirely new agreement involving Fortuna. Fortuna was operated as a "quasi-partnership in a corporate form". Dr. Chen says that he has an entitlement under this agreement to participate as Tempo's nominee on Fortuna's board of directors. He seeks an order, whether by specific performance or otherwise, requiring Wynner and New Frontier to procure his reinstatement to the board and an injunction restraining them from removing him from the board thereafter. There is also a claim in damages. When

asked at trial what role he wanted in management, Dr. Chen said "I just want to be on the board".

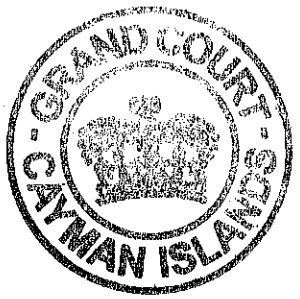
5. The defendants say that the relationship between the three men was never the subject of any mutual understanding or agreement, express or implied, and never took the form of a quasi-partnership. In any event, say the defendants, if there was an agreement, Dr. Chen had repudiated that by his conduct late in 2003 and early in 2004. As for the claim in damages, the defendants say that any alleged loss is too remote, not of a kind which may be recovered, and that there has been a failure to mitigate.

6. On June 22, 2004 an extraordinary general meeting of the shareholders of Fortuna ("the EGM") was held in Beijing. Over the objections of Dr. Chen, Mssrs. Ting and Tsien were successful in passing a series of special and ordinary resolutions which removed Dr. Chen from the board and greatly restricted his right to deal with his shares.

7. The special resolutions could not have succeeded without the support of Maxima Resources Corporation (variously, "Maxima" and "Maxima Samoa") which owned 5% of the outstanding shares. Mr. Philip Niu ("Mr. Niu") claimed to be the sole director and owner of Maxima and sought admission to the EGM but was refused entry; he intended to support Dr. Chen and thus ensure the defeat of the special resolutions. Instead, Mr. Tsien voted pursuant to a proxy from Maxima in favour of all resolutions. The defendants say that the true beneficial owner of Maxima was Pearl Niu, Mr. Niu's

mother; that she had utilized bearer shares to give legal ownership of Maxima to Mr. Tsien and his wife; and that they had arranged for Maxima to give its proxy for the EGM to Mr. Tsien. The result, say the defendants, is that all of the special and ordinary resolutions are valid as Mr. Niu had no right to represent Maxima at the EGM. In any event, a 2011 shareholders meeting of Fortuna has ratified the impugned resolutions.

8. The plaintiffs say that Mr. Niu, not his mother, was the beneficial owner of Maxima and its sole director. The bearer shares were not validly issued so the legal ownership of Maxima remained with Mr. Niu, its sole registered shareholder. The "issuance" of the bearer shares and the proxy to Mr. Tsien were not done in good faith. The deliberate and dishonest exclusion of Mr. Niu from the EGM rendered the meeting, and all business transacted at it, a nullity which is incapable of ratification.



Evidence of Dr. Chen Ching Chih

9. Dr. Chen is a citizen of Taiwan and of the United States with degrees from the Massachusetts Institute of Technology. Now 76, he has been involved in businesses in Taiwan and internationally for over 44 years. He has also acted as an advisor to the Ministry of Finance in Taiwan.

10. The first Plaintiff, Tempo, is a company owned and controlled by Dr. Chen; it was incorporated to hold his 30% shareholding in Fortuna. The second defendant, Fortuna

East Asia Holding Corporation, was formerly known as New Frontier; it was, during the time material to this action, owned and controlled by Mr. Ting and was established to hold his 30% shareholding in Fortuna. The third defendant, Wynner, was owned and controlled by Mr. Tsien and holds his 25% shareholding in Fortuna. A fourth shareholder in Fortuna, Bates Group Limited ("Bates") (the fourth defendant) owned a 10% shareholding on behalf of Dr. Chen, Mr. Ting and Mr. Tsien equally. Finally, and crucially to the issues in this trial, Maxima, the third plaintiff, incorporated as a holding company in Samoa, owned the remaining 5% shareholding. The ownership of Maxima and the right to control it and vote its shareholding is a major issue in this case.

11. Both Mr. Ting and Mr. Tsien have passed away and have never given evidence expressly for use in this trial.

12. Fortuna has a number of subsidiaries, the most important of which are: Metropolitan Development Corporation ("MDC"), which owns indirectly the Hiep Phuoc Power Company Limited ("HPPC") in Ho Chi Minh City, Vietnam; the Tan Thuan Corporation ("TTC"), the developer of a large tract of land in the same area; and the Phu My Hung Corporation ("PMHC"), the developer of a parkway and other infrastructure in the Saigon South area near Ho Chi Minh City. The value of Fortuna and its various direct and indirect subsidiaries (collectively, "the Fortuna Group") is in excess of US $1 billion.

13. Dr. Chen's involvement with Mssrs. Tsien and Ting commenced in relation to a predecessor company to Fortuna – CT & D Taiwan ("CT & D"). In the summer of 1989 Mr. Tsien arranged to meet with Dr. Chen in Taipei. The men had known each other since the mid-1970s. Mr. Tsien was the son-in law of Mrs. Pearl Niu; she had introduced Dr. Chen to the woman who would become his wife. Dr. Chen describes himself as a close friend of Phillip Niu, the son of Robert and Pearl Niu. Dr. Chen's father had had a long standing personal and business relationship with Mr. Robert Niu. Dr. Chen describes Mr. Tsien and the latter's wife, Josephine Tsien (formerly Niu), as "friends".

14. Mr. Tsien explained to Dr. Chen that he and Mr. Ting were considering investing in a joint venture with the Kuomintang political party (the "KMT") for the purpose of investing in a Taiwanese investment company. That entity was already under the control of the KMT. Since Dr. Chen was not acquainted with Mr. Ting, Mr. Tsien explained that he was the son-in-law of a former Minister of Finance in Taiwan, had attended university in the U.S.A., and had returned to Taiwan to go into business. Mr. Ting had been approached by Mr. Albert Hsu, Chairman of the Central Investment Committee of the KMT and a former Deputy Premier of Taiwan, to take over the management of the investment company. The KMT would continue as the majority shareholder and would have a majority of directors on the board; it was proposed that Mssrs. Ting and Tsien and Dr. Chen would be minority shareholders and would each have a representative on the board. Mr. Tsien proposed that the three men meet with Albert Hsu, someone with whom Dr. Chen was already friendly.

15. Not long after this first meeting Albert Hsu met with the three prospective investors in Taipei. Mr. Hsu proposed that the KMT would own a 75% shareholding, with Mssrs. Tsien and Ting each having 10% and Dr. Chen 5%. It was suggested that Mr. Ting "with the assistance of Mr. Tsien" would have control of the day-to-day business operations. Dr. Chen was to have no day-to-day role but was to be a board member of the joint venture company, which was to be known as CT & D Taiwan. Mr. Hsu closed the meeting by providing the three men with a draft joint venture contract for review.

16. On September 20, 1989 the parties executed the joint venture agreement. It provides that each of the three men would be entitled to designate a director on the board of CT & D Taiwan. Dr. Chen says that the quasi-partnership which was created in January, 1994 following the joint purchase by the three men of the majority shareholding in CT & D Taiwan carried forward the "spirit" of the understandings and agreement manifested by the joint venture agreement. The defendants deny the existence of a quasi-partnership.

17. In December, 1993 Mssrs. Tsien and Ting and Dr. Chen met at the American Club in Taipei to discuss the possibility of purchasing the KMT shareholding in CT & D Taiwan. Mr. Tsien told Dr. Chen that Albert Hsu had told him that the former president of Taiwan, Mr. Lee Teng-Hui, had requested that Dr. Chen be a shareholder and director. Mr. Lee and Dr. Chen were acquainted. Mr. Tsien explained that President Lee desired

the participation of Dr. Chen because of his independence from the KMT, his contacts in the Taiwanese business community and his personal financial resources. At the time, Dr. Chen's personal net worth was in the range of hundreds of millions of U.S. dollars. Mssrs. Ting and Tsien were both of "mainland Chinese descent" while Dr. Chen was of Taiwanese descent; he felt this distinction was a motivating factor.

18. Dr. Chen denies he was a passive investor in CT & D Taiwan. Although Mr. Ting and Mr. Tsien were responsible for management, Dr. Chen says he participated in decision making of a strategic nature. He held the title of Vice-Chairman. Between 1989 and 1991 he consulted with Mssrs. Ting and Tsien to determine the best location for investment. With the concurrence of Dr. Chen, they eventually settled upon Vietnam. Dr. Chen met "frequently" with Mssrs. Tsien and Ting to discuss possible investment opportunities, although the initial identification of such opportunities was "primarily" their responsibility. In his written evidence Dr. Chen said these discussions took place in the CT & D offices in Taipei but he agreed in cross-examination that this was incorrect. What Dr. Chen described as a "close working relationship" continued until early 2004. Once the three men had agreed upon a certain course of action, Mr. Ting (as board chairman) would communicate the proposal to Albert Hsu who would bring it to the entire CT & D board.

19. Dr. Chen says that he travelled to the head offices of Fortuna's important subsidiaries once or twice per year until 2001. Beginning in 2002, he visited "more regularly". In

particular, he visited Vietnam on behalf of the Fortuna Group from time to time. On one occasion, he went there with the Chairman of the KMT (Professor Liu) and the two men jointly selected an architectural firm to design a set of plans. On another occasion Dr. Chen took the lead in acquiring a third party's 25% interest in a Fortuna subsidiary, Power JV.

20. Around mid-November, 1993 Dr. Chen learned that Professor Liu was recommending that the Vietnamese investments (with one exception) be abandoned in favour of investment in Indonesia and in the Philippines. Dr. Chen met with Mssrs. Ting and Tsien; all three felt that Vietnam continued to offer good opportunities for investment. The men agreed that Dr. Chen would meet with President Lee to ask whether the KMT would be prepared to change its view. It was also agreed that if the KMT maintained its intention to divest CT & D Taiwan of its Vietnamese investments, Dr. Chen would explore a sale by the KMT of its interest to the three men. Dr. Chen says that he was chosen to meet with President Lee because of their "close relationship". The meeting with President Lee took place at his home shortly afterwards.

21. A few weeks later, President Lee telephoned Dr. Chen to say that the KMT would sell its shares to Dr. Chen and to Mssrs. Ting and Tsien. Dr. Chen left the other two men to work out the details of the transaction.

22. Around January 29, 1994 Dr. Chen met with Mssrs. Ting and Tsien at the American Club in Taipei to consider a draft purchase agreement. The KMT was to sell all but 10% of its 75% interest in CT & D Taiwan to the three men. It was important that the KMT continue to be involved in order to maintain orderly relations with a lender. Mr. Ting advised Dr. Chen that the KMT would only enter into the purchase and sale agreement if Dr. Chen assumed personal liability for certain KMT bank loans and guarantees; he was also asked to issue promissory notes to cover the entire purchase price of the shareholding. In effect, Dr. Chen was to become the guarantor for all three of the partners.

23. Dr. Chen told Mr. Tsien and Mr. Ting that he was prepared to enter into the agreement to purchase the KMT's interest "if we did so as equal partners". His witness statement continues:

> *Mr. Tsien and Mr. Ting both agreed and they confirmed that, if the purchase was to proceed, then our investments in CT & D Taiwan would be owned and operated as a joint venture and quasi-partnership between the three of us and that each of us would be entitled to have equal representation on the boards of directors of those companies and would not be excluded from management.*

24. This alleged agreement between the three men in their personal capacities has been referred to in evidence as the "CT & D Taiwan Agreement". It was never reduced to writing by any of the three parties. It was agreed that Mr. Ting and Mr. Tsien would each acquire 20% of the KMT's shareholding and Dr. Chen would acquire the remaining

25%; the result was to be that each man would own an equal 30% interest in CT & D Taiwan.

25. The share purchase agreement was signed on February 1, 1994. As agreed, Dr. Chen issued promissory notes to the KMT for the full purchase price of the shareholding. Mr. Tsien and Dr. Chen were appointed co-vice-chairmen of the company. Dr. Chen was also appointed to the boards of several subsidiaries. As time passed, he says he became responsible for "resolving issues" between the KMT and the three partners.

26. While the three men were discussing the buyout of the KMT's shareholding, they also considered establishing a new "tax efficient" company in which to hold the Vietnamese business interests. Dr. Chen describes their meetings as having been held "on an ad hoc basis, usually over lunch"; no written record was kept of what was said. Mr. Tsien advised that he had received advice from Offshore Incorporations Limited ("OIL") to the effect that an offshore holding company should be created to hold the assets owned by CT & D Taiwan. That holding company is Fortuna, the first defendant. The proposal was that CT & D Taiwan continue to manage the Group companies under a management agreement.

27. In the first or second week of February, 1994 Dr. Chen, Mr. Tsien and Mr. Ting met at the CT & D offices in Taipei to discuss how the new holding company would be managed and controlled. Dr. Chen's witness statement says:

> *Mr. Tsien told us that, because the company would simply be replacing CT & D Taiwan as the holding company for the group, he considered that the partnership arrangements that we had in place for CT & D Taiwan, governed by the CT & D Taiwan Agreement, could simply be carried over to the new entity.*

28. In effect, because each man was entitled to participate equally in the "management" of CT & D and to have equal representation on its board of directors, it was proposed that none of the three could be excluded from the management of Fortuna or from its board without that individual's consent. Thus, each of the three families would own 30% of Fortuna and 10% would be reserved for the KMT if it decided to participate. Dr. Chen's witness statement says:

> *Mr. Tsien's proposal seemed entirely logical and both Mr. Ting and I agreed to the proposal without much discussion.*

29. The discussion then turned to how the men would hold their investments in the new holding company. Mr. Tsien explained that he had had advice from OIL to the effect that they should establish offshore holding companies through which to own their interests. The motive was to minimize tax liability. There was some discussion about how these offshore vehicles would be established and then both Mr. Ting and Dr. Chen told Mr. Tsien that he should proceed to instruct OIL to put the plan into effect.

30. Thus, on the evidence of Dr. Chen, there were three main elements to what has been referred to in evidence as the "Fortuna Agreement":

- Each of the three men would be entitled to equal representation on the Fortuna board of directors; and
- none of the three men would be excluded from "management" without that man's consent; and
- each of the three men would hold their shares in Fortuna in an offshore company rather than in their personal names.

31. As was the case with the CT & D Taiwan Agreement, the Fortuna Agreement was never reduced to writing. Dr. Chen describes Mr. Ting and Mr. Tsien as being "very enthusiastic" about Dr. Chen joining the board.

32. Fortuna was incorporated in the Cayman Islands as an exempted limited company on February 25, 1994. The articles of association, prepared by OIL, contain nothing which reflects the terms of the Fortuna Agreement. All three men were appointed to the board. The shareholdings in Fortuna were transferred to Tempo, Dr. Chen's company; to New Frontier, Mr. Ting's company; and to Wynner, the property of Mr. Tsien. As at June, 2004 Tempo owned 30% of Fortuna, New Frontier owned 30% and Wynner owned 25%. The remaining minority shareholders were Bates and Maxima. Tempo was owned by Dr. Chen, by his brother Mr. C.H. Chen and by Dr. Chen's son Randy Chen.

33. Around January, 2002 Mr. Albert Hsu was invited to become a director and shareholder of Fortuna. This was to procure the continued involvement of the KMT in Fortuna by giving it a representative at board level.

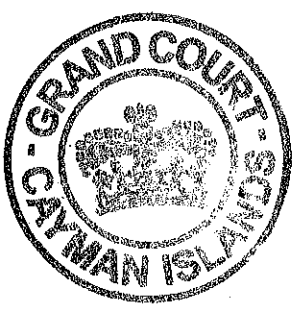
34. Bates was established by the three principals with the intention of inducing the KMT to take up (through Bates) a shareholding of up to 10% in Fortuna. The original shareholders of Bates were Tempo, New Frontier, and Wynner in equal proportions. In fact, the KMT did not take up this opportunity.

35. The remaining Fortuna shareholder was Maxima Samoa, which held 5%. In the summer of 1994 Mr. Tsien had told Mr. Ting and Dr. Chen that he proposed to transfer 5% of his own shareholding in Fortuna to a company owned by Phillip Niu; Dr. Chen later learned that the company was named Maxima. Because of his close connections with Phillip Niu and with the Niu family Dr. Chen was happy to agree. Mr. Ting also agreed. Dr. Chen says that Mr. Tsien "confirmed that he would make the necessary arrangements regarding the transfer".

36. Dr. Chen says he played a crucial role in the financing of Fortuna and its investments. He was instrumental in arranging for the KMT to agree to extend the period during which it would provide collateral for CT & D. In 1996 each of the shareholders of Fortuna was required to make a pro rata contribution of additional capital. Mr. Ting found himself unable to do so. Dr. Chen arranged for a company under his control to loan the sum of

U.S. $5 million to Mr. Ting; the loan was eventually repaid. In 1995 Fortuna borrowed U.S. $40 million from a syndicate organized by First Commercial Bank Limited. Dr. Chen was one of several guarantors of Fortuna's obligation. He pledged a large and valuable shareholding. Dr. Chen says that, had Fortuna defaulted on the loan, the lender would have exercised its security rights over his shares in preference to pursuing the other guarantors. Fortuna borrowed an additional U.S. $180 million from the same syndicate. Again, Dr. Chen was a personal guarantor and pledged a substantial shareholding as security. Again, he says that the lender viewed the shares he pledged as its primary security for the loan. In the event, the loans were repaid and the pledged shares were released. On a number of occasions, from June 1999 to April, 2002 Dr. Chen and his brother (Mr. C.H. Chen) loaned money to the Fortuna Group. These loans ranged from U.S. $535,000 to U.S. $10,500,000. They were to provide short term financing to Fortuna at a time when it was growing slowly and still required capital.

37. In 2003, Dr. Chen, Mr. Ting and Mr. Tsien began to discuss bringing the next generation of members of their respective families into the business. Dr. Chen's son, Randy Chen; Mr. Tsien's daughter, Gayle Tsien; and Mr. Ting's son, Arthur Ting; were appointed to the board of directors. The gist of the discussion between the three principals was that each of them would introduce one successor onto the board. The three members of the next generation, together with Albert Hsu, attended their first board meeting as directors on January 16, 2004.



38. Loans obtained from the First Commercial Bank Limited syndicate (referred to in evidence as the "MDC facility") required the pledging of shares by Dr. Chen and his brother, Mr. C.H. Chen. By 2001, Mr. C.H. Chen had become increasingly concerned about his conditional liability. He said to Dr. Chen that he wanted Mr. Ting and Mr. Tsien to agree in writing to a list of key corporate actions which they would not take without the approval of Dr. Chen and his brother. Mssrs. Tsien and Ting agreed. On July 4, 2001 a written agreement was executed by the three partners in their personal capacity and by Tempo, New Frontier and Wynner. This has been referred to in evidence as the "Shareholders Agreement". A recital in the agreement sets out its purpose: "to procure that C.H. Chen will cause the guarantees to be extended or renewed..." Dr. Chen's position is that the terms of the Shareholders Agreement were not intended to affect in any way the much earlier Fortuna Agreement upon which his claim is based.

39. By mid-2002 Fortuna was beginning to make a profit. In particular, the real estate market in and around Ho Chi Minh City was very buoyant. Fortuna had not been paying dividends but Mssrs. Ting and Tsien now wanted to change that. Mr. Ting suggested to Dr. Chen that U.S. $20 million should be paid out to the shareholders. Dr. Chen agreed although he had no immediate need for the money. Mr. Ting told Dr. Chen that it was "extremely important" to himself and to Mr. Tsien that a dividend be paid. Fortuna's lenders agreed to the dividend.

40. Shortly after, Dr. Chen met with Jessie Hsu, the Chief Financial Officer of CT & D Taiwan and of Fortuna. Jessie Hsu presented a memorandum and supporting documents to, as he said, help explain the accounting aspects of the dividend payment. Dr. Chen found the material puzzling and troubling. The memorandum said that the sum of U.S. $5 million "will be used to cancel out the amount receivable" without presenting any explanation of how or in what circumstances this receivable had come into existence. It went on to say that the remaining U.S. $15 million "will be distributed to the three shareholders in equal shares." However, there were five shareholders not three. A line item in a table referred to U.S. $15 million as "other expenses". A note beside it said "deduct U.S $5 million each time from dividends distributed - 3 deductions in total." There were some cryptic notations beside the U.S. $15 million line item which in total amounted to U.S. $13.7 million but the circumstances in which these purported liabilities had been occurred were not revealed.

41. Dr. Chen says that he raised many "questions" with Jessie Hsu but the latter said only that he was not in a position to answer them. He directed Dr. Chen to speak with Mssrs. Ting and Tsien. Shortly afterwards, Dr. Chen did meet with Mr. Ting but the latter said he would need to arrange another meeting at a later stage to discuss these questions. In the meantime, the formal board resolution authorizing the U.S. $20 million dividend was passed; the resolution makes no reference to the U.S. $5 million deduction. In the result, Tempo received significantly less than Dr. Chen believed was its entitlement.

42. Dr. Chen says that he tried to speak with Mr. Ting and with Mr. Tsien about the confusing information presented to him by Jessie Hsu and about the U.S. $5 million deduction but they always "claimed" that they were unable to meet or unable to answer the questions. As a result, Dr. Chen's confidence in his partners began to evaporate.

43. Gayle Tsien, who has acted as Fortuna's Vice-President of Finance, has examined the company records. She says that the amounts owed to Fortuna by its shareholders are recorded properly and that Dr. Chen has always been at liberty to examine these accounts. The accounts have been audited by KPMG without adverse comment.

44. In December 2002 Mr. Ting and Dr. Chen travelled to Hanoi to meet with the Deputy Minister of Finance for Vietnam. A subsidiary in the Fortuna Group, PMHC, considered that it had an agreement to be taxed at an overall rate of 10%. When certain building permits were issued to it they stipulated that the tax rate on profit would be 25%. At the time, PMHC did not protest but the purpose of the meeting was to ask the government to reinstate the lower rate. During the meeting, the Deputy Minister of Finance suggested a compromise – the applicable rate should be 18%. Dr. Chen was about to accept this offer on behalf of Fortuna when Mr. Ting stopped him and told the government official that he and Dr. Chen would have to discuss the offer.

45. After they had left the meeting and returned to their hotel, Mr. Ting, according to Dr. Chen, explained that they did not have to accept the 18% offer because an arrangement had already been made with other officials to reduce the tax rate back to the original 10%. Dr. Chen says that Mr. Ting said that he had arranged for a payment of U.S. $10 million to people connected with the Vietnamese government – in essence, a bribe of mammoth proportions. Dr. Chen says he was stunned. He asked Mr. Ting where the U.S. $10 million was coming from because he had seen no reference to it in the monthly financial reports. Mr. Ting did not answer this question but said he would discuss it when they arrived back in Taiwan.

46. After hearing from counsel at a case management hearing, I have ruled that the question of whether bribes were paid or money was misappropriated from Fortuna will not be resolved in this trial. The evidence of bribery or misappropriation is of limited relevance; it serves only to explain what Dr. Chen believed in 2003 and 2004 and thus provide an explanation for his actions at that time. It also serves to explain why Mssrs. Ting and Tsien wished to remove Dr. Chen from Fortuna's board; they would have been motivated to remove him whether his allegations were true or false. A determination of whether bribes were actually paid or money was truly misappropriated is simply unnecessary.

47. From this point on, Dr. Chen began to take a much more active interest in the affairs of Fortuna and its subsidiaries. He travelled to Vietnam in December, 2002 in search of

information about some of the "other expenses" to which Jessie Hsu had referred. He visited the offices of SPCC, a major component of the Fortuna Group, requested access to certain business records and accounts, and formed the conclusion he was being put off.

48. Upon Dr. Chen's arrival back in Taiwan, Mr. Tsien raised with him the possibility of another dividend payment. Dr. Chen was reluctant. The proposed dividend payment was U.S. $25 million, a figure which seemed inordinately high. At a meeting between the three partners Mr. Ting said that he thought that U.S. $10 million of the proposed dividend should be withheld to pay for certain "extraordinary expenses" of Fortuna. Dr. Chen had no knowledge of these extraordinary expenses and suspected that the deduction was linked to the alleged bribes to which Mr. Ting had referred a short time previously. Dr. Chen asked Mr. Ting to elaborate but found the explanation unclear. When Mr. Ting promised to provide full details of the extraordinary expenses Dr. Chen acquiesced in the declaration of the U.S. $25 million dividend. The sum of U.S. $10 million was withheld from the shareholders as Mr. Ting had suggested.

49. Towards the end of December, 2002 Dr. Chen questioned Mr. Ting about the alleged bribes to Vietnamese officials. Dr. Chen has said in evidence that, by this point, he was "convinced" that no bribes had actually been paid; he considered the suggestions of bribery to be a way to explain what were actually misappropriations by Mssrs. Ting and Tsien. He quotes Mr. Ting as saying that U.S. $5 million had been paid directly to several

Vietnamese officials and the remaining U.S. $5 million had been deposited into a Swiss bank account. When Dr. Chen asked for the information regarding the "extraordinary expenses", Mr. Ting said that staff members were compiling the information and it would be provided to Dr. Chen in due course.

50. In January, 2003 Dr. Chen met with Mr. Tsien to pose to him the same questions he had asked earlier of Mr. Ting. Mr. Tsien responded that the matters under discussion were "very confidential" and that Dr. Chen should trust his partners to make the right decisions but "should not have been involved in any details".

51. Around January, 2003 Mr. Jessie Hsu gave to Dr. Chen a table entitled "Northern Office Expenses". This table suggests that substantial cash payments were being withdrawn from CT & D Taiwan and from Warson, another group company, and then booked as "receivables" against the interests of the three main shareholders. Fortuna's financial statements make no reference to these receivables. The table suggests that payments totaling U.S. $14.475 million were made between May 2000 and November 2002. Neither the purpose of the payments nor the recipients are stated. The reference to the "Northern Office" is not explained. Dr. Chen speculated that it was a reference to the Fortuna group office in Hanoi. After receiving this document Dr. Chen says that he pressed Mr. Tsien for information about it on several occasions. Eventually, according to Dr. Chen, Mr. Tsien said in effect that the payments listed in the table were illegal;

they were "public relation expenses" and Dr. Chen should not enquire into the detail. Dr. Chen was dissatisfied and determined to investigate further.

52. On April 28, 2003 a further dividend of U.S. $20 million was declared by Fortuna. Only U.S. $15 million was paid out to the shareholders. On August 14, 2003 Fortuna declared a dividend in the amount of U.S. $15 million. No deduction was taken from the dividend on this occasion. Again, on December 5, 2003, a dividend was declared – this time in the amount of U.S. $10 million. The board chairman (Mr. Ting) was authorized to set a time for distribution of the dividend; it was never distributed. Dr. Chen alleges that this latter "dividend" was, according to Mr. Ting, to be used to fund the payment of bribes to Vietnamese officials in order to resolve the tax issue. Dr. Chen says that Mr. Ting told him the money had already been paid out.

53. In 2003 Dr. Chen made nine trips to Vietnam to try, as he said, to gain a better understanding of the operations of the main Vietnamese subsidiaries and to "try to investigate from where the source of funds for Mr. Ting's claims about bribery could be". Mr. Ting "assigned" a friend of his, General Zhang, to accompany Dr. Chen in Vietnam. Dr. Chen formed the view that both Mr. Ting and General Zhang were obstructing and frustrating his enquiries.

54. Randy Chen was working at the offices of a Fortuna subsidiary in Vietnam in 2003. He has described in evidence the delivery of a large sum of cash to a Vietnamese official. Dr. Chen said that his son told him of this incident when it happened.

55. In October 2003 at a Fortuna directors meeting Dr. Chen says that Mr. Ting told those present that he hoped the tax rate dispute would be resolved soon because of the payment of U.S. $10 million in bribes. Again, Dr. Chen asked for information about the source of funding and why the payment was necessary and, again, was told that the issue was sensitive and that he did not need to know anything more. Arthur Ting and Gayle Tsien, who were present, deny that any such conversation occurred.

56. Towards the end of 2003 Mr. Ting provided a copy of a letter to Dr. Chen which was written in code. Dr. Chen says that Mr. Ting said that the document confirmed that bribes of U.S. $5 million and U.S. $2 million to certain named officials. Dr. Chen was skeptical about this explanation. He did not think the payment of such sizable bribes was consistent with his knowledge of business practices in Vietnam. He said in his witness statement:

> *What seemed more likely to me was that Mr. Ting and Mr. Tsien were using the excuse of paying bribes to cover up the fact that they were extracting more money from the group than they were entitled to. By referring to bribery and corruption of such senior officials, I believe they were hoping to deter me from investigating the accounting irregularities.*

Arthur Ting has examined the letter and says that it is not in his late father's handwriting and, in any event, the translation of it in evidence is inaccurate. Gayle Tsien points out

that the "letter" is labeled a "draft", which seems an odd status to confer upon a document purporting to record payments already made.

57. Shortly after receiving the coded letter from Mr. Ting, Dr. Chen showed it to Mr. Tsien. Dr. Chen says that Mr. Tsien confirmed that the letter reflected his own understanding of the situation.

58. Dr. Chen's evidence makes reference to a number of other entries in the books and records of Fortuna group which appeared irregular. By the end of 2003 Dr. Chen began to share his concerns with other trusted colleagues. He discussed the situation with his brother, with Mr. Albert Hsu and with Mr. Philip Niu. Mr. C.H. Chen wrote to Mr. Ting in January seeking details of the extraordinary expenses.

59. A board meeting of Fortuna was scheduled for February 23, 2004. Before the meeting, a preliminary meeting took place between Dr. Chen, Mr. C.H. Chen, Mr. Ting, Mr. Tsien and Mr. Albert Hsu. Dr. Chen says that Mr. Ting told those present that the extraordinary expenses were illegal payments in the form of bribes to Vietnamese officials. He said they had been recorded in Warson's accounts and those of other subsidiaries as "receivables". Dr. Chen says that Mr. Ting then presented a list of 80 payments allegedly made to various government officers and authorities between 2000 and 2003. He allegedly said that all of the payments had been approved by Mr. Tsien

and by himself. Mr. Tsien was silent throughout. Dr. Chen alleges that Mr. Ting then wrote on a blackboard the names of four Vietnamese government agencies and explained to whom each of the various sums had been paid. Dr. Chen took notes, which are in evidence. Again, all allegations of bribery and misappropriation are denied by the defendants and by their witnesses. Dr. Chen himself did not believe the allegations.

60. At the ensuing board meeting Dr. Chen, at his own initiative, was appointed to "oversee finance matters". The actual resolution reads:

> *within the function of the board of directors, Dr. C.C. Chen shall oversee finance matters.*

Arthur Ting and Gayle Tsien, who were present, assert that the resolution was not intended to give Dr. Chen any rights in relation to subsidiaries; his entitlement was confined to Fortuna itself.

61. Subsequently, there was a dispute about whether the intention of this resolution was to permit Dr. Chen access to books and records of the Fortuna Group subsidiaries. Mr. Tsien advised Dr. Chen that Gayle Tsien, the Chief Financial Officer of CT & D Taiwan, would supply the information requested. Subsequently, Mr. C.H. Chen reported to his brother that he had been told by Gayle Tsien that most of the requested documentation had been destroyed (and some was stored in Kuala Lumpur and required review before Dr. Chen would be permitted access). This bit of news triggered a written demand by Dr. Chen for all of the records and for recognition of his right to approve all transactions

over U.S. $100,000 including expenses exceeding that amount, among other things. Gayle Tsien denies that any of this came about for the purpose of preventing Dr. Chen from seeing the records.

62. In April, 2004 Dr. Chen met with Mr. Ting and Mr. Tsien and again demanded access to the records concerning the receivables and the extraordinary expenses. Mr. Tsien replied that the books and records had been sent to Malaysia for "safekeeping". Dr. Chen says there was no good reason for that.

63. Dr. Chen now instructed his attorneys in Hong Kong (Holman, Fenwick and Willan) to send a formal letter of demand to Fortuna for payment of Tempo's outstanding dividends and an accounting. The letter was not answered. On April 29, 2004 Holman's advised Fortuna and CT & D Taiwan that Fortuna had instructed attorneys in the Cayman Islands and Taiwan to commence legal proceedings.

64. As of May, 2002 the MDC Facility was secured by, among other things, personal guarantees from Dr. Chen and Mr. C.H. Chen. Dr. Chen was experiencing doubts that the value of the underlying assets held as security for the facility could satisfy the indebtedness. He believed that the lenders would prefer to exercise their rights under the personal guarantees rather than try to realize assets in Vietnam. Moreover, since Mr. C.H. Chen was not a shareholder, he was receiving no benefit from the substantial dividends which had been declared. Those considerations led to discussions between

the three principals and Mr. C.H. Chen, who wished to be removed as a guarantor. The First Commercial Bank (the lead bank in the syndicate) said towards the end of 2003 that Mr. C.H. Chen's guarantee could be extinguished if all of the other lenders agreed. All but one did so.

65. By early 2004, Dr. Chen had formed the view that he and his brother needed to be released from their guarantees. In light of his good relationship with the lenders, he felt he could induce them to encourage Mssrs. Ting and Tsien to co-operate with Dr. Chen and resolve their differences. Dr. Chen did not believe that any of the lenders would declare an act of default simply by his approaching them to discuss his current difficulties. He says that in none of his conversations with the lenders did he allude to fraudulent conduct or bribery.

66. There is an attendance note of a meeting between Dr. Chen and his attorney on March 27, 2004 over which privilege has been waived. The note reads in part:

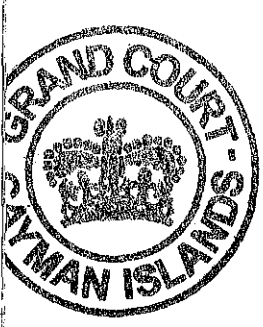
> *(1) The objective ultimately is to force out Dr. Chen's two co-investors, Mr. Tsien and Mr. Ting.*
> *(2) Then insert professional management.*
> *(3) Alternatively, if they can raise the finance, they can buy him out.*
> *(4) He believes that Mr. Tsien and Mr. Ting – who are the executives in the Company – are stealing from him.*

67. In his oral evidence, Dr. Chen said that he wanted to force Mssrs. Ting and Tsien out of "management" but not force them off the board of directors.

68. On April 19, 2004 Dr. Chen's Taiwanese attorneys wrote to First Commercial Bank stating that it had "violated the loan agreement" by applying certain monies to pay down the principal. The letter also alleged that Fortuna was "suspected of falsely using loan borrowing to pay out cash dividends." The loan agreement contained terms constraining the ability of certain Fortuna subsidiaries from increasing their indebtedness. The letter also alleged that Fortuna "is suspected to have cause [sic] [a subsidiary] to increase new borrowings". Dr. Chen's attorneys said that since Dr. Chen had not acquiesced in these violations he intended to terminate his guarantee effective June 1, 2004.

69. Dr. Chen says that he did not intend to prejudice Fortuna's rights under the loan agreement. He conceded that at least one of his approaches to the lenders amounted to an act of default but said he "knew" that the loan would not be called as the lenders considered it secure.

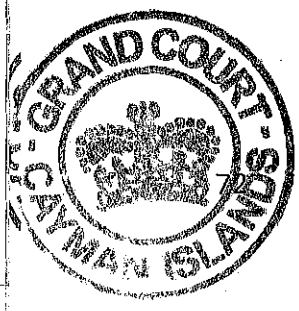
70. In a letter dated April 29, 2004 the First Commercial Bank denied breaching the agreement and refused to accept a release of the personal guarantees. Dr. Chen's Taiwanese attorneys replied to the bank by letter dated May 12, 2004. This latest letter repeats the earlier allegations in somewhat more detail and then notes pointedly that when a guarantor requests a release of his guarantee "this would constitute an event of default and all the lenders may immediately take legal or other action". The letter then repeats a request for release of the guarantees. Somewhat ingenuously, Dr. Chen says



in his evidence "of course, we did not want this to happen, and nor did we think it would happen". His goal was to induce the syndicate banks to pressure Mssrs. Ting and Tsien to resolve their differences with Dr. Chen. In the event, the lenders neither treated the request as an act of default nor sought to pressure Dr. Chen's two partners. The guarantees were not released. Nonetheless, Dr. Chen said in evidence that "I felt that progress was being made ..." The syndicate did impose some additional terms upon Fortuna in relation to the distribution of dividends and timing of loan repayments.

71. Before June, 2004 both board meetings and shareholders meetings of Fortuna had been arranged informally and by a consensus of the three men. They were usually held in Taipei at a mutually convenient time. In May Mr. Ting and Mr. Tsien decided to convene a board meeting to be held in Beijing on June 2, 2004. Taiwanese citizens require special visas for travel to Beijing, which can take over a week to obtain. A formal written notice of the meeting dated May 21, 2004 was mailed from a Fortuna subsidiary in Vietnam to Dr. Chen's address in Taipei. It came to his notice around May 28th while he was in the United States. Both the date and the location were inconvenient, as was the short notice. Contrary to the earlier practice, the notice did not identify the resolutions which would be proposed at the meeting. Dr. Chen requested that the meeting be put off to another time but this was refused. Despite requesting them, Dr. Chen did not receive a copy of the minutes of this meeting until the discovery phase of this action. Those present at the board meeting resolved to convene an extraordinary general meeting of Fortuna shareholders "within the next three months on such a date as is

determined appropriate by the chairman of the board [Mr. Tsien] or the chairman of this meeting [Mr. Ting] each acting individually." Because of the short notice, neither Randy Chen nor Albert Hsu attended the meeting.



Several days after the board meeting, Dr. Chen asked Mssrs. Ting and Tsien for a renewal of the 2001 Shareholders Agreement for an indefinite period of time. They refused. On June 17, 2004 Tempo issued proceedings in this Court (Cause No. 291 of 2004) against Fortuna seeking recovery of Tempo's unpaid share of the declared dividends.

73. On June 18, 2004 Dr. Chen sent an email to Gayle Tsien and Phillip Niu suggesting that a Fortuna shareholders meeting be held on June 30, 2004. He received a reply from Gayle Tsien on June 20th, when he learned for the first time that an extraordinary general meeting of shareholders was planned for June 22nd in Beijing. She advised Dr. Chen of the place and time of the EGM. She did not advise him of the agenda or of the proposed resolutions. Formal notice of the EGM had been sent to Tempo's registered address in the British Virgin Islands (as is required by the Fortuna articles of association) but, in the past, such notices have been sent to Dr. Chen's address in Taipei. When Dr. Chen asked Gayle Tsien why the notice had not been sent to him by email, she did not answer.

74. Despite the short notice, both Phillip Niu and Dr. Chen arrived in Beijing by June 22nd. The EGM was due to start at 9:00 a.m. Dr. Chen and Mr. Niu arrived at the meeting in

the company of Mr. Paul Hatzer, an attorney representing them both, and his assistant. Dr. Chen says that there were security guards at the door to the meeting room. Dr. Chen and Mr. Hatzer were admitted to the meeting but entry was barred to Mr. Niu. Gayle Tsien explained that Maxima was already represented at the meeting because it had granted its proxy for that purpose to Mr. Tsien. When Dr. Chen and Mr. Niu asked for a copy of the proxy, Gayle Tsien said she did not have one. Inside the meeting room, Mr. Tsien produced a minute of a board of directors meeting of Maxima dated June 14, 2004 which contained a resolution appointing Mr. Tsien as Maxima's proxy.

75. This dispute over the right to represent Maxima was crucial because its votes were needed to pass the special resolutions to be proposed at the EGM. The articles of association of Fortuna required a two-thirds majority for a special resolution. New Frontier and Wynner (the Ting and Tsien holding companies) held a total of 55% of the shares. Bates, which at this time was controlled by Mssrs. Tsien and Ting, owned a further 10%. Thus, Maxima's 5% shareholding was vital to the success of any special resolution to which Dr. Chen might be opposed.

76. Present at the EGM were: Mr. Tsien (acting as chairman), Gayle Tsien (acting as secretary), Mr. Ting, Arthur Ting, Dr. Chen, and Mr. Hatzer. Mr. Tsien began by announcing that 100% of the shares of the company were represented at the meeting. Mr. Hatzer protested on behalf of Tempo that Maxima had been wrongly excluded from

the meeting, that inadequate notice of the meeting had been given, and that no agenda had been received. A copy of the agenda was then provided.

77. The first special resolution imposed upon shareholders a requirement to seek approval at a general meeting of shareholders for any transfer of share ownership. If the members were to withhold approval, the directors were empowered to require the member in question to transfer all of his shares to a party designated by the directors. Until he complied with such a direction, the member would be deprived of any rights and privileges attaching to his shareholding. This was passed.

78. The second special resolution made changes to the articles of association. One change dealing with "confidentiality" prohibited a member from disclosing confidential information to any third party. Another change required a member to acquire the written consent of the chairman before speaking to any government authority, to the media or to the public about anything relating to the business of the company. A third change gave a power to the directors to determine if a member had breached these obligations; if so, the directors were empowered to require the member to sell his shareholding to a party designated by the directors. Despite Mr. Hatzer's protest, the resolution was passed.

79. Other special resolutions, also opposed by Dr. Chen and Mr. Hatzer, were passed to increase the number of authorized shares, to decrease the required notice period for a

shareholders meeting, to amend the voting procedures for shareholders and directors meetings, and to change the quorum requirement for a general meeting from "two members entitled to vote" to "two members holding 50% of the issued shares and entitled to vote." The last-mentioned amendment gave Mr. Ting and Mr. Tsien the ability to hold a meeting without Tempo's participation. In every case, Dr. Chen and his legal advisor learned of the fundamental changes to be made for the first time in the meeting room.

80. After the special resolutions had been passed, an ordinary resolution was proposed to reduce the number of directors to two. When Mr. Hatzer asked the reason for this, Mr. Tsien gave him a one word answer: "simplicity". A second ordinary resolution nominated Mr. Ting and Mr. Tsien as the sole directors of the company. Mr. Hatzer's protest that this was unfair to Dr. Chen, who still owned 30% of the company, was ignored. The resolution was passed.

81. In its effect, the June 22nd EGM extinguished any ability of Dr. Chen and his company, Tempo, to influence the affairs of Fortuna. By removing Dr. Chen from the board, Mssrs. Ting and Tsien ensured that Dr. Chen's ability to obtain detailed information from the books and records was eliminated. By shareholders' resolutions dated June 28th and 30th, 2004 Dr. Chen was removed from the boards of various subsidiary companies.

82. In July, 2004, Fortuna commenced proceedings against Dr. Chen in this Court alleging that he had breached his fiduciary duties as a director. Dr. Chen filed a petition in this Court seeking a winding up of Fortuna.

83. In August 2004, after he had been removed from the board of Fortuna, Dr. Chen made a complaint to the Taiwanese prosecuting authorities "about the conduct" of Mssrs. Ting and Tsien in relation to CT & D Taiwan. His witness statement contains no further detail of the terms of his complaint. The office of CT & D Taiwan and the home of Mr. Ting were searched and books and records were seized. Mr. Ting then committed suicide. Mr. Tsien passed away in April, 2006.

84. The fifth defendant, Mr. Stephen Driscoll, was first appointed a director of Fortuna in September, 2004. The sixth defendant, Mr. Lii San-Rong, became a director of Fortuna in April, 2007. The two men are named as defendants simply to ensure that they are bound to implement any orders this Court might make in relation to Fortuna. The same is true of Bates.

85. On April 13, 2011, after this action had been extant for some considerable time, Fortuna held an EGM. Each of the ordinary resolutions passed at the EGM on June 22, 2004 was ratified with effect from the date of that earlier meeting. In each case, Tempo and Maxima were opposed. There was also an attempt to ratify each of the special resolutions passed at the June 22, 2004 meeting and now under attack in this action. In

the case of each special resolution, the opposition of Tempo and Maxima ensured that ratification did not occur; these resolutions were rejected. Tempo's position is that the resolutions passed in 2004 (both ordinary and special) are incapable of ratification.

Evidence of Chen Chao Hon

86. Mr. Chen Chao Hon, the brother of Dr. Chen, is a former banker and has considerable experience in dealing with Taiwanese banks. He has a number of useful relationships with Taiwanese banking officials.

87. In 1994, Mr. Chen assisted the board of CT & D Taiwan to obtain financing. Although not a board member, he attended some board meetings to discuss it. A syndicated loan agreement was obtained from First Commercial Bank Ltd in April, 1995 in the amount of US $40 million. A further loan in the amount of US $180 million (later increased to US $190 million) was obtained in 1998. Each of these lending agreements required that Mr. Chen and his brother pledge shares as security. Some 39 million shares of Wan Hai Lines (a Chen family company) were pledged. Dr. Chen and his brother provided personal guarantees. Some 8.65 million shares in a company called SLPC were also pledged. In general, Mr. Chen asserts that his relationships and the Chen family wealth were of "considerably more importance" to the lenders than the personal guarantees provided by Mssrs. Ting and Tsien.

88. By 2001 Mr. Chen became somewhat uneasy about his financial exposure in relation to Fortuna's borrowing. After consulting his brother (who concurred), he asked for a written agreement to which he would be a party. This has been referred to above as the "Shareholders Agreement"; the parties are Mssrs. Ting and Tsien, Mr. Chen and Dr. Chen, Tempo, New Frontier and Wynner. In consideration for Dr. Chen and his brother continuing to provide their personal guarantees, the agreement sets out a number of major decisions and actions of Fortuna which could only be taken with the express consent of the Chen brothers.

89. Despite the Shareholders Agreement, by late 2003 Mr. Chen wished to approach the lending banks to ask for the release of his personal guarantee. The preliminary approach to the First Commercial Bank elicited the response that the personal guarantees could be released only if alternative security was provided. A second approach to the lending syndicate resulted in a concession that Mr. Chen's guarantee could be released once the indebtedness had been reduced to US. $140 million. However, the syndicate was not unanimous; one lender, Cosmos Bank, did not wish to release Mr. Chen at all. Mr. Chen spoke to the chairman of Cosmos Bank but was unsuccessful at extracting any concession. The Chen family has a small shareholding in this Bank.

90. Mr. Chen also says that early in 2003 Dr. Chen began to "raise concerns with me" about his suspicions concerning improper payments and possible bribery. He recalls being told

about some U.S. $25 million being paid for "extraordinary expenses" which may have been linked to bribery payments to Vietnamese officials. On January 15, 2004 Mr. Chen wrote to Mr. Ting and asked for an explanation of the extraordinary expenses and of the memorandum produced by Mr. Jesse Hsu. Later, he met with Mr. Tsien who attempted to persuade him to withdraw his request.

91. Mr. Chen attended the meeting on February 23rd, 2004 immediately prior to the board meeting and corroborates his brother's evidence of what was said at that meeting. Subsequently, Mr. Chen met with the various financial controllers in the Fortuna Group and explained that Dr. Chen's accounting team now required access to various original records. Gayle Tsien told him that most of the requested documentation had been "destroyed" and the remaining records were stored in Kuala Lumpur. She also said she needed to review the requested information (regarding shareholder transactions, dividends, expenses and paid up capital) before it could be shown to Dr. Chen and his accounting staff. This unsatisfactory response resulted in a written request from Dr. Chen to Mssrs. Ting and Tsien for various accounting records of Fortuna and its subsidiaries.

92. By April, 2004 Mr. Chen had decided that he needed to protect his financial position "by trying to put pressure on the banks for both of us to withdraw the guarantees or get assistance from the banks to pressure Mr. Ting and Mr. Tsien to start behaving properly". After discussing the situation with his brother, Mr. Chen formed the opinion

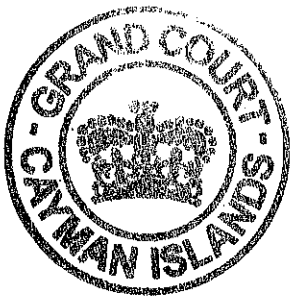
that if certain "minor breaches of the terms of the MDC Facility" were brought to the attention of the lenders, that would induce them to release the personal guarantees. He also believed that knowledge of these breaches would lead the banks to put the desired pressure upon Mr. Ting and Mr. Tsien to address the concerns of the Chen brothers.

Evidence of Randy Chen

93. Mr. Randy Chen has degrees from Duke University and M.I.T. in the United States. In 2002 he returned to Taipei to become involved in the family businesses. He worked in Vietnam and in Taiwan for entities within the Fortuna Group. He also served a brief term as a board member of Fortuna from January 16, 2004 until June 22, 2004.

94. Around the beginning of 2003 Dr. Chen explained to his son that there were some accounting issues contained in documentation received from Jessie Hsu which he did not understand. Around the end of February, 2004 Randy Chen received a memorandum terminating his employment with PMHC, a Fortuna entity for which he had been working. The memo was signed by Mr. Ting. He remained in Vietnam and worked primarily on the affairs of HPPC, another Fortuna subsidiary. He gave evidence about certain activity he had witnessed in Vietnam which is suggestive of bribery.

95. Randy Chen never received a notice of the board meeting held on June 2, 2004 in Beijing. He learned about it shortly before the meeting at a time when he was unable to obtain the necessary visa.



Evidence of Philip Niu

96. Philip Niu is the son of Mrs. Pearl Niu. His sister Josephine Niu Ping Tsien ("Mrs. Tsien") is the widow of Mr. Tsien; they were married in 1964. Mr. Niu's father, Robert Niu, died in 1974. Gayle Tsien is the daughter of Mr. Tsien and Mrs. Tsien. Philip Niu was educated in England and in the United States. He has lived and worked extensively in the United States but has also lived for periods of time in Guam and in Taipei. Since 2002 he has resided in California.

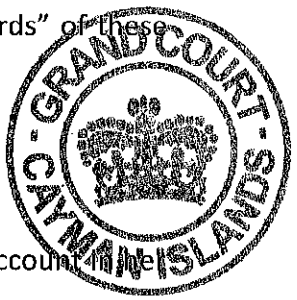
97. Mr. Niu made it clear in his evidence that he has retained few business records in relation to his ownership of assets and due to the passage of time his memory of events and transactions is poor. He has refreshed his memory by reviewing two earlier affidavits sworn by him in 2004 and in 2011.

98. Robert Niu founded and operated various "family" businesses in Taipei. When Robert Niu passed away in 1974, the ownership of the family businesses fell under the control of his widow Mrs. Pearl Niu. Mr. Niu said in his witness statement that ownership of the

family businesses "passed to my mother, my two sisters and me." Jane Niu, the late sister of Philip Niu, passed away in 1986.

99. After the death of Robert Niu, Mr. Tsien was entrusted with the management of many of the family businesses. Over time, says Philip Niu, Mr. Tsien became "an influential advisor" to the Niu family. It is clear that at least until 2003 Mr. Niu relied implicitly upon the advice of Mr. Tsien.

100. In early 1994, upon the advice of Mr. Tsien, the two main businesses inherited from Robert Niu were sold for approximately US. $28 million. Shortly thereafter a third business was sold for US $10 million. According to Philip Niu, Mr. Tsien "retained all of the relevant documentation". Mr. Niu never received any "detailed records" of these transactions.



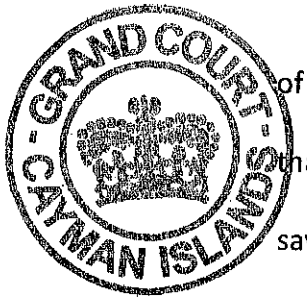
101. Pearl Niu "arranged" for the cash proceeds of sale to be deposited at an account in her name at Deutsche Bank in Singapore. Philip Niu says the account was "managed" by Mr. Tsien on his mother's behalf. Bank statements were sent to Mr. Tsien's address and he provided instructions to the bank.

102. According to Mr. Niu, there were frequent discussions between Pearl Niu, Mr. Tsien, and himself about how the sale proceeds (to which I shall refer as the "Family Funds") should be allocated and distributed. Mr. Niu says that a broad agreement was reached

that Pearl Niu, his sisters and himself would share the Family Funds equally. Because none of the family members had a need for the money at the time, no distribution actually took place. Mr. Niu says that "we were content for the Family Funds to remain on deposit in the bank account". Josephine Tsien denies that any such discussion took place in her presence and says she was "almost always" present when her husband discussed family business with Pearl and Philip Niu. She denies there was an agreement to share the Family Funds equally. Gayle Tsien's evidence is to the same effect.

103. Mr. Niu has a recollection of discussing on several occasions in 1993 or 1994 with Mr. Tsien the possibility of Mr. Niu providing funding to a business venture – CT & D Taiwan. He recalls being told that the KMT had agreed to sell its shares in CT & D Taiwan to Mr. Tsien, to Mr. Ting and to Dr. Chen. In early 1994 Mr. Tsien asked Mr. Niu for a loan of about U.S. $20 million from the Family Funds for the purpose of paying his portion of the buyout price. Mr. Niu said he had no objection provided Pearl Niu agreed. She did. There does not appear to have been any formal loan agreement. Mrs. Tsien's evidence is that the loan was from Pearl Niu to Mr. Tsien and did not require Philip Niu's consent.

104. At some time in the first half of 1994, another discussion took place. Mr. Tsien, his wife, Pearl Niu and Philip Niu discussed the possibility that the latter would purchase an interest in CT & D Taiwan. Mrs. Tsien suggested it and Mr. Tsien agreed. Philip Niu was hesitant at first but became convinced that the investment was "potentially lucrative". The proposal was that Mr. Niu would buy a 5% shareholding in CT & D Taiwan. The size



of the investment was eventually settled at US $5 million but Mr. Niu does not say when that amount was agreed upon. This evidence is contradicted flatly by Mrs. Tsien; she says the investment opportunity was offered to Pearl Niu but not to her son Philip.

105. Mr. Niu says that Mr. Tsien explained that he would arrange for an offshore company to be established to hold Philip Niu's investment. Mr. Tsien said that Philip Niu would be the sole director and shareholder of this company and that Mr. Niu's wife (Rosemarie Porschitz) could act as company secretary. OIL would arrange the incorporation. The purpose, said Mr. Tsien, was to minimize Mr. Niu's Taiwanese tax liabilities. On several occasions Mr. Tsien came to Philip Niu and had him sign documents in relation to the new offshore company. He rarely provided copies and Mr. Niu did not request them.

106. Eventually, Mr. Niu came to understand that two offshore companies had been incorporated by OIL: Maxima Samoa and Maxima Samoa Resources Corporation (Liberia) ("Maxima Liberia"). It appears that Maxima Liberia purchased the 5% shareholding in Fortuna and another 5% shareholding in CT & D Taiwan. The Fortuna shareholding was then transferred to Maxima Samoa in 1994. It is not a matter of dispute that Mr. Niu remains the sole shareholder and director of Maxima Liberia to this day. There is also evidence (to be discussed below) that a single ordinary registered share in Maxima Samoa was registered in the name of Mr. Niu. This registered share was then cancelled immediately after issuance. Mr. Niu says he does not know why this was done.

107. Mr. Niu does have some recollection of attending the first directors meeting of Maxima Samoa in the company of Mr. Tsien. He recalls being appointed as the sole director of Maxima Samoa and consenting to act. The minutes of the first directors meeting record that Mr. Niu approved the allotment of a single bearer share in Maxima Samoa (a source of controversy which will be referred to in greater detail below). He said in evidence that he does not recall why he requested that a bearer share be allotted to him. Moreover, he does not recall taking any further steps to issue the bearer share and says he has never received a bearer share certificate.

108. Mr. Niu gave Mr. Tsien verbal authority to represent Maxima Samoa at shareholders meetings of Fortuna. His witness statement says: "the authority was limited to representing Maxima Samoa at Fortuna shareholders meetings only; he had no authority to take any other steps in relation to Maxima Samoa without my consent".

109. Mr. Niu rarely received minutes of Fortuna shareholders meetings but did receive telephone calls updating him on company affairs. He says that in the following years he visited the various Vietnam investments owned by the subsidiaries of Fortuna including the Saigon South development, the power station, the economic processing zone, and the forestry project. From time to time Mr. Tsien sent invoices for the cost of the administration of Maxima Samoa and Maxima Liberia to Mr. Niu, who says he paid them personally. One such invoice is in evidence.

110. Over time, Mr. Niu (and, according to his evidence, Pearl Niu) became disenchanted with Mr. Tsien's manner of controlling the Family Funds. Increasingly, their requests for up to date information were not being complied with. Mr. Niu expressed the belief that, with the benefit of hindsight, Mr. Tsien had come to believe that he was entitled to "control" the Family Funds absolutely because he had made a major contribution to the success of the family businesses.

111. By early 2004, Philip Niu was pressing Mr. Tsien for information concerning the Family Funds. He asked for a written statement setting out the balance in the bank account and the sources of the money. Mr. Niu says that Mr. Tsien acquiesced.

112. Around March 20, 2004, Gayle Tsien provided a statement ("the Family Funds Statement") to Mr. Niu. The statement (in the form of a spreadsheet) sets out that U.S. $21,964,102 was received from the sale of the "Cannon shares" owned by Robert Niu. There are four columns on the spreadsheet headed "Philip", "Josephine", "Jane", and "Pearl". (Josephine is the Americanized name of Mrs. Tsien.) These are the four family members entitled to claim an interest in Robert Niu's estate. The sale proceeds are divided equally between Philip, Josephine and Pearl. The second section of the Family Funds Statement shows the sum of U.S. $10 million derived from other shareholdings. This sum was divided equally between the four family members with Jane's estate receiving a one-quarter share. Immediately underneath the sum allocated to Philip Niu

is a debit of U.S. $5 million; the line item description for this is "less: CT & D share purchase (P. Niu only)". Mr. Niu says that he had not asked Mr. Tsien to provide an allocation of the funds between family members "because the precise split had still not been determined". The line described as "total owed to shareholders" shows that the share to which Philip Niu would otherwise be entitled has been reduced by U.S. $5 million.

113. Mrs. Josephine Tsien has said that she never received a copy of this document and that it is "entirely inconsistent" with how the Family Funds were regarded by the family – as the sole property of Pearl Niu. Gayle Tsien's position is that the so-called Family Funds Statement was actually created for the use of Pearl Niu and was for estate planning purposes. She also asserts that the copy of this document produced during the litigation by Philip Niu differs materially from the spreadsheet she created originally; the original was given to Pearl Niu and has since been lost.

114. In 2002 and 2003 Fortuna declared a series of four dividends. The minutes of these meetings each list as being present "Maxima Resources Corporation (Western Samoa) as represented by: Mr. Niu Fei". (Niu Fei is Philip Niu's Chinese name.) Mr. Tsien has signed for Mr. Niu in each case indicating his authority to represent him. Maxima Samoa's share of each dividend was: US $752,515.33, US $750,000.00, US $750,000.00 and US $814,731.60. Three of the four dividends were paid into a bank account in Guam in the name of Mr. Niu and his wife; the third dividend was paid into a bank

account the couple kept at the Bank of America. Each of the four dividends is significantly less than what Maxima was entitled to receive for its 5% shareholding. Mr. Niu did not notice this at the time and no one alerted him to the fact. He trusted Mr. Tsien. In late 2003 and early 2004 Mr. Niu had a series of discussions with Dr. Chen during which he learned that Maxima had not received its full entitlement from the dividend payments. The total deficiency is U.S. $1 million.

115. Prior to receiving the third and fourth dividend payments Mr. Niu became concerned about his tax liability and induced his mother to provide him with an admittedly fraudulent letter asserting that these payments were a "gift" from her in the sum of U.S. $1.5 million (sic). There is an email message from Gayle Tsien to Philip Niu dated March 9, 2004 in which she states clearly that the dividend payments are being made "to you". This is significant because the position of the defendants is that Pearl Niu is the true owner of Maxima, the dividends were therefore owed to her, and she was transferring them to her son as gifts. In other words, the defendants do not accept that the gift letter mentioned above was fraudulent; they say it represented the true state of affairs.

116. As time passed and Dr. Chen's suspicions and concerns deepened he kept Mr. Niu informed of them. Mr. Niu assured Dr. Chen that he would "support his investigation". At the end of 2003, prompted by discussions he had had with Dr. Chen, Mr. Niu told Mr. Tsien verbally that "I wanted to attend Fortuna meetings on behalf of Maxima Samoa and I no longer wanted Mr. Tsien to hold himself out as representing Maxima Samoa or

my interest." Mr. Tsien tried to explain that any such change was unnecessary. Mr. Niu replied that "my decision had been made and that I expected him to act in accordance with the decision". Eventually, Mr. Tsien said he would inform Mr. Niu of the next Fortuna shareholders meeting. Mr. Niu told Dr. Chen of the change.

117. On June 1st 2004 Mr. Niu sent an email to Gayle Tsien asking when the next Fortuna shareholders meeting would be held and requesting a copy of the agenda. He told her that he would attend in person. The following day, she responded by email saying that there would be a shareholders meeting sometime in the next few weeks on an undecided date. She asked that Mr. Niu grant a proxy in favour of Pearl Niu (sic) to vote the Maxima Samoa shares. She warned her uncle that the meeting would be acrimonious and said: "the next meeting might put you in a difficult position re voting of your shares". Mr. Niu remained resolved to attend.

118. On June 9, 2004 Mr. Niu received a telephone call from Gayle Tsien during which she reiterated what she had said in her earlier email and asked Mr. Niu to absent himself from the meeting. He said he would attend. The following day in another email Gayle Tsien told Mr. Niu that the shareholders meeting would take place between the 20th and 25th of June "in China". She said she wished to visit Mr. Niu in San Francisco before the meeting. He welcomed her proposed visit.

119. On June 18, 2004 Mr. Niu met with Gayle Tsien and with his sister, Mrs. Josephine Tsien, in San Francisco. He was sufficiently concerned about what was to be discussed that he brought his son, an American attorney, with him. Mr. Niu says that Gayle Tsien and Mrs. Tsien asked that Mr. Niu's son leave the meeting. Mr. Niu refused. They deny this.

120. Gayle Tsien then explained that the shareholders would be asked to remove Dr. Chen from the board of directors of Fortuna and to amend the articles of association because Dr. Chen was causing problems by interfering with Fortuna's lending arrangements and by conducting an unwarranted investigation into various accounting matters. Mr. Niu said he would not vote to remove Dr. Chen. Mrs. Tsien sat silently throughout the meeting. She never mentioned the purported directors meeting of Maxima Samoa of four days earlier at which Mr. Tsien was authorized to represent it at the Fortuna EGM.

121. There was a further discussion between the four people the next day. Mr. Niu says that Gayle Tsien said she had decided that there was no need for him to grant a proxy in favour of Pearl Niu (which, in any event, he had refused to do). There was more discussion between Gayle Tsien and Philip Niu about the forthcoming shareholders meeting. She urged him not to attend. He said he wished to do so. He asked for the date and location of the meeting. She said that "she would in due course confirm the details of the meeting". Eventually, Dr. Chen advised Philip Niu that the meeting was scheduled for June 22, 2004 in Beijing. In his witness statement Mr. Niu says that Gayle Tsien never told him the date but an earlier affidavit of his contradicts that.

122. Mr. Niu arrived in Beijing the day before the EGM. After some discussion with Dr. Chen and Paul Hatzer (Dr. Chen's lawyer) he met with Mssrs. Ting and Tsien. He told them he would attend the meeting the following day and that he would not support the removal of Dr. Chen as a director. Mr. Niu says that the other two men remained silent.

123. On the morning of the EGM, Gayle Tsien told Mr. Niu that he could not attend the meeting because he "was not a shareholder of Fortuna". When he arrived at the meeting room he was prevented by security guards from entering the room. Gayle Tsien emerged from the meeting to tell Mr. Niu, again, that he could not attend. During the meeting Gayle Tsien produced a document dated June 14, 2004 purportedly signed by Mrs. Tsien as a director of Maxima Samoa granting authority to represent that company to Mr. Tsien. Mr. Niu has sworn that he never authorized such a document.

124. Mr. Niu retained an attorney. After an exchange of correspondence, Fortuna's attorneys asserted that Mr. Niu was not the sole director of Maxima Samoa and had never been the legal and beneficial owner of its shares.

125. The defendants rely in this action upon certain corporate records of Maxima Samoa including: the register of members, the bearer share certificates numbered B001 and B002, an unsigned and undated "directors resolution" approving the conversion of Mr. Niu's registered share into a bearer share, an unsigned letter to Maxima requesting the conversion of the registered share into a bearer share, minutes of the Maxima Samoa

shareholders meeting dated January 15, 2004, and minutes of the Maxima Samoa directors meeting dated June 14, 2004. Mr. Niu has sworn that he has "never seen" these documents until their disclosure in some related litigation in October 2004. He says that he never consented to the cancellation of his registered share, did not sign the two bearer share certificates, and believes that the signature on those certificates is that of his mother, Pearl Niu. He says he did not consent to the issuance of bearer shares. He was not notified of the meeting of Maxima's shareholders on January 15, 2004. He was also not notified of the directors meeting of June 14, 2004. He would have opposed the resolution to authorize Mr. Tsien to represent Maxima at Fortuna's EGM.

126. Mr. Niu commenced an action in the Supreme Court of Samoa seeking a declaration that he was the sole beneficial and legal shareholder of Maxima Samoa and its sole director and that the two bearer shares were unauthorized and invalid. Eventually the action was settled on terms which prohibit Mr. Niu from referring to the settlement agreement.

127. As a component of the settlement, Philip Niu sent a letter to Mr. and Mrs. Tsien and to Pearl Niu in which he (in his personal capacity, not on behalf of the company) conceded that the three addressees of the letter had held "an honest belief" that Pearl Niu was the beneficial owner of Maxima and, as a consequence, that all three had an honest belief in the validity of the appointment of Mr. and Mrs. Tsien as directors. He says it is acknowledged by the defendants that he is the current legal and beneficial owner of the

Maxima Samoa shares. He remains the sole shareholder and director of Maxima Liberia. I do not consider that I am bound, when deciding the claims of Tempo and Dr. Chen, to reach the conclusion conceded by Mr. Niu in the settlement. No rule of evidence or procedure would compel that result.

128. Philip Niu was 78 years of age when he gave evidence. He was clearly confused about many points of detail. The impression left by his witness statement that he recalls a reasonable amount of detail was displaced by his oral evidence. Mr. Niu readily admitted that he had discussed his evidence prior to trial with Dr. Chen; however, there was no indication whatsoever that Mr. Niu was shading his evidence to favour Dr. Chen or, for that matter, any of the plaintiffs including Maxima.

129. Mr. Niu said that except for Maxima he had never been involved with the incorporation of a company. He has no experience of corporate record keeping and matters of that kind. He has never until recently understood what a bearer share is and did not know at any material time that he was the owner or holder of bearer shares. He says he has no familiarity with how companies work and that he is not "a detail person". He agreed readily that some things in his memory are "reconstructed". Mr. Niu's desire to support Dr. Chen at the EGM was "emotional" because he thought Dr. Chen had been treated unfairly. Mr. Niu did not purport to understand the reasons for the dispute between the three men.

130. Mr. Niu said he was certain that the assets of his father had passed not only to his mother but to himself and his two sisters. He said his father had no will and it is "normal" in Taiwanese families for the surviving spouse and children to take the property. He did say at one point in cross-examination that the "starting point" was that the money belonged entirely to his mother. At another point in cross-examination he was asked if it was all his mother's money and he replied that he did not know. Mr. Niu says there was never a decision reached on how the assets should be allocated to the various family members and that he did not know how much his share of the Family Funds was to be. With respect to documents, he said that he simply signed everything that he was asked to sign.

Evidence of Lawrence Ting

131. Because of Mr. Ting's untimely death, the only evidence from him which the defendants have been able to enter is a redacted transcript of an examination under oath by Fortuna's Inspectors. In 2004, Mssrs. Russell Smith and David Walker, who had been appointed Joint Inspectors under the *Companies Law* by this Court, conducted an examination of Mr. Ting.

132. Mr. Ting took issue with Dr. Chen's claim that he was instrumental in the founding of CT & D Taiwan and Fortuna. Mr. Ting said that Dr. Chen had little involvement in the affairs of the group until 2002. The relationship between the three men was good until early in

2003, at which point it began to "sour irreparably". Mr. Ting said that Dr. Chen was trying to withdraw his personal guarantee which had been given to secure the syndicated loan agreement and that the "banks actually were really troubled" by this. He observed that pursuant to a request from Dr. Chen the "originally more informal and verbal agreements in the business operations" had to be put in writing starting from February 2004. He said that the removal of Dr. Chen from the board of directors was necessary to avoid additional damage to the Fortuna Group. Mr. Ting confirmed that he held a proxy from Bates and voted it at the June EGM.

133. In various oral statements made by Mr. Ting to others prior to his death, he hotly denied the allegations of bribery and misappropriation made by Dr. Chen then and now.

Evidence of Ferdinand Tsien

134. Mr. Tsien has given no evidence in the present proceeding but he has sworn a lengthy affidavit on October 19, 2014 in a Petition action brought by Tempo to wind up Fortuna. Ultimately, the Petition was dismissed.

135. Mr. Tsien was the chairman of Fortuna and a director of all of the Group's companies. Although his affidavit was directed at opposing Tempo's attempt to wind up Fortuna, it also addresses matters of relevance in the case at bar. In general, Mr. Tsien contradicts

many of the serious allegations made by Dr. Chen in his own affidavit on the winding up proceeding.

136. Mr. Tsien refers in his affidavit to several sources of contention with Dr. Chen. He says that Dr. Chen became aggrieved by the reluctance of Mssrs. Tsien and Ting to grant him a leading role in the management of the Fortuna Group. He denies that the three men ever agreed that either CT & D Taiwan or Fortuna would be operated as a quasi-partnership. However, in a hand written letter dated September 27, 1993 Mr. Tsien described the relationship as a "three-party partnership". He says that after Dr. Chen left his position with Wan Hai Lines Limited in 1999 he began to take a more active interest in the management of Fortuna. Dr. Chen was annoyed by the refusal of Mssrs. Tsien and Ting to give Randy Chen "an extremely significant management role". One company in the Fortuna Group, HPPC, commenced litigation arising from a US $35 million insurance claim against an insurer of which Dr. Chen was a director and significant shareholder.

137. Mr. Tsien's position is that Dr. Chen has "vastly exaggerated" his role in the formation of CT & D Taiwan. The idea to set up CT & D Taiwan came initially from Mr. Albert Hsu, who was then the chairman of the Finance Committee of the KMT. Mr. Ting was appointed to the board of CT & D Taiwan "to represent the interests of the KMT". Albert Hsu then decided to offer a shareholding to a "passive investor". Mssrs. Ting and

Tsien proposed that Dr. Chen be offered a 5% shareholding and this was done. The KMT owned a 75% shareholding and Mssrs. Ting and Tsien owned 10% each.

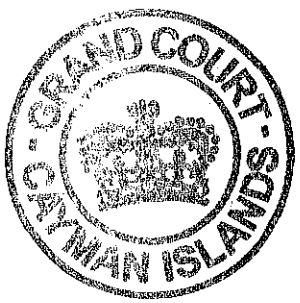
138. Mr. Tsien describes Dr. Chen's involvement in the process of buying out the KMT shareholding as "merely peripheral". Neither of the two men asked Dr. Chen to meet with President Lee. Dr. Chen was, however, asked to assist Fortuna in obtaining financing which he did. In recognition of this, Mssrs. Ting and Tsien agreed that each of the three men should have a 30% shareholding in CT & D Taiwan after the departure of the KMT. During this period Dr. Chen's only active role was to facilitate the obtaining of financing. Mr. Tsien says that after the initial contacts with the lenders had been made, Dr. Chen played a "very limited role" in Fortuna's dealing with the banks.

139. In Dr. Chen's petition affidavit he said that he issued certain promissory notes at the time of the formation of Fortuna and thus bore "primary liability" for CT & D Taiwan's debt. Mr. Tsien points out that Dr. Chen failed to mention that Mssrs. Ting and Tsien counter-signed the back of the notes and thus became jointly and severably liable under them.

140. Mr. Tsien says that he "effectively ran CT & D Taiwan" together with Mr. Ting. Mr. Tsien says that Dr. Chen "played absolutely no part" in the research which led to the decision to invest heavily in Vietnam. Dr. Chen was at this time a "passive shareholder with no executive responsibility". In any event, his presidency of Wan Hai Lines kept him

occupied. He agrees that Dr. Chen was provided with periodic updates on the progress of the development in Vietnam. His agreement was sought on significant strategic issues of the sort which would typically be discussed at board level. Most of the board meetings were held at the American Club in Taipei. In general, the strategic decisions would be taken by Mssrs. Ting and Tsien and then brought to the board for approval.

141. Mr. Tsien has denied categorically both the allegations of bribery and the allegations of misappropriation of funds. He says that by 2000 Fortuna had started to generate a positive cash flow. Around March 2000 the three men agreed that each of them would be granted an interest-free line of credit which could be drawn upon by way of shareholder advances. This collective decision was "not documented". He described it as a "gentleman's agreement". Mr. Tsien continued like this:



> *There are many other examples of such 'gentlemen's agreements' between Mr. Chen, Mr. Ting and me prior to and up to this period since our relationship at that time was amicable. Business was therefore conducted informally. For instance, it was extremely rare for there to be any formal agreements between us and the company for the provision of security. The loans I made to the company were not always formally documented. Nor were sales of shares generally documented. ... at the time, that was the nature of the relationship.*

142. Mr. Tsien says it was understood that members of the family of the three principals could draw upon the line of credit. It was intended that each family would draw approximately the same amount. The indebtedness was to be repaid from dividends when they were declared. The limit on each family's line of credit was US $5 million. Once a dividend was agreed upon, Mr. Ting would tell Jesse Hsu of the decision and the

latter would then give instructions to Mr. Jeff Wang, Vice-Manager of Fortuna's finance department, to prepare documentation. The draft shareholders resolution would be signed by the three men. Mr. Tsien says that although there were five shareholders not three, Maxima and Bates were ignored for the purpose of the shareholder advance agreement because "in purely practical and economic terms ... it is appropriate to regard the company as having three shareholders belonging to each of Mr. Ting, Mr. Chen and me and our respective families." Mr. Tsien points out that Dr. Chen signed each of the resolutions approving the dividends and he accepted that deductions would be made to repay shareholder advances. In fact, Dr. Chen proposed that the dividend of January, 2003 be increased to US $25 million to allow for a larger repayment.

143. At the end of 2003 Mr. C.H. Chen asked Mr. Ting and Mr. Tsien if he could be released from his personal guarantee of the MDC Facility. He says that he was happy to accommodate this request but the banks would obviously have to agree. Fortuna wrote to First Commercial Bank asking for the release of C.H. Chen. Seven of the eight syndicate banks agreed to that. The lone holdout was Cosmos Bank, in which the Chen family itself had a 2% investment.

144. Mr. Tsien characterized Dr. Chen's subsequent actions as a campaign to "destabilize" Fortuna. Mr. Tsien denies that any of the matters raised by Dr. Chen with the lending banks amount to breaches of the lending facility. In any event, he says that all of the matters which were complained of were approved by the banks in advance. Dr. Chen

had known about and approved all of them. Mr. Tsien exhibits some documentation to that effect. It is Mr. Tsien's case that Dr. Chen abused his position as a director of Fortuna by seeking to have the lenders call their loans. Mr. Tsien says that the attempts by Dr. Chen and his brother to demonstrate to the lenders that there had been an act of default "were taken seriously" by the banks. However, Fortuna explained to the lenders that it had fully complied with its obligations, that the incidents complained of by Dr. Chen did not amount to breaches of the lending agreement, and that Dr. Chen had in fact approved the impugned transactions. By the time of the petition action, Mr. Tsien was able to say that Dr. Chen's efforts "appeared to have failed for the moment".

145. Mr. Tsien explained Fortuna's document retention policy. He said that all original records were retained until after the relevant audit had been finished and any queries arising from it had been dealt with. At that point, any documents which the company "no longer needed" were destroyed. This occurred in the normal course of the company's business. He also said that the new Taiwanese government which came to power in 2000 was beginning to show an unhealthy interest in the business affairs of companies affiliated with the KMT. Because of the danger of a "politically motivated investigation", the three men (including Dr. Chen) decided to keep any books and records which were not needed in Taipei in storage in Kuala Lumpur.

146. Mr. Tsien has sworn that the allegations concerning the bribery of Vietnamese officials are completely untrue. Mr. Ting had never suggested any such thing. The table

prepared by Jesse Hsu records only the details of shareholder advances and repayments. The so called "northern office expenses" have nothing to do with Hanoi. The last three letters of "Taipei" formed the Chinese word for "north". Mr. Tsien says the term is a form of shorthand used by Fortuna staff (including Mr. Hsu) to refer to the shareholder advances. The table itself is nothing more than a summary of the advances which have been made. Mr. Tsien has denied expressly that he told Dr. Chen not to query these payments because some of them were illegal and has denied causing any illegal or improper payments to be made to Vietnamese or any other government officials.

147. Mr. Tsien says that Dr. Chen's difficulty in obtaining information from Group companies in 2003 is attributable to his aggressive approach to Group employees combined with inappropriate verbal abuse. He says that General Zhang was an old friend of Dr. Chen's and the suggestion that General Zhang was his "minder" in Vietnam was ludicrous.

148. Mr. Tsien mentioned the board meeting of January 16, 2004. He said the "next generation" of family members – Gayle Tsien, Arthur Ting and Randy Chen – were appointed to the board. When Mssrs. Ting and Tsien refused to promote Randy Chen to a position suggested by Dr. Chen, the latter showed that he was unhappy.

149. Mr. Tsien contradicted Dr. Chen's version of events concerning the preliminary meeting on February 23, 2004 immediately before the board meeting that day. He denies that

the meeting was convened for the purpose of discussing the list of payments referred to by Dr. Chen. The real purpose of the meeting was to discuss the deteriorating relationship between the three shareholders. In the course of the discussion Mr. Ting (not Dr. Chen) produced the list of shareholder advances. Mr. Tsien says that Mr. Ting did not suggest that the "other expenses" were referable to bribes to Vietnamese government officials. Mr. Tsien confronted Dr. Chen about a conversation Mr. Driscoll had had with Dr. Chen that month in which the latter made serious allegations about Mssrs. Ting and Tsien. The confrontation made Dr. Chen angry: he shouted, banged on the table and called Mr. Driscoll a liar.

150. At the board meeting, a resolution was passed that "Dr. C.C. Chen shall oversee finance matters". Mr. Tsien says that this appointment was intended to be a "very limited one", confined to financial matters at board level. It was agreed expressly that Dr. Chen was not to be involved in the day to day management of the Group. There was no agreement that his accounting staff would be entitled to audit financial records. Mr. Tsien says the appointment was "essentially a gesture".

151. During the spring of 2004 Mr. Tsien became increasingly concerned about Dr. Chen's approaches to the lending banks and the "rumours he was spreading in Vietnam". He mentions in particular a letter from Dr. Chen's lawyers to the company's auditors requesting that they investigate certain transactions. He says there was nothing needing investigation and the request was inappropriate.

152. By June 2004 Mssrs. Tsien and Ting had decided that it was necessary to remove Dr. Chen from the board of directors. The board meeting of June 2, 2004 was called strictly in accordance with the articles of association of Fortuna. At the meeting it was decided that an EGM would be held at such time as the two men would decide. Subsequently, Mssrs. Tsien and Ting agreed that the meeting would be held on June 22, 2004. Mr. Tsien says that: "the primary purpose of the EGM was therefore to remove Mr. Chen from the board of directors in an attempt to limit his ability to continue trying to damage the group". He also says that the shares in Fortuna owned by Maxima Samoa were "always seen as part of my own family's holding."

153. Mr. Tsien represented Maxima Samoa at the EGM. He has provided a detailed explanation of how that came about.

154. From 1971 until the death of Robert Niu in 1974, Mr. Tsien assisted him in "restructuring" one of the Niu family investments. After Mr. Robert Niu's death, Mr. Tsien continued to help Mrs. Pearl Niu in "managing the family's business affairs". When it came time to buy out the shareholding of the KMT in CT & D Taiwan, part of Mr. Tsien's funding for that included a "contribution" from Mrs. Pearl Niu. At the same time, she expressed an interest in investing on her own behalf. Mr. Tsien agreed to let her have a 5% shareholding in the company to be taken from his own 30% shareholding. He goes on to say:

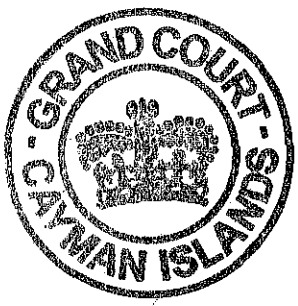
It was always anticipated by Mrs. Niu and me that these two shareholdings would effectively be treated as a single family block. Similarly, it was understood by Mrs. Niu and myself that I would be fulfilling a management role in the company and that I would protect her interests as well as my own.

155. By this time Mrs. Niu was in her late 70s and was considering how the family assets "would eventually be divided". Mr. Tsien said that it was Mrs. Niu's stated intention that Philip Niu would receive the 5% shareholding in CT & D Taiwan "along with the rest of her assets" after her death.

156. Mr. Tsien arranged the mechanics of Pearl Niu's investment. He already had a Liberian shelf company known as Maxima Resources Corporation (Liberia). He paid the costs of incorporation and the annual fees. Mr. Tsien advanced the funding of the share purchase initially and was later reimbursed by Pearl Niu.

157. Shortly afterwards, Mr. Tsien decided to incorporate Maxima Samoa. He again paid the costs of incorporation and has made the annual fee payments. The "company kit" for Maxima Samoa "has been kept at all times by me and my wife on behalf of Mrs. Niu". On August 10, 1994 the Fortuna shares were transferred from Maxima Liberia to Maxima Samoa.

158. Mr. Tsien says that Mrs. Niu informed him that she wanted Philip Niu to be the "sole director" of Maxima Samoa. Philip Niu agreed. Mr. Tsien goes on to say:



> *Although Philip Niu was appointed as a director and was, as a matter of formality, the transferee of the single ordinary (registered) share subscribed for on incorporation of Maxima, I understand that Mrs. Niu made it clear to Philip Niu that she would retain the family assets, including Maxima, under her control. I believe that it was for this reason that Mrs. Niu gave instructions for the initial (registered) ordinary share to be cancelled and for two bearer shares to be issued. The register of members confirms this. In part the creation of bearer shares was done since they would allow Mrs. Niu to retain control over Maxima and her interest in the company during her lifetime but would be easy to transfer to her son when the time came. Before that time Mrs. Niu retained her ownership of Maxima, while being represented by Philip Niu on its board of directors. ... Mrs. Niu took steps to ensure that the bearer shares remained in her control. Accordingly she asked me and my wife to keep them in our physical custody on her behalf, together with the common seal, company chop (an engraved seal used for authenticating documents) and corporate documents. Mrs. Niu has told me and my wife that these arrangements were expressly agreed to by Philip Niu. ... Philip Niu has never been the person who controls Maxima.*

159. Mr. Tsien asserts that Philip Niu was not in a position between 1994 and 1998 to finance a purchase of shares in Fortuna. His business ventures had been unsuccessful. He says:

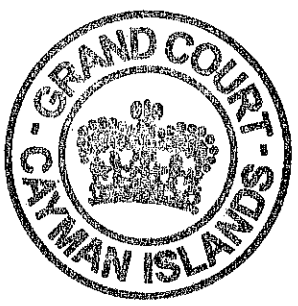
> *I normally represented Maxima and signed the relevant minutes on behalf of Maxima. When I did so I noted Philip Niu's name next to my signature as the director of Maxima to signify that I was acting in this capacity, and in recognition of Philip's position as the future shareholder, and who (unless Mrs. Niu decided otherwise) would ultimately inherit the Maxima shareholding. ... On each occasion on which a dividend was to be paid, I (or, on one occasion, Gayle Tsien) consulted Mrs. Niu and obtained her instructions as to where she wanted the dividend to be paid. In some instances, Mrs. Niu instructed me to leave the dividend funds with the company as a debt to Maxima (as a shareholder).*

160. Mr. Tsien says that money received by Philip Niu in the form of dividends from Fortuna were actually "gifts from his mother". He asserts that Pearl Niu gave the instructions to

remit each of the dividend payments to her son. One dividend remittance instruction carries the notation "re Mrs. Pearl Niu".

161. Mr. Tsien says that by September 2003 both he and Mrs. Niu had a concern regarding the tax implications arising from any eventual distribution of her assets. Pearl Niu said that she wanted to make a gift of U.S. $1.5 million to her son Philip. She directed Mr. Tsien to have the company remit this amount in two payments. There is an email dated September 26, 2003 in evidence in which Philip Niu says it was a gift.

162. Mr. Tsien says that by the end of 2003 Pearl Niu had reached a reluctant decision that leaving her son as the sole director of Maxima Samoa might be a source of difficulty. He says that she asked Mr. Tsien and his wife to become additional directors of Maxima. She also "made it clear to me and my wife that the shares would remain under her control and that our votes would be subject to her directions". Mr. and Mrs. Tsien accepted the appointment. The shareholders resolution was "passed by Mrs. Niu". Mr. Tsien says that he understands from discussions with Pearl Niu that she "chose not to advise Philip Niu of the additional appointments as she was hopeful that it would not prove necessary to rely upon them". She was hoping that Philip Niu would decide not to support Dr. Chen and considered the appointment of Mr. and Mrs. Tsien as a sort of fallback position.



163. Gayle Tsien and Mrs. Josephine Tsien travelled to the United States in an unsuccessful attempt to dissuade Philip Niu from supporting Dr. Chen. When the result of this effort was reported to Pearl Niu, she instructed Gayle Tsien to advise her father to use the proxy "that had been prepared on 24 [sic] June, 2004". Mr. Tsien also says:

> *At Mrs. Niu's direction, I was authorized by my wife (in her capacity as a director of Maxima) to attend and vote at the meeting.*

In any event, Pearl Niu never authorized Philip Niu to attend the EGM.

164. Mr. Tsien notes that Dr. Chen made a false criminal complaint against Mssrs. Ting and Tsien to the Taiwanese prosecuting authority alleging a misuse of Fortuna's funds.

Evidence of Gayle Tsien

165. Gayle Tsien, the daughter of Mr. Tsien and Mrs. Josephine Tsien has been a Certified Public Accountant since 1993. She has a Master of Science in Accounting degree from New York University. In 1993 she began to work in the planning department of CT & D Taiwan as a project manager. Between 2000 and 2004 she worked for PMHC, a Fortuna subsidiary, in Vietnam. On January 16, 2004 she became a director of Fortuna.

166. Understandably, Gayle Tsien has no personal knowledge of whether the three men entered into an agreement that each would be entitled to participate equally in the management of CT & D (and later Fortuna), that no one of them would be excluded

from management, and that each would have equal representation on the board of directors. In general terms, she has sworn that nothing she has been told by her father or by Mr. Ting has ever suggested to her that such an agreement was in existence. She says that she once clearly asked both Mr. Ting and her father whether there were any shareholder agreements with Tempo in place and each answered in the negative.

167. Gayle Tsien made reference to an executed joint venture agreement dated September 20, 1989 found in the records of Fortuna. The parties to this agreement are Mssrs. Ting and Tsien, Dr. Chen, and a company owned and controlled by the KMT. The parties agreed to establish CT & D Taiwan as a joint venture company with the KMT owning 75% of the shares. Dr. Chen was allotted a 5% shareholding (although the text of English translation of the agreement in evidence specifies it as "10%"). The parties agreed that there would be a board of nine directors, six to be designated by the KMT and one each by the other three men. Mr. Ting was appointed as the first chairman of the company. The management of the company was to be placed in the hands of a general manager and a financial accounting manager; the agreement does not allocate any management rights (beyond the right to nominate one director) to Dr. Chen.

168. In general terms, Gayle Tsien says that Dr. Chen took no role in the management of the Fortuna Group until he began to involve himself about 2002. After the incorporation of Fortuna, CT & D Taiwan had two residual purposes. It retained some of the "non-core" assets and it provided management services to Fortuna and to its subsidiaries.

169. Gayle Tsien says she was involved in discussions with her grandmother (at which her parents were present) about the possibility of Pearl Niu investing in Fortuna. Eventually she "became aware" that her grandmother had purchased a 5% shareholding.

170. She says that all important operational decisions were taken by Mr. Ting and all the senior management reported to him. She swears that she cannot recall any occasion upon which Mr. Ting said that he needed to obtain consent from Dr. Chen.

171. Gayle Tsien referred to a letter from Dr. Chen's Vietnamese lawyers to a government authority dated July 18, 2004 which says in part:

> *The Chen family entrusted Lawrence S. Ting and Ferdinand Tsien to be responsible for the management of CT & D Taiwan, Fortuna Cayman and the activities of the subsidiaries. Such subsidiaries include Tan Thuan Export Processing Zone, Hu Mei Hang Corporation and Hiep Phuoc Power Plant. The reason for such entrustment was that the Chen family already owned huge assets in Taiwan, which required direct management.*

172. In a statement to the media dated September 24, 2004 Dr. Chen said that Mssrs. Ting and Tsien were responsible for the "operation and management of" Fortuna and its subsidiaries. He added that he had never participated in "any activity related to the operation and management of" Fortuna. Elsewhere he has said that he was not able to participate because he was "preoccupied" with the business of Wan Hai Lines.

173. Gayle Tsien attended the board meeting of February 23, 2004. She says that the resolution giving to Dr. Chen the power to oversee "finance matters" was expressly limited to matters at board level. There was no discussion of any entitlement of Dr. Chen to audit the financial records of Fortuna.

174. Throughout the spring of 2004 Dr. Chen's conduct was "extremely damaging and disruptive" and, in addition to troubling the relationship with the company's lenders, resulted in Vietnamese government officials "becoming reluctant to meet" with Mssrs. Ting and Tsien. When Dr. Chen's allegations against Mssrs. Ting and Tsien came to their attention, both men were shocked and angry. Bribery had never been discussed in her presence but, as a director, she would have been aware of it if it had been contemplated. On May 5, 2004 (and again on May 28, 2004) notices were published in the Taiwanese and Vietnamese press by the Fortuna Group stating that because of certain disagreements between management and shareholders the Group would "not be responsible for any acts, any means of communications or any kind of promises" made by Dr. Chen or Randy Chen.

175. The June 2, 2004 board meeting was held in Beijing because Mr. Ting, Arthur Ting and Gayle Tsien had meetings scheduled there with a Chinese power company. On the evening of June 2, 2004 (within hours of the board meeting of that day) Gayle Tsien sent the notice and agenda for the June 22nd EGM by air mail to the shareholders. These

were mailed from a Beijing post office. The letters were sent to the address of each shareholder recorded in the register of members as is required by the Fortuna articles.

176. On June 18, 2004 Gayle Tsien received an email message from Dr. Chen suggesting a shareholders meeting on June 30th. She then realized that Dr. Chen was unaware of the EGM scheduled for June 22nd. On June 20th she sent Dr. Chen by email a copy of the notice of the EGM but did not include the agenda. She says: "I confirm that this was an oversight on my part". Eventually, but prior to the EGM itself, she sent the agenda to Dr. Chen by fax.

177. As secretary to the meeting on June 22nd, it was Gayle Tsien's responsibility to ensure that the attending shareholders "had the correct authorizations". Wynner was represented by Mr. Tsien and by Gayle Tsien. New Frontier was represented by Mr. Ting and by Arthur Ting. Tempo was represented by Dr. Chen's attorney, Paul Hatzer (although Dr. Chen was also present). Bates was represented by Mr. Ting pursuant to a resolution of the directors of Bates dated June 10, 2004.

178. Gayle Tsien says that her father represented Maxima pursuant to an authorization of June 14, 2004. He acted as chairman of the meeting. She recalls informing Philip Niu that he was not entitled to attend the meeting because Maxima had authorized her father to represent it. She has no recollection of meeting him in the lobby of the hotel

on the morning of the meeting. She said that she prepared the minutes right after the meeting in order to do so while the events were fresh in her recollection.

179. Gayle Tsien says that her understanding "for as long as I can remember" is that the family businesses were owned by Pearl Niu. The contention by Philip Niu that there had been a division of the sale proceeds resulting in an allocation of a share to him is contrary to Gayle Tsien's understanding. She agrees that she had not been involved in the legal formalities in respect of Robert Niu's estate and resulting assets.

180. Gayle Tsien does say that she understood from conversations with her mother that Pearl Niu intended Philip Niu to inherit the shares in Maxima after her death. She says this was "generally known" within the family. The prospective inheritance was the reason for the appointment of Philip Niu as sole director. In general, Gayle Tsien says she was aware from discussions within the family that Pearl Niu had asked Mr. and Mrs. Tsien to become additional directors of Maxima although Pearl Niu did not inform her son of this. She was also aware that her parents had physical possession of the bearer shares.

181. Gayle Tsien says that around September, 2003 Pearl Niu instructed her to pay the sum of U.S. $1.5 million (in the form of two Fortuna dividends) to Philip Niu. She says this was a gift. This was the only occasion upon which she spoke with Pearl Niu about

dividends owed to Maxima. She mentioned her email message of February 24, 2004 to Philip Niu regarding the family funds which says in part:

> *Provided Grandma is in agreement, your portion is 5 mm plus one year of interest.*

182. She says this illustrates the need for the agreement of Pearl Niu before any payment from the family funds could be made to Philip Niu. She also said that she had an understanding that Pearl Niu had instructed that all dividend payments owing to Maxima should be paid to Philip Niu. In an email to Philip Niu shortly before the June 22nd EGM, Gayle Tsien referred to the "voting of your shares". She explains this by pointing out that Philip Niu would inherit the shares eventually and was the sole director of Maxima; she accepted that the emails "were not worded well". She says these were "colloquial references".

183. She wanted to obtain a proxy from Philip Niu so that Mr. Tsien would not have to use his authority from Maxima granted to him by Pearl Niu and thus reveal to Philip Niu that his mother did not fully trust him in the matter. Gayle Tsien says that during their conversations in San Francisco Philip Niu at first promised that he would not attend the June 22nd EGM but later changed his mind. She denies saying to Philip Niu on the evening of June 19th that she would inform Dr. Chen of the details of the forthcoming meeting if Philip Niu agreed not to attend.

184. On the evening of June 21, 2004 Gayle Tsien spoke with Pearl Niu who then instructed her to authorize Mr. Tsien to represent Maxima at the meeting. She relayed this instruction to Mr. Tsien and to Mr. Ting.

Evidence of Pearl Niu

185. Pearl Niu is now 101 years of age. Although her evidence and an assessment of her credibility are crucial to the second major issue in this case, I have accepted the advice of counsel that her health now prevents her from giving evidence either in person or by video link. One of her doctors has given his opinion to that effect.

186. Mrs. Pearl Niu has a degree in economics from the University of Shanghai. Her three children with Robert Niu are Philip, Josephine (who married Mr. Tsien) and Jane, who passed away in 1986.

187. Mrs. Niu has provided one brief witness statement in this proceeding which incorporates by reference a series of six affidavits sworn by her in 2004 and 2005 in proceedings in Samoa. The Samoa proceeding was an attempt by Philip Niu to obtain a declaration confirming his beneficial ownership of Maxima Samoa. He obtained a preliminary ruling to that effect, after which Pearl Niu intervened and requested a re-hearing. Before the issue could be reconsidered, the proceeding was settled on terms which remain confidential.

188. Mrs. Niu says that after her husband Robert passed away she decided to allow Mr. Tsien to manage her financial affairs for her. She found him trustworthy and believes he gave very useful investment advice. Upon his recommendation, she instructed Mr. Tsien to use some of the Family Funds to purchase a 5% shareholding in Fortuna for her. Philip Niu was not involved in this decision and did not contribute to the purchase price.

189. Mrs. Niu decided that after her passing Philip "may" receive the 5% investment in Fortuna. She says she did not and has not made any irrevocable decision on that question. Mrs. Niu says she speaks fluent English. Mrs. Niu's daughter Josephine looks after her daily needs. She says "I rely heavily" upon her. Josephine Tsien accompanies Mrs. Niu whenever she leaves her residence and ensures that she receives her daily meals. Mrs. Niu describes her as "my full time carer".

190. After deciding to invest in Fortuna, Mrs. Niu instructed Mr. Tsien to arrange the transaction for her. She said that she instructed him to set up a company in Samoa, Maxima Samoa. She describes the decisions she made concerning Maxima as follows:

> *Consistent with my intention that Maxima's stake in Fortuna may ultimately be passed on to Philip, I informed Mr. Tsien that I intended to nominate Philip as the sole director of Maxima. There was no arrangement that the company fees for Maxima be taken from my son's prospective inheritance for I had made no decision at that time as to what his inheritance would be. Accordingly, Philip was appointed as a director. As a matter of formality, he was the holder of the single share subscribed for on the incorporation of Maxima. However, I made it clear to him that I would retain the family assets, including Maxima, under my control. Further, the company documents from Maxima have been kept at all times by Mr. Tsien on my behalf. At the same time, I instructed Mr.*

> *Tsien to cancel the original share in Maxima and to issue two bearer shares to give me greater flexibility over any future distribution of Maxima that may be necessary. I thought that the creation of bearer shares would allow me to retain control over Maxima and my interest in Fortuna during my lifetime but would be easy to transfer to my son, if appropriate, when the time came. I took steps to ensure that the bearer shares remained in my control by asking Mr. Tsien and my daughter to keep them in their custody on my behalf, together with the common seal and corporate documents. At the time I informed Philip of these arrangements. I confirm that the signatures on the bearer shares are mine.*
> [paragraphs 20 to 24 in Pearl Niu's affidavit of December 10, 2004]

191. Mrs. Pearl Niu says that she instructed Mr. Tsien about the disposition of dividends owed to Maxima Samoa. Some were left with Fortuna (as a debt owed to Maxima Samoa) and some were paid to Philip Niu as a "gift". Philip Niu denies that he has ever discussed the question of bearer shares with his mother and says that she would not have had any knowledge of such matters. He first became aware of her claim to be the beneficial owner of Maxima Samoa from evidence filed in the winding up proceeding in October, 2004.

192. By 2003 Mrs. Niu had begun to "resent deeply" various aspects of Dr. Chen's conduct. One of her objections was that she understood Dr. Chen had been seeking to buy Maxima Samoa's shares from her son. This annoyed her because they were not his shares and he had no authority to sell them. This allegation is denied by Dr. Chen.

193. By the end of 2003 Mrs. Niu decided to add Mr. Tsien and Mrs. Josephine Tsien to the board of directors of Maxima Samoa. She instructed them that the bearer shares would remain under her control and that she would give directions as to how Maxima Samoa would vote at Fortuna shareholder meetings. She did not advise her son Philip of the additional appointments because she hoped to avoid additional family strife.

194. Mrs. Niu gave her instructions on June 14, 2004 that a proxy should be granted to Mr. Tsien to represent Maxima Samoa at the Fortuna EGM. This occurred after Mrs. Niu had learned that Gayle Tsien and Josephine Tsien had been unsuccessful in convincing Philip Niu to abandon Dr. Chen. Mrs. Niu says that she told Philip Niu that Mr. Tsien would be representing Maxima Samoa at the meeting.

195. In her affidavit of December 17, 2004 Mrs. Niu said that she had "physical possession" of the two bearer shares of Maxima Samoa. In her affidavit of January 13, 2005 Mrs. Niu said that she paid US $1.5 million for the Fortuna shares. She did this by using Maxima Liberia for the purpose. It was upon her instruction to Mr. Tsien that Maxima Liberia acquired the Fortuna shares and subsequently transferred them to Maxima Samoa. In this subsequent affidavit Mrs. Niu said:

> *Philip was nominally named as the shareholder simply for the purposes of effecting the transfer of Maxima to me from OIL Samoa and held the position, as nominee, for less than a day. ... At the time of the incorporation of Maxima Samoa, Philip well knew that he was not the true owner of the Fortuna shares but that his name would be used to effect the transfer of Maxima Samoa to me from OIL Samoa and that his name would be removed as a shareholder almost immediately.*

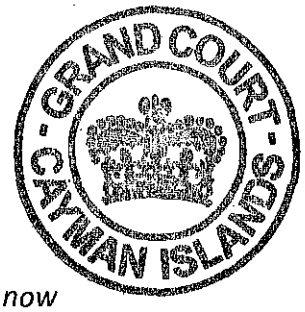
196. Mrs. Niu says that the subscriber share which had been transferred to Philip Niu was cancelled and the two bearer shares were created upon her instructions. Her evidence does not suggest any cogent reason for the issuance of bearer shares.

197. In March 2004 Mrs. Niu instructed Gayle Tsien to assist her in preparing a spreadsheet setting out the source of the Family Funds. She says in her affidavit of July 1st 2005 that this was prepared "in accordance with my intention at the time for my own estate planning purposes..." When she swore the last-mentioned affidavit, she said she was unable to locate the spreadsheet. She took issue with the version of the spreadsheet produced by Philip Niu in the Samoan proceedings which suggested that U.S. $5 million had been deducted from his share of the family funds to purchase Maxima Samoa's shareholding in Fortuna.

Evidence of Josephine Tsien

198. Mrs. Josephine Tsien (born Niu Ping) attended university in Taipei and then pursued postgraduate studies in education in the United States. During her marriage to Mr. Tsien she often discussed his business affairs with him but did not seek to influence him or to participate herself. Thus her evidence was necessarily general and impressionistic, based largely upon things which had been said to her by others.

199. She said in her evidence that Mr. Tsien came from a wealthy family in Shanghai but left China in 1949. The couple met and married in the United States and returned to Taiwan in 1971. At this time the family businesses of Robert Niu were "heavily debt- ridden" but Mr. Tsien gradually changed that. After the death of Mr. Niu, debts were repaid by Mrs. Pearl Niu from the Family Funds.



200. Josephine Tsien said:

> *The nature of our family businesses are such that my father was, and now my mother is, the actual beneficial shareholder at all times of any company or investments owned by the family. While Philip and I (or others) may appear on the face of the corporate records as a shareholder or as directors, our names do not represent any beneficial interest or entitlement. In fact, I would say that my mother borrowed our names as she deemed convenient for whatever particular purposes she had in mind.*

201. Mrs. Tsien said that Mrs. Pearl Niu sometimes gave gifts to her children and grandchildren using income from the family businesses, at her discretion.

202. Mrs. Tsien's evidence makes it clear that she has always regarded Maxima Samoa as being the property of her mother. She was aware, however, that Mrs. Pearl Niu's intention was to leave the Maxima Samoa investment eventually to Philip Niu as a bequest. Pearl Niu asked Mr. and Mrs. Tsien to look after the Maxima Samoa bearer shares, seal, and incorporation documents. These were kept in a safe in Mr. Tsien's office to which both Mr. and Mrs. Tsien had access. Around the end of 2003 Mrs.

Tsien agreed to become an additional director of Maxima Samoa at her mother's request. She said that:

> *When Ferdinand [Tsien] asked me to attend meetings and sign documents I would make myself available to do so. Consistent with my typical practice on such occasions I ensured that I signed the minutes based on Ferdinand's instruction.*

203. There is in evidence a letter dated July 5, 2004 signed by Mrs. Tsien and addressed to Pearl Niu. In it, Mrs. Tsien says that she is the custodian of the two bearer shares numbered B001 and B002; she acknowledges that Pearl Niu is the beneficial owner and the shares are being held in trust for her. The letter goes on to assert that Mrs. Tsien will be responsible for exercising Maxima Samoa's voting rights in the future. There is no mention at all in this letter of Mr. Tsien. Mrs. Tsien says that she signed this letter at her husband's suggestion. More generally, she says:

> *I wish to emphasize that the meetings I attended and the documents I signed were as a result of requests made of me by Ferdinand [Tsien] and my mother.*

204. Mrs. Tsien confirms that on June 14, 2004 she acted upon an instruction from her mother and signed an authorization to Mr. Tsien to represent Maxima at the Fortuna EGM. She says her husband prepared the document.

205. Josephine Tsien displayed almost no recollection or understanding of relevant events. Nonetheless, she provided a number of answers which she must have known would assist the defendant's cause. She said that Pearl Niu instructed Mr. Tsien to make Mr.

and Mrs. Tsien directors of Maxima Samoa. She said that although Pearl Niu is 101 years of age she is fully aware of what is happening in the dispute between the two families. Mrs. Tsien was asked if she had ever told Philip Niu that she had become a director of Maxima Samoa and that Mr. Tsien had been appointed to represent it at the Fortuna EGM. She answered both questions in the negative.

206. Mrs. Tsien was cross-examined about the affairs of Wynner, of which she is the sole director. She displayed no knowledge of those matters. She said she did not know what Wynner's function was and did not know where Wynner's bearer share is kept. She did display an awareness that Wynner owns shares in Fortuna. She summed up her role by saying "my husband put my name down – I am just a housewife".

Evidence of Albert Hsu

207. Mr. Albert Hsu has provided two witness statements which I have considered but he did not submit to cross-examination in court although the plaintiffs requested that. Mr. Hsu is resident in Taipei. He has provided two reasons for his reluctance to attend the trial: he did not believe that he could devote the necessary time to preparing to give evidence; and did not wish to appear to take sides in what he has characterized as a "private matter between the shareholders". In my ruling of September 10, 2014 I held that his witness statements are admissible. The absence of cross-examination must be taken into account in deciding how much weight to give to his evidence.

208. Mr. Hsu has university degrees in public administration and political science. He has held a number of very senior government positions in Taiwan, including the chairmanship of the finance committee of the KMT and the office of Vice- Premier. He has also acted as a director of a number of corporations.

209. As chairman of the KMT finance committee between 1988 and 1993, Mr. Hsu was instrumental in the creation of CT & D Taiwan. A company owned and controlled by the KMT – China Trading Corporation – was not performing to Mr. Hsu's expectations so he recruited Mr. Ting to become its chairman. Mr. Hsu then accepted the suggestion of Mr. Ting that the KMT's overseas investments be placed in a new entity, CT & D Taiwan. Mr. Hsu executed the joint venture agreement dated September 20, 1989 on behalf of the KMT.

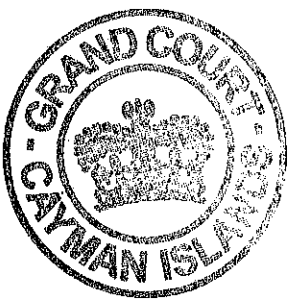
210. Mr. Hsu asserts that he was not made aware at any time of the existence of an understanding or agreement between Mssrs. Ting, Tsien and Chen that

> *each would be entitled to participate equally in the management of the investments (and that no party would be excluded from so managing, without his consent).*

211. In any event, the KMT owned 75% of CT & D Taiwan in 1989 so any such agreement would have been inconsistent with that in Mr. Hsu's view. The KMT retained the power to appoint six of the nine directors. It also retained control over the identity of CT & D Taiwan's minority shareholders. During this period, Mr. Ting reported to the KMT; Mr.

Hsu was not aware of any involvement of Dr. Chen in the management of the company. When Mr. Hsu became Vice-Premier of Taiwan in 1993 his involvement with CT & D Taiwan ceased. Mr. Hsu denied that the KMT had any particular interest in Dr. Chen's involvement in CT & D Taiwan. He said that he cannot recall any contribution made "directly or indirectly" by Dr. Chen.

212. In January 2004 Mr. Hsu was appointed a director of Fortuna but says that he did not play any active role. He has no recollection of the events leading up to the board meeting of June 2, 2004 or the EGM of June 22, 2004. He was unavailable to attend those meetings. He also denied that his appointment to the board of Fortuna was for the purpose of investigating the veracity of Dr. Chen's allegations. He did say that he had attempted to act as mediator between Dr. Chen and Mssrs. Ting and Tsien from time to time.



Evidence of Arthur Ting

213. Arthur Ting is now the Chairman of CT & D Taiwan. He has a degree in management and finance from Boston College in the United States. Mr. Ting was appointed to the Fortuna board of directors on January 16, 2004 together with the other members of the "second generation".

214. As with the evidence of Gayle Tsien, most of Mr. Ting's evidence describes things he has been told by others and impressions he has gained. In general, he understood Dr. Chen to have no executive role in Fortuna; he was a passive investor. Arthur Ting says that he has never heard, until the present litigation, of any suggestion that the agreement alleged by Dr. Chen was made.

215. Mr. Ting described several examples of what he termed aggressive and inappropriate behavior by Dr. Chen. At the board meeting of January 16, 2004 he recalls Dr. Chen proposing that Randy Chen be appointed the General Manager of PMHC, to replace Frances Ba; this allegation is denied by Dr. Chen. The proposal was rejected. Mr. Ting said that Dr. Chen was bypassing the chain of command within the Fortuna group by requesting documents directly from employees of subsidiary companies; Dr. Chen says that, as a director of Fortuna and many of its subsidiaries, he was entitled to do that. In addition, by the end of 2003 Dr. Chen was spreading rumours intended to discredit Mr. Ting (Senior) and Mr. Tsien.

216. Arthur Ting confirms that the board meeting of June 2nd 2004 was held in Beijing because a number of other meetings had already been scheduled there. He recalls mailing notice of this board meeting to the registered addresses of the directors from Vietnam on May 22nd 2004. After the board meeting, he recalls accompanying Gayle Tsien to the post office while she mailed notices of the June 22 EGM to the shareholders at their registered addresses in accordance with the Fortuna articles.

Evidence of Other Witnesses

217. Ms. Frances Ba is the General Manager for the Vietnamese region of Fortuna. She began working with CT & D Taiwan at its formation and has worked within the group ever since. She said she does not recall any change in the way the Fortuna Group was managed around the time of the agreement alleged by Dr. Chen. In general terms, she says that Dr. Chen did not participate in the management of any of the Vietnamese projects until he tried to involve himself around 2002. Ms. Ba has never been aware of any agreement that Dr. Chen had a right to participate in the management of group entities. She believes that because she attended many CT & D Taiwan board meetings she would have learned of such an agreement if it existed. By 2002 Dr. Chen was making pointed demands for access to accounting records of the Vietnamese subsidiaries and having a disruptive effect. He "regularly caused considerable disruption at a staff level by verbally and physically harassing staff".

218. Mr. Steven Driscoll was educated in the United States and has an MBA from Columbia University. In 1994 he joined CT & D Taiwan as its Vice-President and worked full time within the group until 2001. He is now a director of Fortuna and a nominal defendant in this proceeding. Mr. Driscoll characterized Dr. Chen's role as that of "a substantial shareholder and non-executive director". Dr. Chen did not participate in management of group entities. Mr. Driscoll has no recollection of hearing of any agreement, oral or

written, between Mssrs. Ting and Tsien and Dr. Chen except the agreement to consult Dr. Chen in relation to expenditures over US $100,000.

219. Mr. Lii-San Rong has worked for over forty years in the banking industry in Taiwan. He has been a director of Fortuna since 2007 and is a nominal defendant in this proceeding. Mr. Lii recounted an incident which occurred around June 2004. He received a telephone call from Mr. C.H. Chen who asked Mr. Lii to sign a "pre-drafted" letter stating that while he had been general manager of the First Commercial Bank he had approved the 1995 MDC loan facility for Fortuna. That part of the letter was factual. The pre-drafted letter went on to say that Mr. Lii had done so "because of the availability of the Wan Hai shares as security". Mr. Lii said that, in accordance with usual banking practice, he had considered a variety of factors before approving the loan. He refused to sign the letter. Later on the same day Dr. Chen asked Mr. Lii to come to his office. Dr. Chen presented the pre-drafted letter again and requested that Mr. Lii sign it. He refused. Later that evening he received telephone calls from two prominent figures in the banking community pressuring him to sign the letter. He said that Dr. Chen was "very angry" at his continuing refusal to sign. In general, Mr. Lii says that he was never aware of any agreement between the three Fortuna shareholders about participation in management and equal representation on the board of directors.

220. Mr. Phan Chanh Duong is a Vietnamese official who worked for a joint venture partner in Vietnam of two Fortuna subsidiaries. He said that Dr. Chen was not involved in

management activities in Vietnam and that he was unaware of any agreement between the three men about participation in management.

221. Mr. Phan Hon Quan, another Vietnamese government official, gave evidence to the same effect. He also said that Dr. Chen's allegations about Mr. Ting tended to poison the relationship between Fortuna and the Vietnamese Government. Around July 2004 Dr. Chen alleged that the transfer of assets from CT & D Taiwan to Fortuna violated the rights of IPC, a Vietnamese venture partner for which Mr. Phan was working. Mr. Phan said in his witness statement that the allegations were "baseless". IPC had had no objection to the transfer and suffered no detriment by it. He characterized Dr. Chen's assertions as a "smear campaign".

222. Mr. Wang Li Sheng has been the director of finance at CT & D Taiwan since 2001. His evidence responded to the allegations made by Dr. Chen to the banks in April, 2004 concerning events of default. Mr. Wang said that the early repaying of U.S. $20 million to redeem Wan Hai shares had been approved of by Dr. Chen in writing. The distribution of dividends by Fortuna was in compliance with the MDC Facility and Dr. Chen had signed the relevant memorandum. In October 2001 the syndicate banks agreed that HPPC could obtain new borrowings of up to U.S. $20 million. Dr. Chen consented in writing to this. Evidently, Mr. Wang had a stormy relationship with Dr. Chen.

223. Mr. Young Yun-Ti is the president of Tan Thuan Corporation, a Fortuna subsidiary. He said that Mssrs. Ting and Tsien both played active roles in managing this subsidiary but that Dr. Chen was not involved. He was not aware of any agreement between the three men that Dr. Chen would participate equally in the management of Fortuna.

224. Mr. Murray Drake, the solicitor representing Maxima in Samoa, has said in evidence that he only received the company's corporate records from OIL after the settlement of the Samoa litigation.

225. Paul Hatzer, Dr. Chen's attorney, provided a description of the EGM and events leading to it which was essentially the same as Dr. Chen's evidence.

Maxima Samoa

226. Until the incorporation of Maxima Samoa, Maxima Liberia owned a 5% shareholding in both CT & D Taiwan and in Fortuna. There is evidence that both Mr. Tsien and Philip Niu paid the incorporation fees for Maxima Liberia at various times. Philip Niu was the sole director and shareholder of Maxima Liberia at all times material to this action. By an instrument of transfer dated August 10, 1994 Maxima Liberia transferred 1,500,000 shares in Fortuna to Maxima Samoa.

227. Maxima Samoa was incorporated as an international company under the Samoan *International Companies Act 1987* on August 4, 1994. The register of members shows that OIL subscribed for a single subscriber share; this was the only share issued at the time of incorporation.

228. By an instrument of transfer dated August 6, 1994 the sole registered share in Maxima Samoa was transferred from OIL to Philip Niu. This single registered share was then surrendered by him on the same day and cancelled. The register of members reflects that. Finally, according to the register, on August 6, 1994 share certificates numbered B002 and B003 in the form of bearer shares were issued.

229. OIL appointed Philip Niu as the sole director of Maxima Samoa and he agreed to act. The first directors meeting of Maxima Samoa was held on August 6, 1994. Only the sole director, Philip Niu, was present. Mr. Niu's wife was appointed secretary of the company. The registered address of the company was set at the premises of OIL and the location of the books and records of the company was stated to be Mr. Tsien's office address in Taiwan. These minutes are signed by Philip Niu. The register of directors records his appointment. It also records that on January 15, 2004 Mr. Tsien and his wife Josephine were added as directors.

230. The minutes of the directors meeting of August 6, 1994 also record that an application for the issuance of a single bearer share was received and approved. There is in

evidence an unsigned copy of a "letter" dated August 6, 1994 purporting to be from Philip Niu to himself (i.e. to "the director, Maxima Resources Corporation") asserting that he is the holder of registered share certificate number 001 for one share and requesting that this share be converted into a bearer share. The defendants say that this document shows on its face that it was sent by fax from Philip Niu's fax number in 2004, suggesting that it had been in his possession at that time. There is also in evidence an unsigned copy of a purported resolution by Philip Niu as the sole director of Maxima Samoa approving the conversion of the registered share certificate into a bearer share in satisfaction of a request from himself.

231. The two original bearer shares have been entered in evidence. They each have been impressed with the common seal of Maxima Samoa but are signed only by Pearl Niu. Each certificate form contains spaces for two directors' signatures but the second space has been left blank. The rights and obligations conveyed to the bearer by virtue of his possession of the share certificate are set out on the backs of the certificates.

232. There is in evidence what purports to be a minute of a general meeting of shareholders of Maxima Samoa on January 15, 2004. The minute shows that Mrs. Tsien was present by virtue of being the holder of bearer share certificates numbers B001 and B002. Her husband, Mr. Tsien, was also present in an unexplained capacity. The document contains no mention of Philip Niu. The only business which took place at the meeting

was the appointment of both Mr. and Mrs. Tsien as additional directors of Maxima Samoa. The minutes are signed by Mrs. Tsien.

233. Also in evidence is a purported minute of a directors meeting of Maxima Samoa held on June 14, 2004. The minutes show that Mr. and Mrs. Tsien were both present. The only act recorded in the minutes is the appointment of Mr. Tsien to represent the company at Fortuna's EGM on June 22, 2004 and "to vote for or against any resolution presented in such a way as he thinks fit". These minutes are signed by Mrs. Tsien. There is also a document addressed to Fortuna and signed by Mrs. Tsien on June 14, 2004 "for and on behalf of Maxima". In this document she repeats the authorization to her husband to represent Maxima Samoa at the Fortuna EGM.

234. On July 5, 2004, after the Fortuna EGM, Mrs. Tsien wrote to her mother, Pearl Niu, and acknowledged that Pearl Niu was the beneficial owner of the two bearer shares; the letter says that Mrs. Tsien is holding those shares "in trust for you pending your instruction as to their disposal in the future".

Expert Evidence for the Plaintiffs

235. The question of whether Fortuna was entitled to accept Mr. Tsien in preference to Mr. Niu as the authorized representative of Maxima Samoa is strictly a question of Cayman Islands law and therefore not amenable to expert evidence. However, the questions of

who owned Maxima Samoa, who were its legitimate directors, and whether Mr. Tsien was authorized by it to vote at the Fortuna EGM are matters of Samoan law. The plaintiffs and the defendants have adduced expert evidence about the law of Samoa in support of their respective arguments that Philip Niu, or alternatively Mr. Tsien, was authorized by Maxima Samoa to represent it at the Fortuna EGM. The plaintiffs called Ms. Fiona Ey and the defendants called Mr. David Goddard, Q.C. There was a significant amount of agreement between the two experts.

236. The plaintiffs' expert, Ms. Ey, is a barrister and solicitor of the Supreme Court of Samoa and is also entitled to practice in Australia. She has been practicing law in Samoa since 2002.

237. The country generally referred to as "Samoa" or "Western Samoa" became an independent nation in 1962, having formerly been administered since 1919 (1921 on the evidence of Mr. Goddard) by New Zealand. Samoa is a common law jurisdiction which derives its law from English and Commonwealth statutory and common law. In addition to local precedents, court decisions from other Commonwealth jurisdictions ("particularly New Zealand, Australia and the United Kingdom") are persuasive.

238. Maxima Samoa was incorporated under the *International Companies Act* 1987 ("the Act"). This statute is based upon the analogous British Virgin Islands legislation according to Mr. Goddard. New Zealand company law has had a major influence on the

domestic company law of Samoa but it differs in significant ways from the *Act* in relation to bearer shares.

239. Ms. Ey began by noting that under Samoan law both the register of members and the share certificates provide *prima facie* evidence of a person's entitlement to be regarded as a member of a company. This is a rebuttable presumption, as it would be under the law of the Cayman Islands. The register of members shows that Philip Niu became a member of Maxima Samoa on August 6, 1994. There is no evidence in Maxima Samoa's corporate records supporting the possibility that Pearl Niu has ever been a legal owner of a registered share in Maxima Samoa.

240. Ms. Ey said that Samoan law recognizes the separation of legal and beneficial ownership of shares. Moreover, this separation applies equally to registered shares and to bearer shares. A trust in relation to share ownership need not be recorded in a company's register of members. There is no particular formality necessary for the establishment of a trust regarding shares. Although the ownership of shares may be transferred by an instrument of transfer which is then registered, there is no requirement that a trust which effects a separation between legal and beneficial ownership be registered with the company.

241. Section 2(2) of the *Act* provides that a person is deemed to hold a beneficial interest in a share if that person is entitled either to receive (directly or indirectly) any dividends in

respect of that share or to control the exercise of any rights attaching to that share. This deeming provision is in addition to the possibility of separation of the legal and beneficial interests by means of a trust. Mr. Goddard said that evidence of payment of Fortuna dividends to Mr. Niu was not evidence from which one can infer that he was the beneficial owner of Maxima Samoa's shares.

242. The *Act* (in the form it took at the time of Maxima Samoa's incorporation) permitted the redenomination of a registered share as a bearer share. Section 35(8) of the *Act* provides that a bearer share "may be transferred by the delivery of the certificate". Article 7 of Maxima Samoa's memorandum of association permits the redenomination of registered shares to bearer shares. The holder of the registered share must make a written request to the company for redenomination and surrender up the registered share certificate. Following a resolution of the directors to permit the redenomination, the company may issue the bearer share.

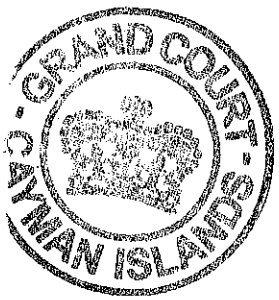
243. Ms. Ey noted that the request for redenomination in evidence has not been signed by Philip Niu. In her opinion, it is "questionable" whether the procedural requirements for redenomination have been satisfied. In any event, Ms. Ey says that the holder of the registered share must necessarily consent to its redenomination to a bearer share. She was asked to consider whether a beneficial owner of a registered share (hypothetically, Pearl Niu) could give a valid consent to the redenomination of that share as a bearer share. She said that this would depend upon the terms of the trust arrangement

between the beneficial and legal owners. Whether or not the beneficial owner consents to the redenomination, the "general principles of law in force in Samoa" would require the legal owner's consent also. Ms. Ey said:

> *It would not be sufficient or adequate to solely rely on the beneficial owners consent without the legal owner's consent. Further, the beneficial owner's consent could not override or be inconsistent with the legal owner's consent. The opinion in this paragraph is based on general principles of law and my general understanding and knowledge of Samoan common law. There is no particular authority for this point.*

244. Ms. Ey noted that both bearer share certificates were signed by Pearl Niu although Philip Niu was, at the date of issuance of the certificates, Maxima Samoa's sole director. There is no evidence that Philip Niu authorized his mother to sign the bearer share certificates on his behalf. Since the sole director was not consenting to the redenomination, "little reliance could be placed on the apparent bearer share certificates." Alternatively, if the bearer shares were to be regarded as valid instruments, they are to be regarded as held on constructive trust for Philip Niu.

245. Ms. Ey gave evidence about the January 15, 2004 meeting of shareholders. Assuming that Mrs. Tsien was the holder of two legitimate bearer share certificates, she was entitled to call for a shareholders meeting by addressing a requisition for that to the directors of the company. The directors would then cause notice of the general meeting to be provided to the holders of both registered and bearer shares. At least fourteen days written notice must be given. The necessary quorum for a general meeting is one



member holding more that 50% of the issued shares or two members. Although accidental omission to give notice of a meeting to a member would not invalidate the subsequent proceeding, an "intentional omission" to give such notice would not be saved by the curative provision in the *Act*.

246. Applying these rules to the present case, Ms. Ey said that the presumed holder of the bearer shares (Mrs. Tsien) would have had to make a requisition to Philip Niu requesting a general meeting. In the absence of any evidence of such a requisition, the conclusion must be that the meeting was not validly requisitioned. Moreover, if Mr. Niu was still the lawful owner of one registered share in Maxima Samoa at this time he had an entitlement to be given notice of the general meeting. While accidental omission to give such notices will not invalidate a meeting, the relevant curative provisions do not extend to intentional omission to give notice.

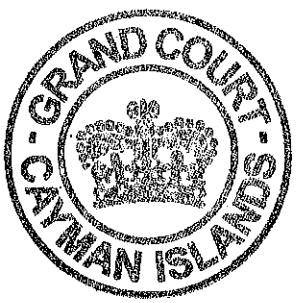
247. As for the meeting itself, Mrs. Tsien was required by article 10(a) of Maxima Samoa's articles to produce the bearer share certificates at the meeting and so establish her entitlement to be present. The minutes do not record that she did this. Section 103(4) of the *Act* provides that where minutes of a directors or shareholders meeting have been entered into the company registers and signed by the chair of the meeting, certain presumptions apply until the contrary is proved. The meeting is taken to have been duly held and all proceedings are viewed as valid. Thus the burden of proving that the directors meeting and the general meeting of Maxima Samoa were invalid rests with the

plaintiffs. Moreover, section 86 of the *Act* states that the acts of a person acting in the capacity of a director are valid despite any defect in the person's appointment. Ms. Ey says that this curative provision is not absolute:

> *Persuasive Commonwealth precedents provide that this protection does not extend to a situation where there has been no appointment of a director at all (such as where a shareholder who purports to appoint a director had no entitlement to do so).*

248. The minutes of the directors meeting held on June 14, 2004 appoint Mr. Tsien as Maxima Samoa's representative at the Fortuna EGM. Philip Niu says he was never told about this directors meeting. Ms. Ey notes that there is no express requirement in the *Act* or in the articles that all directors receive notice of a directors meeting; however, in her view it is necessarily implied in the requirement in the articles to "summon a meeting of the directors". Ms. Ey also mentions common law authority that a deliberate attempt to exclude a director from a meeting is a breach of the rights of that director. Moreover, if the appointment of Mr. and Mrs. Tsien as additional directors was invalid, then the only validly appointed director (Philip Niu) was absent from the June 14 meeting. Ms. Ey concluded this part of her opinion by saying:

> *Without proper requisition and notice, the directors meeting held on 14 June 2004 could not have been validly convened. Consequently, any decision purportedly made at that meeting to appoint Mr. Tsien as Maxima's authorized representative at the 2004 EGM would not have been lawful and valid.*



249. Although the other directors of Fortuna would be entitled to rely on the appointment of Mr. Tsien as the representative of Maxima Samoa and assume that he had been validly appointed, that assumption would be negated "by actual knowledge or suspicion that the appointment was not duly made". On the subject of revocation of a person's right to act as a representative of the company, Ms. Ey said that this was governed by the general law of agency. No particular formality is required. Mr. Niu's attempt to attend the June 22nd EGM is sufficient evidence of his intention to revoke any authority which may have been conferred upon Mr. Tsien. To rebut the presumption of Mr. Tsien's authority, one would have to show actual knowledge on the part of the other Fortuna directors or reason to suspect and a lack of good faith.

Expert Evidence for the Defendants

250. The defendants relied upon the expert opinion evidence of Mr. David Goddard, Q.C. Mr. Goddard was admitted to the bar of New Zealand in 1989 and was appointed Queens Counsel in 2003. He has practiced as a barrister in New Zealand and has appeared as counsel at proceedings in Samoa. On two occasions he has been retained by the Samoan Government to advise it on matters pertaining to corporate activity and domestic company law reform.

251. Mr. Goddard emphasizes that Samoan company law focuses on substance in preference to form. His evidence stressed the well-known principle articulated in *Re Duomatic Ltd.* [1969] 2 CH 365 and summarized by Mr. Goddard in this way:

> *"The assent of all members is effective to bind the company even if there is a failure to comply with formalities prescribed by companies legislation or by the company's articles."*

252. An important qualification is that the transaction in question must be "honest": per Neuberger, J. in *EIC Services v. Phipps* [2003] EWHC 1507 (Ch).

253. The register of members is prima facie evidence of a person's membership in the company. A party seeking to contradict the register must produce sufficient relevant and admissible evidence to satisfy a court on the balance of probabilities that the entry is incorrect.

254. A company cannot rely upon its own failure to comply with relevant formalities and so deny a member the ability to exercise the rights attached to his shareholding. Section 63(3) of the *Act* makes it clear that the rights of the holder of a share are not affected by the company's failure to issue a share certificate. This applies to bearer shares as well as to registered shares. On the other hand, a bearer share cannot be transferred (for obvious reasons) until such time as a bearer share certificate has been issued to the initial holder.

255. Article 113 of Maxima Samoa's articles provides that a share certificate must be signed by or on behalf of a director or by some other person appointed by the directors for that purpose. Mr. Goddard says:

> *.. section 63(3) confirms that failure to comply with the sealing requirement does not affect the rights of the holder of the share. It follows that the absence of a signature, or a signature by the wrong person, could not affect the rights of the holder of the share.*

256. Once a valid decision had been made to issue a bearer share or shares, the directors of Maxima Samoa could delegate the authority to issue the share certificate to some other person. There is express provision for that in the articles. Moreover, by an application of the *Duomatic* principle, if the sole shareholder of Maxima Samoa authorized another person to sign and issue bearer share certificates under the seal on his behalf, and this was done, the share certificates would be validly issued pursuant to the articles. He expanded on this as follows:

> *If the sole director of Maxima authorized the issue of a bearer share or the sole shareholder acquiesced in its issue, formal defects or failure to comply with the requirements of the articles would be unlikely to be regarded by a Samoan court as rendering the issue of the bearer share invalid or ineffective. Similarly, if a valid decision was made by the sole director to convert a registered share to a bearer share, or the sole shareholder approved or acquiesced in that conversion, formal defects or failure to comply with the requirements of the articles would be unlikely to be regarded by a Samoan court as rendering the conversion of the share invalid or ineffective.*

257. In short, a defect in the form of the bearer share certificate would not affect the validity of the prior decision to issue it.

258. As for the validity of the decision to issue a bearer share or shares, this would depend upon whether that decision has been "authorized or acquiesced in" by the sole director "or" the sole shareholder of the company, Mr. Niu. Mr. Goddard says:

> *I consider that a court in Samoa would focus on whether the decision to issue/convert the share had as a matter of substance been authorized or acquiesced in by the sole director and shareholder, Mr. Niu. If Mr. Niu had authorized or acquiesced in the issue of the share, formally or informally, then the issue of that share would be treated as valid. It would not matter whether that authorization/acquiescence took place before or after the issue. Provided there was such authorization or acquiescence, a failure by Mr. Niu to pass a formal resolution would not mean that the share had not been validly issued. Under* Duomatic, *'the only person entitled to insist on compliance with the articles would have acquiesced in the making of the decision without such compliance, and could not later challenge the effectiveness of the decision.*

259. If the issuance of the bearer share was not valid, "the share simply would not exist". If the redenomination of the registered share to a bearer share was not valid, then the registered share would continue in existence in the name of Mr. Niu. He agreed that the ownership of a bearer share can be separated into legal and beneficial ownership under a trust but observed that Samoan company law generally concerns itself only with the legal owner of shares, that is, the person entitled to exercise the rights attaching to the shares.

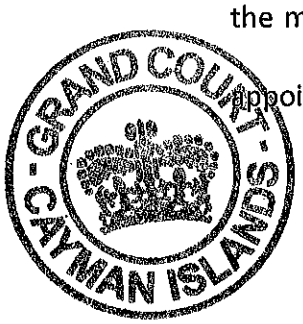
260. It is Mr. Goddard's position that if Mr. Niu approved "or acquiesced in" the conversion of the registered share to a bearer share on August 6, 1994 the conversion was valid regardless of any non-compliance with the formal requirements. Mr. Goddard went on

to examine certain questions on the assumption that the two bearer shares had been validly issued.

261. Mr. Goddard noted that the articles of Maxima Samoa require that notice be given to all members at least fourteen days before a general meeting of shareholders but said that "accidental omission" to give notice would not invalidate the meeting. A director who is not a member of a company has no entitlement to be given notice of a general meeting of shareholders; therefore, the lack of notice to Mr. Niu of the January 2004 shareholders meeting of Maxima Samoa would not invalidate the appointment of Mr. and Mrs. Tsien as directors. It is Mr. Goddard's opinion that the holder of the bearer shares in Maxima Samoa (allegedly Mrs. Tsien) was entitled to appoint additional directors and their appointment would be regarded as valid whether or not the necessary formalities were complied with. If the holder of the bearer shares in January 2004 made a decision to appoint Mr. and Mrs. Tsien as directors, a Samoan court would uphold that.

262. He said the validity of the appointment of Mr. and Mrs. Tsien to the board of Maxima Samoa turns upon who the members of the company were in January 2004. Similarly, the validity of Mr. Tsien's appointment as the authorized representative of Maxima Samoa for the Fortuna EGM turns upon who the members of Maxima were in June 2004.

263. All of the directors of Maxima Samoa were entitled to receive notice of a directors meeting; the failure to give notice of the June 2004 directors meeting to Mr. Niu was an irregularity. That is the position at common law and is the implication derived from article 106 of Maxima Samoa's articles. However, the *Duomatic* principle has application to the validity to the appointment of Mr. Tsien at this meeting as Maxima Samoa's representative to the Fortuna EGM. It is Mr. Goddard's opinion that, if all of the members of Maxima Samoa have acquiesced in the appointment of Mr. Tsien, his appointment would be recognized as valid. He said:



> *"Unanimous shareholder assent to the appointment of a representative would, as a matter of Samoan law, cure any irregularities associated with the board meeting at which directors purported to appoint the representative."*

264. The appointment of Mr. Tsien to represent Maxima Samoa at the Fortuna EGM would be regarded by a Samoan court as effective under the *Duomatic* principle if the decision was "approved or acquiesced in" by all of the members of the company. In this context, if the holder of the bearer shares (allegedly Mrs. Tsien) approved or acquiesced in the appointment of Mr. Tsien, the lack of notice to Mr. Niu would not be effective to invalidate this decision.

265. Finally, it was Mr. Goddard's opinion that, if Mr. Tsien was not properly appointed as Maxima Samoa's representative, a Samoan court would not treat Mr. Niu as authorized to represent it unless Mr. Niu had been so appointed at a valid directors meeting or his appointment had been approved of or acquiesced in by the shareholder or

shareholders. He did agree that if Mr. Niu was the only director of Maxima Samoa at the relevant time, he was entitled to appoint himself (informally) as its representative. Mr. Goddard also agreed that a representative's authority to act for a company at a shareholders meeting could be revoked by a unanimous decision of the members of the company pursuant to the *Duomatic* principle.

The Duomatic Principle

266. Ms. Ey says that the courts of Samoa have not made any decisions in which the *Duomatic* principle has been relied upon. One line of authority (from Commonwealth jurisdictions) requires that the shareholders must be fully informed of the issue upon which their consent is sought before the *Duomatic* principle will apply. The *Duomatic* principle is limited to approval of matters which are *intra vires* and for the benefit of the corporation. Ms. Ey quoted from *Gibbins Investments PTY Ltd. v. Savage* [2011] FCA 527 in which the court said:

> [The *Duomatic* principle] *requires actual, not merely potential assent, and the assent must be informed assent. Meagher, JA spoke of the need for "full knowledge and consent" in Herrman v. Simon at 83, and noted that 'it would be a very odd result if one could waive the destruction of rights of whose destruction one was ignorant.*

267. She went on to say that this view "could well be applied by the Samoan courts as it derives from persuasive common law authorities". She accepted that some other authorities do not appear to go so far. The leading Australian case on the issue is

Herrman v. Simon (1990) 4 ACSR 81, a unanimous decision of the New South Wales Court of Appeal. The Court said that "full knowledge and consent" on the part of the shareholders was required. This view has been endorsed and adopted by a number of Australian state and federal court decisions including appellate courts.

268. I am satisfied that the *Duomatic* principle is a part of the law of Samoa. To what degree must the authorizing shareholders understand the step they are taking? There is not much distance between Mr. Goddard's formulation ("authorization") and that of Ms. Ey ("full knowledge and consent"). The question is fact-specific; the authorizing shareholders must have an understanding that is sufficient to demonstrate that they took the step with a reasonable appreciation of what they were doing and the likely consequences.

The Contract Claim

269. The alleged Fortuna Agreement is that each of Tempo, New Frontier and Wynner would be "entitled to participate equally in the management of Fortuna, and in particular to have equal representation on its board of directors". Since Mssrs. Ting and Tsien are now deceased, it is not enough for Dr. Chen to prove that each of them entered into the alleged agreement in his personal capacity. It is necessary to show by a preponderance of evidence that the three corporate entities controlled by the three men entered into the same agreement.

270. Fortuna was never anything more than a holding company. Its management rested with the board of directors at all times. Thus I consider the reference to "management" in paragraph 12(a) of the amended statement of claim to be superfluous. Mr. Green admitted as much during argument. The essence of the Fortuna Agreement is equal board representation. Broadly, it is alleged that each of the three men was bound to cause his holding company to support the election from time to time of the other two men to the board to directors. If that was agreed, then each would have accepted implicitly that the other two would have a right to participate in the "management" of this holding company.

271. The plaintiffs bear the burden of proving the existence of the Fortuna Agreement on the balance of probabilities. The absence of any written record of the Fortuna Agreement is a tactical difficulty for the plaintiffs but it does not alter their burden of proof. I also disagree with a suggestion in the defendants' closing submission (at paragraph 157) that the burden of proof is affected in any way by the fact that two of the three parties to the alleged conversation are deceased.

272. Each of the three men has referred to his preference, in accordance with the traditional Chinese approach to business dealings, for informal and verbal agreements. Mr. Ting said to the Joint Inspectors that agreements "in the business operations" of Fortuna were originally "informal and verbal" but that this changed commencing in February

2004. Mr. Tsien said in his affidavit that business was conducted "informally" which, in context, appears to mean in the absence of a written agreement. Dr. Chen spoke in detail in his evidence of the reluctance to reduce agreements to writing. I accept the general proposition that important business agreements in Taiwan are (or at least have been in the past) often concluded verbally and not reduced to writing.

273. The Fortuna Agreement was never reduced to writing. There is no reference in any document before me to the existence of the Fortuna Agreement. Fortuna's articles contain no hint of any agreement between the shareholders about equal board representation. No board minutes of the holding companies contain a resolution ratifying such an agreement.

274. There is direct evidence for the existence of the Fortuna Agreement from Dr. Chen and direct evidence denying its existence from Mr. Tsien. Dr. Chen's evidence was lacking in circumstantial detail. He displayed a tendency in cross-examination to overstate the precision with which he could recall distant past events. Mr. Tsien was not of course cross-examined. His affidavit contains a denial that the three men ever agreed to a partnership or quasi-partnership but there is a letter in his own hand dated September 27, 1993 in which he described the relationship as a "three-party partnership". Each witness was advancing a version of events that accorded closely with his own financial interests. I would not accept the evidence of either man unreservedly.

275. Both the plaintiffs and the defendants each characterized the evidence of the other side as having been "heavily lawyered". Both are correct. Aside from Dr. Chen, none of the witnesses had any useful evidence to offer concerning the existence of the Fortuna Agreement. What was offered was typically vague and impressionistic. A number of witnesses said they were not aware of the Fortuna Agreement and had the impression that no such agreement had been entered into. I cannot derive any real assistance from this evidence. In short, I must look to the reliable circumstantial evidence to resolve this question.

276. The plaintiffs emphasize that the three men and their holding companies acted in a manner entirely consistent with the existence of the Fortuna Agreement between 1994 and 2004. In general, each holding company had one representative on the board during that period of time. Each man was content to have the other two as his fellow directors. When the second generation of family members – Randy Chen, Gayle Tsien and Arthur Ting – was appointed to the board the existing equality between the three families was maintained. Arthur Ting referred in his witness statement to Twenty First Century, Inc. as "a corporate director appointed by Wynner". Gayle Tsien said in an email of June 2, 2004 that the Tsien family had three directors on the board while the other two families had just two directors. "Thus", she said, "there will be a proposal for a reduction of directors tabled at the meeting". I am satisfied that there was a pattern of conduct from 1994 onwards in which each of the three men and their companies enjoyed equal

board representation. I am satisfied that the younger family members – the so-called second generation – enjoyed equal representation for the three families also.

277. This established pattern of conduct is some evidence for the existence of the Fortuna Agreement but it is not in my estimation particularly weighty. Each of the three men may well have decided, for reasons personal to him and in his own best interest, to support the election of the other two to the board of directors. Each man may well have acted throughout the ensuing decade consciously in parallel with the other two principals without having committed himself to an enforceable obligation. The crucial question is not whether each of the men acquiesced in equal board representation as long as relations between them were good but whether each man bound his holding company by an enforceable agreement to guarantee equal representation even if the relationship soured. In other words, was there an exchange of promises in 1994 by which each of the three holding companies acquired a right to equal board representation combined with an enforceable obligation to support equal board representation? The pattern of conduct throughout the period 1994 to 2004 is consistent with the existence of the Fortuna Agreement but equally consistent with individual and voluntary decisions on the part of the three principals that equal board representation was appropriate and beneficial.

278. As the plaintiffs have said, an agreement on equal board representation is entirely plausible in the circumstances. Each man was making an investment of a substantial

size. Each was engaged in posting security for Fortuna's borrowing and each was putting his own personal fortune at risk. It would not be unusual for three investors in this situation to enter into an express agreement about equal board representation. I do not consider such an agreement inevitable. An investor with a significant degree of trust in his fellow investors might well be content to leave the strategic decision-making ("management" if you like) of the company in their hands. He might prefer to apply his energy to other projects and remain a passive investor. Moreover, in light of the evidence I have heard about the traditional Chinese approach to business relationships, it is plausible that each of the three men may have simply assumed that each would have equal board representation without the need for an express agreement. Each man would have had a natural expectation to sit on the board of directors. I am satisfied that each man would have felt in 1994, and would have continued to feel as time passed, an entitlement to sit on the board or to designate a substitute. This circumstance – the sense of entitlement – does not advance the plaintiffs' case very far. While the three men may have decided to guarantee their right to sit on the board by entering into the Fortuna Agreement, it is also plausible that they chose to rely upon the good will and spirit of co-operation which no doubt existed at the time. In other words, they may have been content to rely upon each other to do the "right thing" without legal compulsion.

279. At one point in his evidence Dr. Chen referred to the Fortuna Agreement as a "gentleman's agreement". Historically, this phrase has been applied to agreements which are not intended to be enforceable in a court of law; the parties to a gentleman's

agreement depend upon the sense of honour and obligation of the other parties to ensure the agreement is honoured. Dr. Chen did not intend to use the phrase in that sense (and I am conscious that English is not his first language) but it seems to me there is but a narrow line between a gentleman's agreement and the sort of conscious parallelism I have described above. In short, it is certainly plausible in the circumstances that the three men entered into an express oral agreement on equal board representation but the possibility that they simply went forward assuming that each would act in such a way as to allow equal board representation is by no means implausible. The question is not whether the Fortuna Agreement was a natural one for them to have made in the circumstances but whether they actually did come to such an agreement. If each of the three men assumed that the atmosphere of goodwill would continue and that each man would have a seat on the board, an agreement to that effect would have been unnecessary. My task is to determine whether the three men not only assumed that equal representation would be appropriate and fair, as they obviously did, but whether they each acquired legal rights and obligations arising from an exchange of promises.

280. The defendants advance a number of arguments against the existence of the Fortuna Agreement. The amended statement of claim alleges that the Fortuna Agreement originated in 1989 and was "carried over and/or transferred" to the three holding companies in 1994. This pleading introduces a note of confusion because in 1989 the KMT controlled CT & D Taiwan and was entitled by written agreement to six of the nine

board seats. Although the KMT accepted that each of Mssrs. Chen, Tsien and Ting would have a seat on the board, the three men could not on their own have brought that about. There would have been little point in the three men agreeing to equal board representation between them; it was the KMT which had to and did accept that stipulation.

281. The primary case for the plaintiffs (which evolved somewhat during the course of the action) is that there was a fresh agreement concluded between the three holding companies in 1994. Dr. Chen's evidence is that the Fortuna Agreement was entered into around January 29, 1994. However, one of the companies – New Frontier – did not exist until August 9, 1994 and could not have been a party. There is no evidence of a later ratification by New Frontier of any pre-incorporation contract.

282. Moreover, Dr. Chen told the Joint Inspectors that he was unaware of Tempo's existence until after 1994; Tempo was acquired for him by Mr. Tsien. At trial he sought to explain this away as a mistake but I am satisfied it was not. The context in which the statement was made leads me to that conclusion. Tempo was a shelf company acquired from OIL at the behest of Mr. Tsien. It was Mr. Tsien who arranged for Dr. Chen to hold his Fortuna shareholding in a company incorporated offshore in the British Virgin Islands. Dr. Chen was telling the Joint Inspectors that Tempo could not have consented to certain shareholder advances because he had not yet learned of its existence. The point

was of considerable importance to Dr. Chen and to the Joint Inspectors. The assertion was not accidental.

283. There are occasions upon which, if the Fortuna Agreement had been made, one would expect Dr. Chen to have said so clearly. In 2004 Dr. Chen filed a petition seeking the winding up of Fortuna. He did not at that time seek injunctive relief as would have been his right if the Fortuna Agreement existed. He said in his winding up petition affidavit (at para. 231) that a winding up was his "only" remedy.

284. Neither the winding up petition nor Dr. Chen's affidavit in support describes the Fortuna Agreement in express terms. His petition (which was drafted by experienced counsel) asserts that there was a personal relationship of mutual trust and confidence between the three men which had broken down and that Dr. Chen had "justifiably" lost confidence in them. The petition and affidavit in support refer broadly to "a mutual understanding and agreement" and to a "partnership-type relationship" or a "quasi-partnership". The agreement about equal board representation is said to have been "an inherent part of the understanding between" the three men. The petition says that Mssrs. Ting and Tsien have acted in an oppressive and prejudicial manner towards Tempo and Dr. Chen. In light of these claims, it cannot be argued (as the plaintiffs sought to do) that a clear description of the Fortuna Agreement and its breach were immaterial to the issues raised in the petition. The implication left by the winding up petition and its supporting material is that there was no clear, express, enforceable

agreement: if there was, Dr. Chen would have said so and would have provided a narrative of how the agreement had been reached.

285. Dr. Chen's lawyer, Mr. Hatzer, engaged in a significant amount of correspondence with the attorneys for Mr. Tsien and Mr. Ting in 2004 but made no mention of the Fortuna Agreement. It would have been in the interests of both Dr. Chen and Maxima Samoa (which was also represented by Mr. Hatzer) to invoke the terms of the Fortuna Agreement if it existed.

286. On balance, I consider that the circumstantial evidence taken as a whole is more consistent with the absence of an express agreement than with the existence of one. When I weigh the oral evidence together with my assessment of the reliable circumstantial evidence, I find I have not been satisfied on the balance of probabilities that the Fortuna Agreement was ever made. It is more probable than not that the three men simply acted throughout the years in a spirit of mutual cooperation while there was harmony between them, resulting in each of them having equal board representation. I am satisfied, however, that they did not engage in an express exchange of promises creating enforceable legal obligations.

287. As an alternative argument the defendants say that, if there was an express agreement for equal participation in management and equal board representation, the terms are too uncertain to be enforceable. If the term about equal participation in management

were to be viewed in isolation, I would agree that it lacks sufficient certainty. However, as I have said above, this aspect of the Fortuna Agreement is redundant. Given Fortuna's single and narrow purpose (to act as a holding company), participation in Fortuna's management equates to having a seat on its board of directors.

288. I see no difficulty with certainty in a term that board representation must be "equal". Each of the three principals had an approximately equal shareholding (although Mr. Tsien had relinquished a 5% shareholding to Maxima). Each of the three holding companies would be entitled but not obliged to designate one-third of the board members.

289. I am equally unconvinced that the lack of a term setting out the duration of the Fortuna Agreement renders such an agreement unenforceable. The clear implication in any agreement for equal board representation arising from equal shareholdings is that the equality would be maintained for so long as the shareholdings remained roughly equivalent.

290. The plaintiffs have also pleaded in the alternative that an agreement for equal board representation is implied. The plaintiffs devoted just three paragraphs of their argument to this proposition and said little about it in argument.

291. The question is whether an implied term for equal board representation "is essential to give effect to the reasonable expectations of the parties": per Lord Steyn in *Equitable Life Assurance Society v. Hyman* [2002] 1 AC 408 (HL). There is a presumption against the implication of terms in commercial agreements: Lewison, *Interpretation of Contracts*, at page 286.

292. I do not consider the provision of equal board representation "essential" to give effect to the reasonable expectations, viewed objectively, of Dr. Chen, Mr. Ting and Mr. Tsien or their respective holding companies. It was well understood that Mssrs. Ting and Tsien would be managing the various entities of the Fortuna Group while Dr. Chen remained, for the most part (and despite his denial of it), a passive investor. Dr. Chen no doubt had an expectation that he would be a director of Fortuna but I am not persuaded that the nature of the relationship made it "essential" that he have one. Dr. Chen was to play a leading role in the provision of security for Fortuna's indebtedness but that function does not require that he have a directorship.

293. Finally, there is nothing in the authorities cited to me which suggests that whenever a small number of investors have equal shareholdings in a company it is essential that they have equal board representation. No such broad rule exists.

294. A further difficulty in the contract claim is the lack of any evidence regarding how the three holding companies acquired the alleged contractual rights. There is no evidence of

an assignment of rights by any of the three men to his holding company and no evidence of ratification by Tempo and New Frontier of the Fortuna Agreement which, if it was made at all, must have preceded the incorporation of those two entities. On this basis, also, I would dismiss the claim.

295. The defendants also argue that if the contract was entered into Dr. Chen repudiated his contractual obligations by his behavior and activities in the spring of 2004. Dr. Chen's heavy-handed communications with Fortuna's lenders during that period created a risk that the lenders would declare an event of default. They did not do so, but Dr. Chen's willing assumption of that risk was arguably in breach of his fiduciary obligations to Fortuna and its shareholders.

296. The alleged Fortuna agreement was a simple exchange of promises that each of the three holding companies would have the right to designate an equal number of directors. To repudiate this agreement, Dr. Chen would have had to act in such a manner as to show unequivocally that he did not intend to support the continuing presence on the board of directors of Mr. Ting or Mr. Tsien or both of them. An act of repudiation must go to the root of the contract: *Molena Alpha Inc. et al v. Federal Commerce and Navigation Co. Ltd.* [1979] AC 757 (HL). The repudiatory breach must deprive the innocent parties of substantially the whole benefit which they would have obtained from due performance of the contract: *Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kasiha Ltd* [1962] QB 26 at 72 (HL). There is no suggestion in the

evidence that Dr. Chen threatened or attempted to withdraw his support for a board of directors made up of equal representation from the three holding companies. Nothing less than that can amount to a repudiation of his obligations. Had I found that the Fortuna Agreement was made, I would not have dismissed the plaintiffs' claim on the ground that Dr. Chen repudiated the contract afterwards.

297. For these reasons, the plaintiffs' claims concerning the Fortuna Agreement are dismissed.

The Company Claim

298. At an extraordinary general meeting of the shareholders of Fortuna held on June 22, 2004 a number of ordinary and special resolutions were passed over the objections of Dr. Chen. The effect of these resolutions was to remove Dr. Chen from the Board of Directors and to impose severe restrictions upon his right to deal with his shares. The special resolutions required a two-thirds majority of votes to pass, measured by the shareholdings of the persons voting. Messrs. Tsien and Ting, who were both present and voting, held (through Wynner and New Frontier) 55% of the shares between them. Bates, which was controlled by Messrs. Tsien and Ting, owned a further 10% of the shares. Since Dr. Chen was clearly opposed to the special resolutions, the support of Philip Niu was vital; he controlled Maxima Samoa's 5% shareholding, which would have enabled Mssrs. Tsien and Ting to satisfy the two-thirds majority requirement.

299. Mr. Niu attempted to attend the meeting but was denied entrance. Everyone present was well aware that he intended to support Dr. Chen and that, if he was admitted, the special resolutions would fail. The plaintiffs say that Mr. Niu was "entitled at all material times to exercise the voting rights of the Fortuna shares held by Maxima".

300. When Mr. Niu was refused entry, Gayle Tsien told him that Maxima Samoa had already granted a proxy for the EGM to Mr. Tsien. At the meeting Mr. Tsien produced minutes of the board of directors of Maxima Samoa dated June 14, 2004 purporting to appoint himself as its proxy. The plaintiffs say that this was a false document and that the exclusion of Mr. Niu from the EGM was a deliberate act by New Frontier and Wynner "in their attempt to falsely engineer a special majority". The plaintiffs argue that Mr. Tsien had no authority to represent Maxima Samoa at this meeting. Since these acts were deliberate, there was a lack of good faith on the part of Mssrs. Tsien and Ting and all business transacted at the EGM should be regarded as a nullity.

301. Resolution of this issue starts with a consideration of whether Philip Niu was, at all material times, the beneficial owner of the shares of Maxima Samoa. He says he was. The case for the defendants is that Maxima Samoa was owned beneficially at all material times by Pearl Niu and the legal owner of its shares "throughout" was Mrs. Josephine Tsien.

302. When Mr. Robert Niu passed away in 1974, his assets fell under the control of his surviving wife, Pearl. Neither side has produced any evidence explaining the law of succession in Taiwan. The defendants say that Pearl Niu became the owner of the entire estate and the plaintiffs have been content to advance their claim on that basis.

303. The plaintiffs argue that the U.S. $5,000,000 investment in Maxima Samoa by Philip Niu was a gift from Pearl Niu, probably to be debited against his ultimate share of her estate. The defendants say that the money belonged to Pearl Niu, that she did not give it to her son, and that she made the investment on her own account for her own benefit. The defendants argue that she made Philip Niu (briefly) a shareholder of Maxima Samoa and appointed him as a director in recognition of her expectation that the shareholding would ultimately become his through inheritance. Until her death, she intended to remain the beneficial owner of Maxima Samoa.

304. Philip Niu's evidence was confused, lacking in detail, and subject to some internal contradictions. However, my assessment of his veracity is that he was at all times speaking the truth as he perceived it to be. I saw no sign that he was embellishing his evidence or purporting to remember things which he had in fact forgotten. The gist of his evidence is that he always understood that he was the beneficial owner of Maxima Samoa because his mother had given him the U.S. $5,000,000 as an advance upon his share of his father's estate. The spreadsheet prepared by Gayle Tsien at Pearl Niu's direction in March 2004 accords with Philip Niu's evidence. It shows a debit of U.S.

$5,000,000 against his share of the Family Funds with a line item description reading "less: CT & D share purchase (P. Niu only)". In context, this refers to a purchase by Philip Niu not by Pearl Niu. The figures in the spreadsheet appear to be derived from an earlier document in the handwriting of Mr. Tsien. Whether or not the spreadsheet was prepared (as Pearl Niu and Gayle Tsien allege) for the purpose of estate planning, I accept it as some confirmation of Philip Niu's evidence that he was given the sum of U.S. $5,000,000 by his mother. I am satisfied that Mr. Niu's evidence that he was Maxima Samoa's beneficial owner is the product of an honest and sincere belief, uninfluenced by his personal financial interests. Mr. Niu was not told by anyone, at any relevant time, that he was not the beneficial owner of the company.

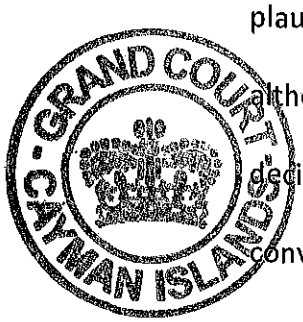
305. The remaining question is whether Mr. Niu could have been mistaken. In light of his lack of business experience and general lack of interest in financial matters, there is room for a conclusion that he was wrong to think that beneficial ownership of Maxima Samoa had been given to him.

306. The primary evidence of Pearl Niu's beneficial ownership comes from Pearl Niu herself. She was not cross-examined but I must make an assessment of her credibility in any event.

307. Pearl Niu is now 101 years of age. At the time of the investment in Maxima Samoa she would have been about 80 years of age. She appears to have been heavily influenced by

Mr. Tsien during his lifetime. She has described Mrs. Josephine Tsien as "my full-time carer" upon whom "I rely heavily". I infer that as Mrs. Niu advanced in years she fell increasingly under the influence of her daughter and son-in-law.

308. The explanation advanced by Mrs. Niu in her evidence (which includes her witness statement and her previous affidavits) to explain the investment in Maxima Samoa lacks plausibility. She says that she decided to make the investment on her own behalf and although the shareholding "may ultimately be passed on to Philip" she had made no decision about that. She then says "accordingly, Philip was appointed as a director". No convincing rationale is offered for why she decided upon this appointment if the company was hers. Philip. Niu was entirely uninterested in matters of business and at that time was quite content to have Mr. Tsien manage the family's affairs. Since Maxima Samoa was merely a holding company for an investment in Fortuna, making Philip Niu a director would not provide him with any useful experience.



309. Pearl Niu goes on to say: "as a matter of formality, he was the holder of the single share subscribed for on the incorporation of Maxima". No further explanation is given. Why, if the investment was to be hers, would she place the single share of Maxima Samoa in the name of her son? Pearl Niu's evidence then asserts that she left the "company documents" of the company in the keeping of Mr. Tsien. In her affidavit of January 13, 2005 Mrs. Niu said that her son Philip was named as the registered shareholder of Maxima Samoa "simply for the purposes of effecting the transfer of Maxima to me from

OIL Samoa..." The transfer of the share from OIL could have been effected with equal ease whether the transferee was Philip Niu or Pearl Niu.

310. Pearl Niu says she instructed Mr. Tsien to cancel the registered share in Maxima Samoa (in the name of Philip Niu) and to issue two bearer shares "to give me greater flexibility over any future distribution of Maxima that may be necessary". This makes little sense and is left unexplained. If, as she says, Pearl Niu intended to retain the beneficial ownership in Maxima Samoa she would have instructed OIL to issue the single registered share in her name. There is no convincing reason why the issuance of two bearer shares would give her "greater flexibility" in the "future distribution" of the company's ownership. Her evidence then says: "I thought that the creation of bearer shares would allow me to retain control over Maxima and my interest in Fortuna during my lifetime but would be easy to transfer to my son..." How did she retain control? She says: "I took steps to ensure that the bearer shares remained in my control by asking Mr. Tsien and my daughter to keep them in their custody on my behalf..." Since possession of a bearer share gives legal ownership to the bearer, giving the certificates to Mr. and Mrs. Tsien is relinquishing control not retaining it. No sensible explanation is offered for why this tortuous arrangement would constitute an improvement upon a straightforward issuance of a single registered share in the name of Pearl Niu. Mrs. Niu also said (in her affidavit of December 17, 2004) that she had "physical possession" of the two bearer shares; in fact, it was her daughter and son-in-law who had them in their possession. As for the signatures on the two bearer share forms, Pearl Niu confirms that

they are hers but offers no explanation whatever for why she signed them after having transferred legal ownership of Maxima Samoa to Mr. Tsien or to Mrs. Josephine Tsien (or both).

311. Having said, essentially, that Maxima Samoa was not a gift to Philip Niu because she had yet to make any decision about that, Pearl Niu then instructed Mr. Tsien to pay dividends totaling over U.S. $3,000,000 to Mr. Niu (and to his wife) as a "gift". This "gift" is roughly 60% of the value of the original investment. Thus, although (on her evidence) she retained beneficial ownership of the company at all times, her son was the sole director, the sole registered shareholder, and the ultimate recipient of over U.S. $3,000,000 in dividend income. One of the dividend payments was recorded as "re payment of Pearl Niu" but the other three had no such notation. This notation was not explained further in the evidence; the "beneficiary" (sic) of the payment was described as Philip and Rosemarie Niu. I regard the receipt of these large dividend payments as evidence inconsistent with Pearl Niu's beneficial ownership of the shares.

312. Mrs. Niu claims that by the end of 2003 she decided to add Mr. and Mrs. Tsien to the board of directors of Maxima Samoa. She says she instructed them that the bearer shares would remain under her "control" and that she would give directions as to how the company would vote at Fortuna shareholder meetings. The bearer shares were not under her control; they were locked in a safe to which only Mr. and Mrs. Tsien had access. If the bearer shares were validly issued, their possession by Mr. and Mrs. Tsien

gave them legal ownership of the company. That means they would be entitled to determine how Maxima Samoa would vote (although they may have had some obligation to consult the beneficial owner before making that decision).

313. Pearl Niu says she did not advise her son that he was now to be joined on the board of directors by two new directors because she hoped to avoid strife in her family. This makes no sense; no matter how diplomatically it may be put, Mr. Niu had to be told that the board of directors now contained two additional directors.

314. Pearl Niu's evidence is a mass of implausible, inconsistent, and insufficiently explained assertions. I do not believe it. Where her evidence conflicts with that of her son, I prefer his evidence to hers. I do not believe that Pearl Niu has the degree of understanding suggested by her evidence of the matters she describes. I accept the evidence of Philip Niu that he has never discussed the question of bearer shares with his mother, that she would not have had any knowledge of bearer shares, and that he first became aware of her claim to be the beneficial owner of Maxima Samoa from evidence filed in the winding-up proceeding,

315. The evidence of Josephine Tsien adds little to the defendant's case. It is obvious that she did what was asked of her by her husband and signed whatever he put in front of her. Mrs. Tsien does not pretend it was otherwise. She has said in evidence that she always understood that Maxima Samoa was owned by her mother. She took instructions from

her mother from time to time. Overall, nothing in the evidence of Mrs. Tsien contributes anything of substance to the question of beneficial ownership.

316. As in the case of Pearl Niu, I must make an assessment of the credibility of the evidence (given in the winding-up proceeding) of Mr. Ferdinand Tsien although he has never been cross-examined. Mr. Tsien's narrative bears a strong resemblance to that of Pearl Niu – so strong, in fact, that this in itself raises doubt about his credibility.

317. He says that Pearl Niu was always the beneficial owner of Maxima Samoa. She intended that Philip Niu would inherit the company after her death. When addressing Philip Niu's acquisition of the single registered share, Mr. Tsien says that he was "as a matter of formality" made the transferee of the single ordinary registered share. Here he uses the same odd phrase ("as a matter of formality") as is found in the evidence of Pearl Niu; like Mrs. Niu, he fails to explain what he means.

318. Mr. Tsien goes on to say that he understood that Mrs. Niu told Philip Niu that she would retain Maxima Samoa "under her control". His evidence repeats the same assertion found in Pearl Niu's evidence that she "took steps to ensure that the bearer shares remained in her control". He says: "I believe that it was for this reason that Mrs. Niu gave instructions for the initial (registered) ordinary share to be cancelled and for two bearer shares to be issued". He says this was done to "allow Mrs. Niu to retain control

over Maxima" and also because it would "be easy to transfer" Maxima to her son in due course.

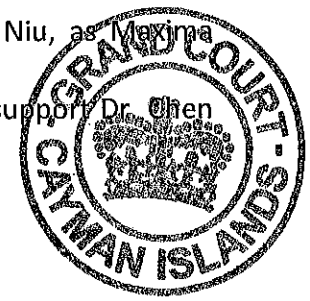
319. Like Pearl Niu, Mr. Tsien gives no plausible or sensible explanation for the issuance of the bearer shares. He implies that it was Pearl Niu's idea; in fact, I am confident the idea originated with Mr. Tsien. Unlike Mrs. Niu, Mr. Tsien was a man with very substantial business experience and sophistication; if there was a cogent explanation for the issuance of the bearer shares, he would have known it.

320. Mr. Tsien says that sometime late in 2003 Pearl Niu asked him and his wife to become additional directors of Maxima Samoa. He says she made it clear that "our votes would be subject to her directions". This evidence suggests that in late 2003 (at the age of 89 or 90) Pearl Niu was still robust enough to exercise firm control over her assets and over the company's affairs. Despite her alleged ability to give firm instructions to the two new directors, she was unable to summon the initiative to advise the sole current director that the board had been expanded.

321. In general, Mr. Tsien's evidence follows the narrative of Pearl Niu's story very closely. My assessment of his credibility is the same as that for Pearl Niu. I do not believe his evidence where it contradicts the evidence of Philip Niu.

322. Gayle Tsien has testified that she always understood that it was Pearl Niu, not Philip Niu, who invested in Maxima. In general, Gayle Tsien's evidence is reflective of things she was told by others; she has little personal knowledge of the ownership question.

323. Some of Gayle Tsien's contemporaneous emails tend to contradict her evidence. In one email shortly before the June 22 EGM, she referred in an email to Philip Niu to the "voting of <u>your</u> shares" (underlining added). Her explanation that this was just a "colloquial reference" and "not worded well" is not credible. I also do not accept Gayle Tsien's explanations for her trip to San Francisco in June, 2004. I am satisfied that she would not have travelled from Taiwan to San Francisco to attempt to convince Philip Niu to provide his proxy to Mr. Tsien if she was certain, as she says, that the true beneficial owner was her grandmother. The only plausible explanation for the trip to San Francisco is that both Gayle and Josephine Tsien were well aware that Philip Niu, as Maxima Samoa's validly appointed director and beneficial owner, intended to support Dr. Chen at the EGM.



324. I find that Pearl Niu made a gift of U.S. $5,000,000 to Philip Niu in 1994 which was used to acquire a shareholding in Maxima Samoa. Mr. Niu is and always has been the beneficial owner of the company. Pearl Niu has never been the beneficial or legal owner of Maxima Samoa. It follows that the *Duomatic* principle, so heavily relied upon by the defendants in argument, can have application only to acts and transactions undertaken by Philip Niu on behalf of his company.

325. The next question of substance is whether the bearer shares were validly issued or whether Mr. Niu continued to be the legal owner by virtue of the single share registered in his name. If the bearer shares were never validly issued the cancellation of the registered share would be invalid for the same reasons.

326. If the bearer shares were issued validly, then Mrs. Tsien (as the defendants argue) or Mr. Tsien (who controlled her actions) became the legal owners of Maxima Samoa by virtue of their possession of these negotiable instruments. Mrs. Tsien was a simple nominee for Mr. Tsien at all times. As the legal owners, Mr. and Mrs. Tsien were entitled to appoint themselves to the board of directors of Maxima Samoa in January 2004. As the legal owners, they were entitled under the *Duomatic* principle to designate Mr. Tsien in June 2004 as the authorized representative of Maxima Samoa for the Fortuna EGM. As directors, they had (if validly appointed) the same authority. Fortuna was obliged to recognize anyone appointed by Maxima's board as its representative even if, to Fortuna's knowledge, Philip Niu retained beneficial ownership of Maxima. That is one consequence of the division between legal and beneficial ownership: it is only the legal owner who is entitled to be regarded as the owner by third parties. For these reasons, I must resolve the validity of the bearer share issuance even though I am satisfied that Mr. Niu remained the beneficial owner of Maxima at all relevant times.

327. Maxima's register of members records that share certificate no. 1 in the name of Philip Niu was cancelled on August 6, 1994. The register contains entries on the same day

asserting that share certificates no. B001 and B002 in bearer form were issued. I accept the general proposition, upon which the defendants have placed heavy reliance, that the state of the register creates a rebuttable presumption that the bearer shares were validly issued (and the registered share cancelled) under the law of Samoa. The plaintiffs bear the burden of showing on the balance of probabilities that the bearer shares and the cancellation were invalid.

328. I accept the evidence of both Samoan law experts to the effect that the real question is one of substance not form. If the director of Maxima Samoa on August 6, 1994 (Philip Niu) or, for that matter, the sole shareholder on that date (also Philip Niu) made a conscious decision to convert his registered share into bearer shares then any deficiency in the formalities would not render the shares invalid. Mr. Goddard said that the bearer shares were validly issued if the sole shareholder "authorized" or "acquiesced" in their issue. While I entertain some doubt that acquiescence in these peculiar circumstances would be sufficient, I am content to approach the question on that basis.

329. What was Philip Niu's state of mind in August, 1994? His evidence on this subject, which I accept as truthful in its entirety, was:

> *Q. And you are obviously now familiar, Mr Niu, with what a bearer share is, and can you recollect when you first learnt about the existence of bearer shares and what they are?*
>
> *A. I don't think I ever had bearer share. I didn't know that, actually. There's -- it's only quite recently I said before, Ferdie was still living, though, at that time, quite a while ago, 94/93, something like that. That's*

the first time I ever had contact with offshore corporation. He introduced me to this.

Q. What you told the inspectors in 2004, and I can show you to remind you, if we can go to bundle E at page 2. Do you remember that you were interviewed twice by the inspectors? Do you remember -- do you remember, Mr Niu, that you were interviewed twice by the inspectors?

A. Yes.

Q. And there are records of what you told the inspectors, and the first of those is your interview in September 2004. And if you go to bundle E in divider 2 at page 30.

A. Divider 2.

Q. So at the bottom of the page, the last but one question asked by Mr Walker, the inspector, was:

"What is your understanding with respect to in terms of the shares issued? The documents we have show there's a bearer share. Is it your understanding that the share that was issued to you was a bearer share?

Answer: No, not until maybe just recently. I have no idea what a bearer share is."

So I am going to suggest to you, Mr Niu, that it wasn't until the whole dispute about who owned Maxima that you even came to know what a bearer share was. Is that correct?

A. I think that's true, yeah.

Q. That's true. Thank you. So it follows from that that when Maxima was incorporated ten years before, you didn't know the difference between a registered share and a bearer share?

A. No, sir.

Q. Thank you. And so would it be a fair summary, Mr Niu, that apart from what you have learnt by reason of your involvement in the dispute about who owns Maxima, you really have no familiarity with the internal workings of companies?

A. No.

330. As this evidence shows, Mr. Niu did not know what a bearer share was in 1994 and had no intention of issuing any. I am satisfied that Mr. Tsien took no step to explain to Mr. Niu the nature of bearer shares or his reason for wanting to issue them and take them into his own possession.

331. By "cancelling" the registered share in his own name, by "issuing" bearer shares, and by delivering the bearer share certificates into the hands of Mr. and Mrs. Tsien, Philip Niu was surrendering legal ownership of Maxima Samoa. There was no conceivable reason for him to do this. He derived no benefit whatsoever from it. Neither did the company. Mr. Niu was happy to have Mr. Tsien's advice and content to have Mr. Tsien do the minimal amount of work necessary to maintain Maxima Samoa in good standing. Until the dispute with Dr. Chen came to a head, Mr. Niu was content to have Mr. Tsien represent Maxima Samoa at Fortuna shareholder meetings. None of that required or was assisted in any way by the issuance of bearer shares. A simple letter or power of attorney could have clothed Mr. Tsien with the authority he needed. Mr. Tsien engineered the "issuance" of the bearer shares to give himself control over Maxima Samoa's affairs; he was not in any sense serving the interests of Mr. Niu. Mr. Tsien wished to control Maxima Samoa's voting at Fortuna shareholder meetings and wished to ensure that the shareholding remained in safe hands.

332. I am satisfied that Mr. Niu had no intention of surrendering legal ownership of Maxima Samoa to Mr. Tsien at any time. He understood that Mr. Tsien was representing the company at Fortuna shareholder meetings and had no objection to that. He never agreed to or even acquiesced in any broader transfer of rights to Mr. or Mrs. Tsien. Having no understanding of the nature of bearer shares, Mr. Niu cannot be said to have "authorized" or "acquiesced in" their issuance in any meaningful sense.

333. Philip Niu did sign two documents presented to him by Mr. Tsien which make reference to bearer shares. There is an undated letter from Mr. Niu to "the board of directors" of Maxima Samoa, i.e., to himself. The letter reads:

> *On behalf of the bearer, I hereby apply for one share of US$1 each in the capital of the company and undertake to pay in full in cash for the said share upon allotment.*
>
> *Yours faithfully, for and on behalf of bearer*
>
> *[Philip Niu's signature]*

334. The other document is the minute of the first directors meeting held on August 6, 1994. A number of matters were dealt with at the meeting, most of which are routine and necessary tasks upon the incorporation of a company. Item no. 7 is unusual; it reads:

> ***Application for an allotment of shares***
>
> *The following applications for shares in the company were submitted:*
>
> | *Applicant* | *No. of Shares* | *Consideration* |
> |---|---|---|
> | *Bearer* | *1* | *US $1* |

It was resolved that the applications be approved and that the shares be issued accordingly. It was further resolved that the common seal of the company be affixed to the share certificates to be issued and that details be entered into the register of members.

These minutes are signed by Philip Niu.

335. Also in evidence are two pieces of paper purporting to be bearer share certificates no. B001 and B002. Each of these contains the signature of Pearl Niu, signing as a "director". She was never a director and has never explained why she signed these certificates. Mr. Niu says he has never seen the bearer share certificates until recently; I believe his evidence to that effect.

336. There is an unsigned draft of a letter dated August 6, 1994 from Philip Niu to himself as director of Maxima Samoa whereby he requests himself to convert his registered share into a bearer share. I place no reliance upon this document. The defendants argue that the existence of an unsigned letter is some evidence that the original of the letter was signed but has since been lost. It is not. When the genuineness of a document is questioned, an unsigned copy cannot substitute for the original.

337. Josephine Tsien's letter of July 5, 2004 is a self-serving attempt to create evidence favouring the defendants at a time when Dr. Chen was initiating litigation over the validity of the June 22 EGM. I consider it devoid of evidentiary value.

338. I am satisfied that Philip Niu had no understanding of the significance of the undated application letter when he signed it. I am also satisfied that he had no understanding of the significance of item 7 of the minutes of the first directors meeting, even assuming that he read the minutes before signing them (which I doubt). Mr. Niu signed these documents because he trusted Mr. Tsien, who presented the documents to him for signature.

339. Moreover, I find Mr. Tsien's failure to present the bearer share certificates to Philip Niu for his signature to be suspicious. Mr. Green argues that these certificates were created shortly before the EGM, at a time when Philip Niu was no longer willing to sign whatever Mr. Tsien put in front of him. From Mr. Tsien's point of view at that time, the best alternative was to have Pearl Niu, the alleged beneficial owner of the company, sign the two certificates. Mr. Green notes that Mr. Tsien had possession of the registers of members and directors and could easily have made the appropriate register entries himself. Mr. Green may be right but it is unnecessary for me to determine when the bearer share certificates were created and the register entries made.

340. On balance, I am satisfied that the evidence of Philip Niu considered together with the relevant documents is sufficient to rebut the presumption of regularity of the register. It is more probable than not that Philip Niu, Maxima Samoa's sole director and sole beneficial owner, never gave a valid authorization for the issuance of bearer shares and did not in any meaningful sense acquiesce in their issuance. He had no intention of

parting with legal title to his company. I find that the two bearer shares were never validly issued and the registered share was never cancelled.

341. Since the bearer shares were never validly issued, Mr. Niu was the only person who could appoint Mr. and Mrs. Tsien to the board of directors. He did not do so and their appointments are invalid. As a result, Mr. Tsien had no authority to represent Maxima Samoa at the EGM; his right to do so had been revoked earlier (orally) by Philip Niu. Mr. Niu, as the only legal and beneficial owner of the company, could under the *Duomatic* principle revoke Mr. Tsien's authority and appoint himself to represent Maxima Samoa at the EGM; in substance, he did so.

342. I am satisfied that Mr. Tsien did not at any time have an honest belief that Pearl Niu was the beneficial owner of Maxima Samoa; he knew that it belonged to Philip Niu. He never had an honest belief that Philip Niu had authorized or acquiesced in the issuance of the bearer shares. He had no honest belief in the validity of his (and his wife's) appointment as a director. He knew that he had no valid proxy from Maxima Samoa.

343. Gayle Tsien would not have travelled from Taiwan to San Francisco to attempt to induce Philip Niu to provide a proxy if she believed that Pearl Niu owned Maxima Samoa and that her parents' appointments as directors were valid. She, also, had no honest belief in her father's right to represent the company at the EGM.

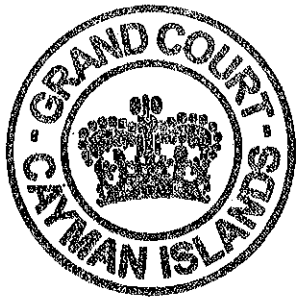
344. The defendants argue that the indoor management rule (established in *Foss v Harbottle* 67 ER 189; and see *MacDougall v Gardiner* [1875] 1 Ch D 13) has application here; if the ouster of Dr. Chen could in any event have been achieved by the majority acting regularly, the Court should not interfere. Moreover, they say that the resolutions are saved by article 19.6 of Fortuna's articles, which reads:

> *If any votes are counted which ought not to have been counted, or which might have been rejected, the error shall not vitiate the resolution unless pointed out at the same meeting, or at any adjournment thereof and not in that case unless in the opinion of the chairman (whose decision shall be final and conclusive) it is of sufficient magnitude to vitiate the resolution.*

345. The exclusion of Philip Niu from the EGM was not the result of an accident, mistake or technical misunderstanding; it was deliberate. Mr. Tsien (the meeting's chairman), assisted to some extent by Gayle Tsien (the meeting's secretary), made a deliberate decision to exclude Mr. Niu knowing that his exclusion was illegitimate. Mr. Tsien was well aware that Mr. Niu was the owner of Maxima Samoa and its sole director and that Mr. Tsien's own authority to vote for the company had been revoked. In bad faith, he pretended otherwise in order to ensure that the special resolutions would pass. Those resolutions were an integral part of the scheme.

346. The scope of article 19.6 is confined to "errors" which, in the opinion of the chairman acting in good faith, are not of sufficient magnitude to vitiate the resolution. The failure to count the vote of Maxima's true representative was no error and, in any event, the meeting's chairman did not act in good faith. The indoor management rule, which is also

concerned with actions taken in good faith, has no application. I adopt the words of Chitty, J in *Harben v Phillips* (1883) 23 Ch D 14, who said in the course of holding a board meeting invalid:



> *Now, in this state of things, I hold that the exclusion on the 28th of those who, as I have already said, were duly elected directors, was unlawful. I consider that the meeting of the 28th therefore was an unlawful meeting, that it was not properly constituted, and that everything that was done at it is invalid. The adjourned meeting was invalid, and the notice convening the meeting is invalid.* [underlining added]

347. I find that the EGM was a nullity. Nothing decided at the EGM was decided validly. It is as if the meeting was never held. I derive further support for this position from: *Pender v Lushington* [1877] 6 Ch D 70; *Edwards v Halliwell* [1950] 2 All E R 1064; and *Byng v London Life Association* [1990] 1 Ch 170 (CA).

348. Finally, the defendants say that the ratification of the ordinary resolutions in 2011 and their expressed willingness to abandon the special resolutions justify a dismissal of the company claim. Board resolutions which have been passed irregularly but in good faith may be ratified subsequently by the shareholders. "Resolutions" passed in bad faith at a meeting which is itself a nullity are incapable of ratification. This principle emerges clearly from*: Northwest Transportation Company v Beatty (*1887) 12 App Cas 589; *Burland v Earle* [1902] AC 83 (PC); *Clemens v Clemens Bros Ltd* [1976] 2 All E R 268; and *Gore-Browne On Companies*; 45th edition; at 17[2A]. I find that the ordinary resolutions were and are incapable of ratification.

Conclusion

349. The contract claim is dismissed.

350. I have decided that the EGM was invalid in its entirety and all resolutions passed at it are void. The purported ratification of the ordinary resolutions is invalid. The result is that Dr. Chen has been since the EGM and is still a director of Fortuna, and that the articles have not been amended in the manner proposed at the EGM. Dr. Chen has a present right to receive all the information to which he would have been entitled since the EGM by virtue of his directorship. He may not be removed from the board except by strict compliance with Fortuna's articles and the law of the Cayman Islands.

351. The parties are at liberty to speak to costs if they are unable to agree.

Henderson, J.

Henderson, J.

GRAND COURT CAYMAN ISLANDS

EXHIBIT 12

CHAPTER 28

TERMINATION FOR BREACH

E.G. McKendrick

1. IN GENERAL[1]

Introduction and terminology One party to a contract may, by reason of the other's breach, be entitled to treat himself as discharged from his liability further to perform his own unperformed obligations under the contract and from his obligation to accept performance by the other party if made or tendered. The expression "discharge by breach" is sometimes employed to describe the situation where he is entitled to, and does, exercise that right. However, it is not the only expression used to denote this entitlement. Other competitors include "rescission", "repudiation" and "termination". The variety of expressions so used has created both confusion and difficulty in the law. As Lord Wilberforce observed in *Photo Production Ltd v Securicor Transport Ltd*,[2] "to plead for complete uniformity may be to cry for the moon"[3] but it should be possible to reduce the uncertainty and confusion by reducing the number of expressions relied upon to give expression to this entitlement. **28-001**

Rescission The word "rescission" is used in a number of authorities in the present context but it is an unfortunate choice of word in so far as it invites confusion with **28-002**

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1 See Lord Devlin [1967] Camb. L.J. 192; Reynolds (1963) 79 L.Q.R. 534; Treitel (1967) 30 M.L.R. 139; Shea (1979) 42 M.L.R. 623; Beatson (1981) 97 L.Q.R. 389; Rose (1981) 34 C.L.P. 235; Carter (2012) 128 L.Q.R. 283; *Carter's Breach of Contract*, 2nd edn (2019); J.E. Stannard and D. Capper, *Termination for Breach of Contract*, 2nd edn (2020).

2 [1980] A.C. 827.

3 [1980] A.C. 827, 844.

the use of the same word in relation to the setting aside of a contract as a result of a vitiating factor, such as misrepresentation.[4] At this point it is important to recall that rescission for misrepresentation has important and different consequences in that it operates retrospectively and so sets aside the contract ab initio, whereas in our present context the discharge following a breach of contract operates prospectively only.[5] It would be possible to address this difficulty by retaining use of the word "rescission" and distinguishing between "rescission for misrepresentation" and "rescission for breach". Judges have certainly used the word "rescission" in both contexts in the past, being fully cognisant of the different senses in which the word "rescind" or "rescission" was being used in these two contexts.[6] But more modern judicial practice, perhaps dating from the decision of the House of Lords in *Johnson v Agnew*[7] has shied away from use of the word "rescission" in the context of termination following a breach of contract, leaving "rescission" to be used in the case in which the contract is set aside ab initio. Accordingly, the word "rescission" will not be used in this chapter to describe the entitlement of a party to treat itself as prospectively discharged from its primary obligations to perform the remaining contractual obligations following the termination of the contract consequent on a breach of contract.

28-003 Repudiation Similar difficulties attend the use of the word "repudiation". Thus Lord Wright observed that the word "repudiation" has given rise to "difficulties because it is an ambiguous word constantly used without precise definition in contract law".[8] Some of the uses of the word "repudiation" to which Lord Wright referred are no longer current,[9] but nevertheless the point remains that the word "repudiation" is used loosely in some judgments, sometimes with reference to the party who has committed the breach and at other times with reference to the party responding to the breach. Thus a breach which entitles a party to terminate further performance of the contract is frequently referred to as a "repudiatory breach" and the response of the innocent party who decides to terminate further performance of the contract is described as an "acceptance of the repudiation". The fact that the word is used with reference to both parties, and is not a word in ordinary use with a readily ascertainable meaning, suggests that it should not be the term of choice to denote the entitlement of a party to terminate further performance of the contract following a breach of contract committed by the other party to the contract. Nevertheless, it remains a term in frequent use in the courts.

28-004 Discharge by breach The expression "discharge by breach" does not suffer from the same terminological difficulties as "rescission" and "repudiation" and it has the

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4 See above para.10-126.

5 *Heyman v Darwins Ltd* [1942] A.C. 356, 373, 399; *Johnson v Agnew* [1980] A.C. 367, 373; *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827, 844; *Bank of Boston Connecticut v European Grain and Shipping Ltd* [1989] A.C. 1056, 1098–1099; *State Trading Corp of India Ltd v M. Golodetz Ltd* [1989] 2 Lloyd's Rep. 277, 286. See below, para.28-078.

6 The classic example being the judgment of Dixon J in *McDonald v Dennys Lascelles Ltd* (1933) 48 C.L.R. 457, 476–477.

7 [1980] A.C. 367.

8 *Heyman v Darwins Ltd* [1942] A.C. 356, 378 (Lord Wright). See too Lord Porter (at 398) where he observes that repudiation is "an ambiguous expression".

9 For example, repudiation is no longer used to described a denial by the defendant that there ever was a contract in the sense of an actual consensus ad idem, nor is it used to denote a claim that the contract was vitiated by duress, misrepresentation or the like.

advantage that it is consistent with the terminology used in previous editions in respect of other chapters in this Part, all of which referred to grounds on which a contract may be discharged. But it has the potential to create misunderstanding in so far as it appears to suggest that it is the breach which discharges the contract when the true position is that it is for the innocent party to decide whether or not to exercise its right to bring the contract to an end following a breach of contract by the other party.

28-005 **Termination** The more commonly used term today to describe this process is probably "termination" and it is the language of termination that will principally be used in this chapter. But even the word "termination" must be used with care. It is sometimes said that termination operates to bring the contract between the parties to an end. This shorthand expression carries with it a danger in so far as it may be taken to suggest that the contract itself has been extinguished when in fact it is the obligations of the parties to perform the remaining primary obligations under the contract that are brought to an end and in their place is substituted a secondary obligation imposed on the party in default to pay damages to the other party for the losses sustained as a result of its non-performance.[10] Further, some terms of the contract may be designed to survive the bringing of the contract to an end.[11] It is therefore not the contract that is terminated but the primary obligations of the parties to perform in the future (in the absence of provision, express or implied, for their survival). In so far as the expression "termination of the contract" is used in this chapter, it is to be understood not as a reference to the ending of the contract itself but to the termination of the obligation of the parties to perform their own unperformed primary obligations under the contract and to accept performance by the other party if made or tendered.

28-006 **Withholding performance and termination** The decision to terminate the obligation of the parties to perform the remaining primary obligations under the contract is not one for the party in breach to take. The party in breach is a wrongdoer and it cannot benefit from that wrong by maintaining that its breach was effective to bring the contract between the parties to an end irrespective of the wishes of the other party to the contract.[12] It is for the innocent party to decide whether the primary obligations of the parties to perform in the future should be brought to an end or not.[13] The innocent party may decide either to terminate or to affirm the contract. A further option open to the innocent party is simply to withhold performance of its own obligations until such time as the other party performs its obligations under the contract. The entitlement of a party to withhold performance in this way depends upon the rules relating to the order of performance and the interdependence of the parties' obligations.[14] The party who elects so to withhold performance is not thereby choosing to terminate the contract. Rather, it is withholding performance so that the obligations of the parties are effectively in suspense

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10 *R. V. Ward Ltd v Bignall* [1967] 1 Q.B. 534, 548; *Moschi v Lep Air Services Ltd* [1973] A.C. 331, 345, 350, 351; *Hyundai Ltd v Pournouras* [1978] 2 Lloyd's Rep. 502, 507; *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827, 848–851. See below, para.28-083.

11 See below, para.28-079.

12 *Geys v Société Générale, London Branch* [2012] UKSC 63, [2013] 1 A.C. 513 at [15] and [66].

13 See below, paras 28-054—28-069.

14 See above, paras 25-021—25-025.

pending the performance by the other party of the obligation which is a condition precedent to, or a concurrent condition of, the first party's obligation to perform. Thus the first party's obligations are effectively in suspense until the other performs.

28-007 Actual and anticipatory breach A breach of contract is an "actual" breach of contract where the time for performance of an obligation has passed without it being performed in accordance with the terms of the contract. An anticipatory breach, on the other hand, arises when, before the time for performance, a party to the contract either renounces the contract or disables itself from performing its obligations under the contract. Although the doctrine of anticipatory breach is well established in English contract law, its doctrinal underpinnings are less certain as a result of the difficulty which has arisen in explaining the basis on which it can be said that a party can be in breach of contract before the time for performance of the obligation in question has arisen. The doctrine of anticipatory breach can be rationalised either on the basis that it is a present breach of an implied promise to maintain the contractual relationship during the term of the contract or on the basis that the conduct of the party before the time for performance gives rise to a legal inference that a future obligation will not be performed when it is due to be performed.[15]

28-008 Structure of the chapter The chapter will proceed in four principal stages. The next section will be devoted to an analysis of the circumstances in which a party to a contract is entitled to terminate further performance of the primary obligations of the parties as a result of a breach of contract committed by the other party to the contract. Then consideration will be given to the options which the law gives to the innocent party in relation to the exercise, or non-exercise, of its entitlement to terminate the contract. The next section will examine the doctrine of anticipatory breach before the concluding section will examine the consequences of the exercise by one party of its entitlement to bring to an end the primary obligations of the parties to perform their remaining obligations under the contract.

2. The Entitlement to Terminate

28-009 Introduction Not every breach of contract gives to the innocent party the entitlement or, more accurately, the power to bring to an end the obligation of the parties to perform their future primary obligations under the contract. The entitlement to terminate is not necessarily coincident with a right to sue for damages. The rule is usually stated as follows: "[a]ny breach of contract gives rise to a cause of action; not every breach gives a discharge from liability". The fact that a party is entitled to terminate further performance of the contract does not, however, mean that it is obliged to exercise that entitlement. It may elect not to do so and in such a case it will be confined to a claim for damages in respect of the loss which it has suffered as a result of the breach.[16]

28-010 No single rule There is no single rule which gives expression to the entitlement of a party to terminate further performance of the contract as a result of a breach

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[15] See further Q. Liu, *Anticipatory Breach* (2011) esp. Ch.2.

[16] See below paras 28-056—28-057. See also Sale of Goods Act 1979, s.11(2); *Wallis, Son & Wells v Pratt & Hynes* [1911] A.C. 394.

of contract committed by the other party to the contract. At a high level of generality, it can be said that the party in breach will generally have been guilty of a substantial failure to perform its obligations under the contract or that the failure to perform has had serious consequences for the other party to the contract. But there is no universal rule to this effect, given that English law permits contracting parties to elevate any term of the contract to the status of a condition, breach of which gives to the innocent party an entitlement to terminate further performance of the contract irrespective of the consequences of the breach or the objective significance of the term which has been breached.

A range of factors The best that can be said is that the entitlement of a party to terminate further performance of the contract depends upon a range of factors. These factors include the nature of the term that has been breached, the nature of the breach and the consequences of the breach. The cases will be divided into five broad groups. In the first the focus is upon the nature of the term broken, in particular whether the term broken is a condition or a warranty (and also, to the extent that it is relevant, a fundamental term). The second group of cases concern the breach of time stipulations, an issue which has given rise to a substantial amount of litigation. In the third group the focus is upon the nature of the breach and its consequences (in particular upon "intermediate" or "innominate" terms). The final two sections deal with cases where the entitlement to terminate arises from either a renunciation of the contract or the fact that it is impossible for one party to perform its obligations under the contract. Cases in the latter two categories include cases of anticipatory breach as well as actual breach. A renunciation of the contract arises when one party to the contract by words or conduct evinces an intention not to perform, or expressly declares that it is or will be unable to perform its obligations under the contract in some essential respect, while impossibility cases are those in which one party has by its own act or default disabled itself from performing its contractual obligations in some essential respect. **28-011**

The development of the law When deciding whether or not a breach of contract gives to the innocent party an entitlement to terminate further performance of the contract, the law could focus attention on the nature of the term broken, the nature of the breach or the consequences of the breach or some combination thereof. In its earlier history, English law tended to focus attention on the nature of the term broken so that if a term had a certain status (a "condition"[17]), a breach of it in principle entitled the innocent party to terminate further performance of the contract irrespective of the consequences of the breach. But in its more recent history, in particular since the decision of the Court of Appeal in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*[18] in which recognition was given to a new category of term known as an "intermediate" or an "innominate" term,[19] English law has focused greater attention on the nature of the breach and its consequences so that the entitlement to terminate does not depend on the nature of the term broken but rather hinges upon the gravity of the breach and its consequences. The significance of the intermediate or innominate term can be seen in the fact that "the modern approach is that a term is innominate unless a contrary intention is made **28-012**

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17 On which see below, para.28-014.
18 [1962] 2 Q.B. 26.
19 On which see below, para.28-041.

clear".[20] However, the intermediate or innominate term has not displaced entirely the emphasis on the nature of the term which has been breached. If, for example, the term which has been breached has been classified by the parties as a "condition," any breach of it will continue to give to the innocent party an entitlement to terminate further performance of the contract. But, in the case where the nature of the term has not been classified as a condition by the parties, the courts or statute, a court will be more likely to regard the term as an intermediate or innominate term so that the entitlement to terminate will depend upon the nature and the consequences of the breach.[21]

(a) The Nature of the Term Broken

28-013 Introduction Traditionally, in English law, the terms of a contract were classified as being either *conditions* or *warranties*, the difference between them being that any breach of a condition entitles the innocent party, if he so chooses, to terminate the contract, and in any event to claim damages for loss sustained by the breach. A breach of warranty, on the other hand, does not entitle him to terminate the contract, but to claim damages only. Therefore in principle a breach of a condition always gives to the innocent party an entitlement or a power to terminate further performance of the contract, whereas a breach of a warranty never does so. In this respect the decision whether or not there is an entitlement to terminate flows from the classification of the term as either a condition or a warranty. In addition to the recognition of conditions and warranties, it has from time to time been suggested that there is a further category of term recognised by English law, namely a fundamental term. The case for the continued recognition of such a term is, however, weak.[22]

28-014 Conditions The word "condition" is, however, a difficult one in English contract law as it has different meanings depending on the context in which it is used and, indeed, its meaning has changed over time.[23] Traditionally, the word condition was used to denote an obligation which must be performed as a condition precedent to the obligation of the other party to perform its obligations under the contract.[24] However, the word condition is also sometimes used, even in legal documents, to mean simply "a stipulation, a provision" and not to connote a condition in the technical sense of that word.[25] Even within the sphere of the technical meaning attached to the word "condition", the terminology employed is, unfortunately, not uniform.[26] There may, for example, be conditions, the failure of which gives no right of action, but which merely suspends the rights and obligations of the parties.[27]

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[20] *Grand China Logistics Holding (Group) Co Ltd v Spar Shipping AS* [2016] EWCA Civ 982, [2016] 2 Lloyd's Rep. 447 at [93]. See to similar effect *Ark Shipping Co LLC v Silverburn Shipping (IoM) Ltd* [2019] EWCA Civ 1161, [2019] 2 Lloyd's Rep. 603 at [81].

[21] See below, paras 28-045—28-046.

[22] See below, paras 28-022—28-025.

[23] See above, para.25-022.

[24] See above, para.25-022.

[25] As in the phrase "terms and conditions of business" where it is clear that the word "condition" is not being used in a technical sense.

[26] See Stoljar (1953) 69 L.Q.R. 485.

[27] See, for example, *Trans Trust S.P.R.L. v Danubian Trading Co Ltd* [1952] 2 Q.B. 297, 304. Conditions of this type are discussed above, paras 4-195—4-197.

Today,[28] the most commonly used sense of the word "condition" is that of an essential stipulation of the contract which one party guarantees is true or promises will be fulfilled. The word condition has therefore broken free from its historical roots and can no longer be confined to an obligation which must be performed as a condition precedent to the liability of the other party.

Identifying conditions The dichotomy between conditions and warranties can be seen in, for example, the Sale of Goods Act 1893, where certain implied stipulations were assigned to one or other category by statute.[29] Others were so assigned by virtue of judicial decisions.[30] Numerous cases turned on the question whether or not a particular statement or promise amounted to a condition. In one of these, *Bettini v Gye*,[31] Blackburn J stated that, in the absence of an express declaration of intention by the parties, the test was: **28-015**

> "… whether the particular stipulation goes to the root of the matter, so that failure to perform it would render the performance of the rest of the contract a thing different in substance from what the defendant had stipulated for."[32]

And in another case[33] Bowen LJ remarked:

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

but he suggested that:

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

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

Conditions and the reason for the right to terminate In the modern law, the reason why a breach of a condition entitles the innocent party to terminate further performance of the contract has been said to be that conditions: **28-016**

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28 It has not always been so and indeed it has been argued the notion of a "promissory condition" as a term the breach of which gives rise to a power to terminate should be rejected (see J. English (2021) 137 L.Q.R. 630). The strength of the argument lies in its analysis of the history of English contract law but the "missteps" in the development of the law that are identified in the article are now probably too well-established to be overturned.

29 Sale of Goods Act 1893 ss.12–15. The distinction between conditions and warranties was carried forward into the Sale of Goods Act 1979. In contrast, the Consumer Rights Act 2015 does not refer to conditions or warranties. Instead, Chs 2 (goods) and 3 (digital content) distinguish between the statutory rights that exist under a goods contract or a digital content contract and then sets out separately the remedies that exist if the statutory rights are not met. See Vol.II, para.41-525.

30 See above, para.28-046.

31 (1876) 1 Q.B.D. 183.

32 (1876) 1 Q.B.D. 183, 188, citing Parke B. in *Graves v Legg* (1854) 9 Ex. 709, 716.

33 *Bentsen v Taylor, Sons & Co* [1893] 2 Q.B. 274, 281.

> "… go so directly to the substance of the contract or, in other words, are so essential to its very nature that their non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all."[34]

And the reason why *any* breach of a condition has this effect has been put on the ground that the parties are to be regarded as having agreed that any failure of performance, irrespective of the gravity of the event that has in fact resulted from the breach, should entitle the other party to elect to put an end to all primary obligations of both parties remaining unperformed.[35]

28-017 The creation of conditions Given that the right to terminate further performance of the contract follows from the classification of a term as a condition, it is vital to be able to identify the circumstances in which a contract term will be classified by the law as a condition. The conclusion to be drawn from the cases is that a term of a contract will be held to be a condition if: (i) it has been expressly so provided by statute[36]; (ii) it has been so categorised as the result of a previous judicial decision which is binding on the court required to apply it[37]; (iii) it has been designated as a condition in the terms of the contract between the parties; or (iv) the nature of the contract or the subject matter or the circumstances of the case lead to the conclusion that the parties must, by necessary implication, have intended that the innocent party would be discharged from further performance of its obligations in the event that the term was not fully and precisely complied with.[38] If the term in question does not fall within one of these four categories, the likelihood is that the term will be classified as an intermediate term[39] with the consequence that the entitlement of a party to terminate further performance of the contract will depend upon the nature and the consequences of the breach, not the nature of the term that has been broken.

28-018 Express choice by the parties Of particular note is the fact that contracting parties may by express words agree that a particular stipulation is to be a condition of

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[34] *Wallis, Son & Wells v Pratt & Haynes* [1910] 2 K.B. 1003, 1012, per Fletcher Moulton J (dissenting): approved [1911] A.C. 394; *L.G. Schuler A.G. v Wickman Machine Tool Sales Ltd* [1974] A.C. 235, 264, 272; *State Trading Corp of India Ltd v M. Golodetz Ltd* [1989] 2 Lloyd's Rep. 277, 282.

[35] *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827, 849. See also *Bunge Corp v Tradax Export SA* [1981] 1 W.L.R. 711; *State Trading Corp of India Ltd v M. Golodetz Ltd* [1989] 2 Lloyd's Rep. 277.

[36] See, for example, Sale of Goods Act 1979, ss.12(5A), 13(1A), 14(6) and 15(3), and Supply of Goods and Services Act 1982, ss.2(1), 3(2), 4(2), 5(2), 7(1), 8(2), 9(2) and 10(2).

[37] Some of the older decisions in which the courts classified terms as conditions on what now appear to be rather technical grounds may be open for review but it is likely that a comprehensive review could only be carried out by the Supreme Court: *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 W.L.R. 989, 998.

[38] *United Scientific Holdings Ltd v Burnley BC* [1978] A.C. 904, 937, 941, 944, 950, 958; *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep. 109, 113, 116; *Bunge Corp v Tradax Export SA* [1981] 1 W.L.R. 711, 716, 717, 720, 729; *Greenwich Marine Inc v Federal Commerce and Navigation Co Inc* [1985] 1 Lloyd's Rep. 580, 584; *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827, 849; *State Trading Corp of India Ltd v M. Golodetz Ltd* [1989] 2 Lloyd's Rep. 277, 283; *Barber v NWS Bank Plc* [1996] 1 W.L.R. 641; *B.S. & N. Ltd v Micado Shipping Ltd* [2001] 1 Lloyd's Rep. 341, 350, 353, 356; *PT Berlian Laju Tanker TBE v Nuse Shipping Ltd* [2008] EWHC 1330 (Comm), [2008] 2 Lloyd's Rep. 246 at [65]; *C21 London Estates Ltd v Maurice Macneill Iona Ltd* [2017] EWHC 998 (Ch) at [70]–[72].

[39] See below, para.28-041.

their contract.[40] Further, they may agree to classify as a condition a term which would not otherwise amount to a condition under the general law.[41] Some doubt may appear to have been cast on these propositions by the decision of the House of Lords in *L.G. Schuler A.G. v Wickman Machine Tool Sales Ltd*[42] where a clause which stated that "it shall be [a] condition of this agreement" that representatives of Wickman "shall send its representatives to visit [six named UK manufacturers] at least once in every week for the purpose of soliciting orders" was held not to be a condition in the technical sense. However, the decision can be explained on the basis that the contract was poorly drafted, given the omission of the indefinite article before the word condition and the awkward relationship between the disputed clause and a clause making provision for the occurrence of a "material breach" of the contract which was not remedied within a 60-day period, and the unreasonable consequences which it was believed would follow from the classification of the term as a condition. The decision does not therefore prevent contracting parties from choosing to classify any term of their choice as a condition. All that it does is require that parties express that choice in language which is sufficiently clear to persuade the court that such was their intention.[43] Thus if contracting parties agree that a particular term "is a condition of the Agreement"[44] or is "of the essence of the Agreement"[45] and there are no overlapping or potentially conflicting terms that would cast doubt upon the classification of the term as a condition in its technical sense,[46] then effect should be given to the choice of the parties.[47]

Implied choice by the parties The parties may also be held to have created a condition by necessary implication arising from the nature, purpose and circumstances of the contract,[48] and in this respect: **28-019**

> "There is no way of deciding that question except by looking at the contract in the light of the surrounding circumstances, and then making up one's mind whether the intention of the parties, as gathered from the instrument itself, will best be carried out by treating the promise as a warranty sounding only in damages, or as a condition precedent by the failure to perform which the other party is relieved of his liability."[49]

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40 *Bettini v Gye* (1876) 1 Q.B.D. 183, 187; *Dawsons Ltd v Bonnin* [1922] 2 A.C. 413; *Financings Ltd v Baldock* [1963] 2 Q.B. 104, 120; *Bunge Corp v Tradax Export SA* [1980] 1 Lloyd's Rep. 294, 305, 307, 309, 310; aff'd [1981] 1 W.L.R. 711; *Lombard North Central Plc v Butterworth* [1987] Q.B. 527; *Personal Touch Financial Services Ltd v Simplysure Ltd* [2016] EWCA Civ 46, [2016] Bus. L.R. 1049 at [28]–[31].

41 *Lombard North Central Plc v Butterworth* [1987] Q.B. 527, 535.

42 [1974] A.C. 235.

43 *Havila Kystruten AS v Abarca Companhia de Seguros SA* [2022] EWHC 3196 (Comm) at [301].

44 *Personal Touch Financial Services Ltd v Simplysure Ltd* [2016] EWCA Civ 461, [2016] Bus. L.R. 1049 at [28].

45 *Lombard North Central Plc v Butterworth* [1987] Q.B. 527.

46 As was case with the material breach term in *L.G. Schuler A.G. v Wickman Machine Tool Sales Ltd* [1974] A.C. 235.

47 In *Heritage Oil and Gas Ltd v Tullow Uganda Ltd* [2014] EWCA Civ 1048, [2014] 2 C.L.C. 61 at [33], it was noted that the decision of the House of Lords in *L.G. Schuler A.G. v Wickman Machine Tool Sales Ltd* [1974] A.C. 235 represented the "high-water mark" of the reluctance of the courts to classify a term as a condition.

48 *Bunge Corp v Tradax Export SA* [1981] 1 W.L.R. 711. See also the cases cited in para.28-029 below (mercantile contracts).

49 *Bentsen v Taylor, Sons & Co* [1893] 2 Q.B. 274, 281. See also *Glaholm v Hays* (1841) 2 Man. & G. 257, 266; *Re Comptoir Commercial Anversois and Power, Son & Co* [1920] 1 K.B. 868, 899; *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha* [1962] 2 Q.B. 26, 60; *Astley Industrial*

28-020 Warranties The word "warranty" has been described as "one of the most ill-used expressions in the legal dictionary".[50] In many older cases, it was used in the sense of a "condition"[51] and today it is very frequently used simply in the sense of a contractual undertaking or promise. In its most technical sense, however, it is to be understood as meaning a term of the contract, the breach of which may give rise to a claim for damages but not to an entitlement to terminate further performance of the contract.[52] The use of the word "warranty" in this sense is reserved for the less important terms of a contract, or those which are collateral to the main purpose of the contract,[53] the breach of which by one party does not entitle the other to terminate further performance of the contract.

28-021 The modern significance of warranties Warranties in the technical sense are now of reduced significance in the modern law. The principal reason for this is the emergence of the new category of "intermediate" terms[54] where the entitlement to terminate further performance of the contract depends upon the nature and consequences of the breach. A court today is more likely to classify a term as intermediate, so that termination remains available in an appropriate case, than conclude that the term is a warranty, the effect of which is to exclude the possibility of termination in respect of the breach. In this way the emergence of intermediate terms seems to have reduced the number of occasions when a term will be classified as a warranty in the technical sense almost to vanishing point,[55] save in the very exceptional circumstances where a term has been specifically so classified by statute.[56]

28-022 Fundamental terms There was at one time some support for the view that, in addition to conditions and warranties, the law recognised a further category of term, the "fundamental term".[57] The fundamental term has been described as part of the "core" of the contract,[58] the non-performance of which destroys the very substance

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Trust Ltd v Grimley [1963] 1 W.L.R. 584, 590; *L.G. Schuler A.G. v Wickman Machine Tool Sales Ltd* [1974] A.C. 235; *Bunge Corp v Tradax Export SA* [1981] 1 W.L.R. 711, 719, 725; *State Trading Corp of India Ltd v M. Golodetz Ltd* [1989] 2 Lloyd's Rep. 277, 282; *Compagnie Commerciale Sucres et Denrees v Czarnikow Ltd* [1990] 1 W.L.R. 1337, 1347; *Torvald Klaveness A/S v Arni Maritime Corp* [1994] 1 W.L.R. 1465, 1475–1476; Sale of Goods Act 1979 ss.11(3), 61(1).

50 *Finnegan v Allen* [1943] 1 K.B. 425, 430.

51 *Behn v Burness* (1863) 3 B. & S. 751. In marine insurance, a promissory "warranty" is used to signify a condition precedent, the breach of which discharges the insurer from liability as from the date of breach: Marine Insurance Act 1906 ss.33–41; *Thomson v Weems* (1884) 9 App. Cas. 671, 684; *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd* [1992] 1 A.C. 233.

52 *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 Q.B. 26, 70; Sale of Goods Act 1979 ss.11(3), 61(1).

53 Sale of Goods Act 1979 s.61(1).

54 See below, para.28-041.

55 *Wuhan Ocean Economic and Technical Co-operation Co Ltd v Schiffahrts-Gesellschaft "Hansa Murcia" mbH & Co KG* [2012] EWHC 3104 (Comm), [2013] 1 Lloyd's Rep. 273 at [33]. But see *Palmco Shipping Inc v Continental Ore Corp* [1970] 2 Lloyd's Rep. 21; *Anglia Commercial Properties v North East Essex Building Co* (1983) 266 E.G. 1096.

56 Sale of Goods Act 1979 ss.11(3), 12(5A). See also Supply of Goods (Implied Terms) Act 1973 s.8(3). These provisions do not apply to contracts which fall within the scope of Ch.2 of Pt 1 of the Consumer Rights Act 2015 (see below, Vol.II, para.41-497).

57 See below, paras 18-023, 18-027. See also Guest (1961) 77 L.Q.R. 98, 327; Montrose [1964] C.L.J. 60, 254; Reynolds (1963) 79 L.Q.R. 534; Lord Devlin [1966] C.L.J. 192; Jenkins [1969] C.L.J. 251.

58 *Alderslade v Hendon Laundry Ltd* [1945] K.B. 189, 192.

of the agreement. It has been distinguished by Devlin J[59] as being "something narrower than a condition of the contract" and as:

> "… something which underlies the whole contract so that, if it is not complied with, the performance becomes totally different from that which the contract contemplates."

Examples usually cited are those where a seller delivers goods wholly different from the agreed contract goods or delivers goods which are so seriously defective as to render them in substance not the goods contracted for, e.g. the delivery of beans instead of peas,[60] of pinewood logs instead of mahogany logs,[61] or of a vehicle which is incapable or barely capable of self-propulsion instead of a motor car.[62] In each case, so it is said, there is a breach of the fundamental term, that is to say, of the "core" obligation to deliver the essential goods which are the subject matter of the contract of sale.

Fundamental terms and exemption clauses The concept of the fundamental term has most often been employed in relation to exemption clauses. At one time it was asserted that, even though liability for a breach of condition might be excluded by an appropriately drafted exemption clause, no such clause could exonerate a party from failure to perform the fundamental term of an agreement. The House of Lords, however, has since held that there is no rule of law that an exemption clause is inapplicable in the case of a "fundamental" or "total" breach.[63] The question is now whether the clause, on its true construction, applies to the breach which has occurred. No doubt, as a matter of construction, a court will be reluctant to ascribe to an exemption clause so wide an ambit as in effect to deprive one party's stipulations of all contractual force.[64] But, for the purpose of ascertaining the intention of the parties in this respect, it seems unnecessary to predicate the existence of a fundamental term, i.e. in considering whether an exemption clause covers the delivery of beans instead of peas, to say that the contract contains a "fundamental term" to deliver peas. There may also be difficulties in identifying the "core" of the particular contract: Is it to supply "peas" or "leguminous vegetables" or "agricultural produce"?[65] The quest for the fundamental term may well deflect the court from its proper task of ascertaining the true construction of the exemption clause into a barren enquiry as to whether the essential object of the contract has not been fulfilled at all or whether it has been fulfilled, but not in a way that the contract requires. **28-023**

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59 *Smeaton Hanscomb & Co Ltd v Sassoon I. Setty Son & Co* [1953] 1 W.L.R. 1468, 1470.

60 *Chanter v Hopkins* (1838) 4 M. & W. 399, 404.

61 *Smeaton Hanscomb & Co Ltd v Sassoon I. Setty Son & Co* [1953] 1 W.L.R. 1468, 1470.

62 *Karsales (Harrow) Ltd v Wallis* [1956] 1 W.L.R. 17; *Yeoman Credit Ltd v Apps* [1962] 2 Q.B. 508; *Farnworth Finance Facilities Ltd v Attryde* [1970] 1 W.L.R. 1053.

63 *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361; *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827; *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd* [1983] 1 W.L.R. 964, 971; *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 A.C. 803; see below, para.18-023.

64 *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, 432. See also *Tor Line AB v Alltrans Group of Canada Ltd* [1984] 1 W.L.R. 48, 58–59. See below, para.18-010.

65 See, e.g. *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 1 W.L.R. 163; Lord Devlin [1966] C.L.J. 192, 212.

28-024 Lack of practical consequences Whether any further consequences follow from the categorisation of a particular contractual obligation as a fundamental term is even more doubtful. It is possible to contend that s.11(4) of the Sale of Goods Act 1979,[66] which in certain circumstances precludes a buyer who has accepted the goods from subsequently rejecting them and treating the contract as repudiated, does not apply to the breach of a fundamental term.[67] This seems to be only an ex-post facto rationalisation of an independent principle (if such exists) that, for the purposes of s.35 of the 1979 Act, a buyer will not be deemed to have accepted goods that are wholly different from those agreed to be sold. It is also possible to assert that the breach of a fundamental term gives rise, not merely to a claim for damages, but to recover all money paid as upon a consideration which has totally failed.[68] But it seems better to regard the question whether or not there has been a total failure of consideration as dependent upon the facts of the case, rather than upon the breach of a "fundamental term".

28-025 Fundamental term: neither necessary nor desirable In conclusion it is submitted that it is neither necessary nor desirable to create a further category of contractual term—the "fundamental term". In *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale*,[69] Lord Upjohn defined the expression "fundamental term" in language which clearly indicated that he regarded it as an alternative way of referring to a condition, i.e. a term which went to the root of the contract so that any breach of it entitled the innocent party to terminate further performance of the contract. There is therefore strong ground for the view that English law does not recognise any category of "fundamental terms" distinct from conditions.

(b) Time Stipulations

28-026 Time "of the essence of the contract" A number of difficulties surround the law relating to time stipulations in contracts. The first is that the phrase which is commonly employed, namely "time is of the essence of the contract", is potentially misleading in that the question in each case is whether time is of the essence of the particular term which has been broken, not whether time is of the essence of the contract as a whole.[70] The agreement by the parties that "time is of the essence" in relation to a particular term of the contract is another way of identifying the term as a condition of the contract so that any failure to comply with it will in principle entitle the other party to terminate further performance of the contract.

28-027 Common law and equity The second point of difficulty is that, historically, common law and equity adopted a divergent approach to time stipulations in contracts.

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66 Formerly s.11(1)(c) of the Sale of Goods Act 1893.

67 See Vol.II, para.47-068.

68 *Rowland v Divall* [1923] 2 K.B. 500; *Karflex Ltd v Poole* [1933] 2 K.B. 251; *Warman v Southern Counties Car Finance Corp Ltd* [1949] 2 K.B. 576; *Butterworth v Kingsway Motors Ltd* [1954] 1 W.L.R. 1286; *Karsales (Harrow) Ltd v Wallis* [1956] 1 W.L.R. 936. See also *Hain SS Co v Tate & Lyle Ltd* (1936) 41 Com. Cas. 350, 368, 369, and Vol.II, paras 42-401, 47-081, 47-127.

69 [1967] 1 A.C. 361, 422; see above, para.18-024.

70 *British and Commonwealth Holdings Plc v Quadrex Holdings Inc* [1989] Q.B. 842, 856–857; *Fitzpatrick v Sarcon (No.177) Ltd* [2012] NICA 58 at [20].

At common law a strict approach was taken so that, as was once stated by Sir John Romilly MR:

> "… at law time is always of the essence of the contract. When any time is fixed for the completion of it, the contract must be completed on the day specified, or an action will lie for breach of it."[71]

However, even at common law there were exceptional cases where time was held not to be of the essence of the contract.[72] But the thrust of the approach of the courts at common law was clear: stipulations as to time were generally of the essence of the contract, so that a party was entitled to terminate further performance of the contract if the other party's performance was not completed on the date stipulated by the contract. A different set of rules, however, evolved in equity where time was not of the essence of the contract, except in the three cases considered below:

> "The court of equity was accustomed to relieve against a failure to keep the date assigned … if it could do justice between the parties"[73];

> "… relief is given against mere lapse of time where lapse of time is not essential to the substance of the contract."[74]

Law of Property Act 1925 s.41 Section 41 of the Law of Property Act 1925,[75] provides that: **28-028**

> "Stipulations in a contract, as to time or otherwise, which according to the rules of equity are not deemed to be or to have become of the essence of the contract, are also construed and have effect at law in accordance with the same rules."

Thus the rules at law are now the same as those in equity: the effect of s.41 is that:

> "… contractual stipulations as to time … shall not be construed as essential, except where equity would before 1875 have so construed them—i.e. only when the strict observance of the stipulated time for performance was a matter of express agreement or of necessary implication"[76];"

or, in other words, s.41:

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71 *Parkin v Thorold* (1852) 16 Beav. 59, 65.

72 See, e.g. *Martindale v Smith* (1841) 1 Q.B. 389, 395 (although note the criticism levelled against the case by Lord Simon in *United Scientific Holdings Ltd v Burnley BC* [1978] A.C. 904, 941); Sale of Goods Act 1979 s.10(1); *Woolfe v Horne* (1877) 2 Q.B.D. 355; *Re Olympia & York Canary Wharf Ltd (No.2)* [1993] B.C.C. 159, 172.

73 *Lock v Bell* [1931] 1 Ch. 35, 43. The equitable rule was developed in cases of the sale of land: see *Stickney v Keeble* [1915] A.C. 386, 415–416; *Williams v Greatrex* [1957] 1 W.L.R. 31. For the history of the law on stipulations as to time, see *United Scientific Holdings Ltd v Burnley BC* [1978] A.C. 904, 924–929, 940–945; *Raineri v Miles* [1981] A.C. 1050.

74 *Lennon v Napper* (1802) 2 Sch. & Lef. 682, 684–685.

75 Re-enacting s.25(7) of the Judicature Act 1873.

76 *United Scientific Holdings Ltd v Burnley BC* [1978] A.C. 904, 943–944, per Lord Simon.

"… does not negative the existence of a breach of contract where one has occurred,[77] but in certain circumstances it bars any assertion that the breach has amounted to a repudiation of the contract",[78]

which entitles the innocent party to terminate the contract. Following the enactment of s.41, it is only in the three cases set out in the next two paragraphs that time is of the essence of a contract.[79]

28-029 Time made expressly or implicitly "of the essence" Time is of the essence:

(1) Where the parties have expressly stipulated in their contract that the time fixed for performance must be exactly complied with,[80] or that time is to be "of the essence".[81]

(2) Where the circumstances of the contract or the nature of the subject matter indicate that the fixed date must be exactly complied with, e.g. the purchase of a leasehold house required for immediate occupation[82]; the sale of business land or premises,[83] such as a public-house as a going concern[84]; the sale of a reversionary interest[85]; the exercise of an option for the purchase or repurchase of property,[86] or for determining a lease under a "break" clause[87] or an option to acquire a leasehold interest in futuro[88] (since in these cases, "the parties on the exercise of the option, are brought into a new legal relationship"[89]); "mercantile contracts",[90] such as a contract for the sale of goods where a time is fixed for delivery,[91] or for the sale of shares liable to

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77 This means that damages may be recovered for any loss caused by the breach: *Raineri v Miles* [1981] A.C. 1050 (below, para.28-036).

78 *Raineri v Miles* [1981] A.C. 1050, 1059, per Buckley LJ, approved by the House of Lords in the same case: 1085.

79 *United Scientific Holdings Ltd v Burnley BC* [1978] A.C. 904; *British and Commonwealth Holdings Plc v Quadrex Holdings Inc* [1989] Q.B. 842, 857; *Hammond v Allen* [1994] 1 All E.R. 307, 311.

80 *Hudson v Temple* (1860) 29 Beav. 536; *Steedman v Drinkle* [1916] 1 A.C. 275; *Brickles v Snell* [1916] 2 A.C. 599; *Mussen v Van Diemen's Land Co* [1938] Ch. 253; *Harold Wood Brick Co Ltd v Ferris* [1935] 2 K.B. 198. The same result follows if the contract provides that the provision is to be a "condition" in this sense, or that any breach of the clause shall entitle the innocent party to "rescind" or terminate.

81 *Lombard North Central Plc v Butterworth* [1987] Q.B. 527; *Topalsson GmbH v Rolls-Royce Motor Cars Ltd* [2023] EWHC 1765 (TCC) at [295]–[296] (below, paras 28-031—28-032).

82 *Tilley v Thomas* (1867) L.R. 3 Ch. App. 61; *Hudson v Temple* (1860) 29 Beav. 536, 543.

83 *Macbryde v Weekes* (1856) 22 Beav. 533; *Harold Wood Brick Co Ltd v Ferris* [1935] 2 K.B. 198.

84 *Tadcaster Tower Brewery Co v Wilson* [1897] 1 Ch. 705, 711; *Lock v Bell* [1931] 1 Ch. 35.

85 *Newman v Rogers* (1793) 4 Bro. C.C. 391.

86 *Dibbins v Dibbins* [1896] 2 Ch. 348; *Hare v Nicoll* [1966] 2 Q.B. 130. cf. *Millichamp v Jones* [1982] 1 W.L.R. 1422.

87 *United Scientific Holdings Ltd v Burnley BC* [1978] A.C. 904, 929; *Coventry City Council v J. Hepworth & Son Ltd* (1983) 46 P. & C.R. 170; *Metrolands Investments Ltd v J.H. Dewhurst Ltd* [1986] 3 All E.R. 659.

88 Whether or not it is an option to renew an existing lease: *United Scientific Holdings Ltd v Burnley BC* [1978] A.C. 904, 929, 945, 961. An option to a tenant to determine his interest under a "break clause" must also be strictly complied with.

89 [1978] A.C. 904, 945 (see also at 951, 961). cf. a rent review clause: below, para.28-036.

90 *Reuter Hufeland & Co v Sala Co* (1879) 4 C.P.D. 239, 249; *Bunge Corp v Tradax Export SA* [1981] 1 W.L.R. 711, 716.

91 *Bowes v Shand* (1877) 2 App. Cas. 455, 463, 464; *Sharp v Christmas* (1892) 8 T.L.R. 687 (perishable goods); *Hartley v Hymans* [1920] 3 K.B. 475, 484; *Pharmapac (UK) Ltd v HBS Healthcare Ltd*

fluctuate in value (where the contract stipulated a time for payment).[92] However, the mere fact that the contract can be labelled "mercantile" or "commercial" does not determine the issue.[93] Nor does the fact that the contract confers on a party the right to terminate or withdraw from the contract on the breach of a term of the contract, such as the failure to pay hire "punctually" under a charterparty, have the consequence that the term relating to the payment of hire has the status of a condition.[94] Whether a time limit is of the essence of a contractual provision is a question of interpretation of the provision in the context of the contract as a whole.[95] The question is whether the time specified in the particular clause was (expressly or by necessary implication) intended by the parties to be essential, e.g. because they needed to know precisely what were their respective obligations.[96] Thus, where the buyers were required to give 15 days' notice

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[2022] EWHC 23 (Comm) (contract for weekly delivery of facemasks during the Covid-19 pandemic when demand was high and the market was volatile). See below, Vol.II, para.47-246.

92 *Hare v Nicoll* [1966] 2 Q.B. 130. See also *Re Schwabacher* (1908) 98 L.T. 127, 129; *Sprague v Booth* [1909] A.C. 576, 579–580; *British and Commonwealth Holdings Plc v Quadrex Holdings Inc* [1989] Q.B. 842, 857; *Grant v Cigman* [1996] 2 B.C.L.C. 24, 31 (although Judge Weeks QC stated that the dicta in *Re Schwabacher* and *Hare v Nicoll* "may be too wide" and that "a property company may be different from a trading company, and a company in one line of business may be different from a company trading in another less dynamic market". Ultimately, the question is one of the interpretation of the particular contract: *Msas Global Logistics v Power Packaging Inc* [2003] EWHC 1393 (Ch), [2003] All E.R. (D) 211 (Jun) at [43]–[47]. The implication that time is of the essence may be made more readily where the subject matter of the sale is not simply a parcel of shares in a private company, but the entirety of the shares (*Msas Global Logistics* at [44]), although in each case it is necessary to have regard to all the facts and circumstances of the case (*Aymes International Ltd v Nutrition 4U B.V.* [2023] EWHC 1452 (Ch) at [104]–[108]).

93 *Bunge Corp v Tradax Export SA* [1981] 1 W.L.R. 711, 729 (cf. at 716); *United Scientific Holdings Ltd v Burnley BC* [1978] A.C. 904, 924, 938, 950; *Torvald Klaveness A/S v Arni Maritime Corp* [1994] 1 W.L.R. 1465 (obligation to make timely redelivery in time charterparty held not to be a condition). *Re Simoco Digital UK Ltd: Thunderbird Industries LLC v Simoco Digital UK Ltd* [2004] EWHC 209 (Ch), [2004] 1 B.C.L.C. 541 at [14]; *Haugland Tankers AS v RMK Marine Gemi Yapim Sanayii ve Deniz Tasimaciliii Isletmesi AS* [2005] EWHC 321 (Comm), [2005] 1 Lloyd's Rep. 573; *Peregrine Systems Ltd v Steria Ltd* [2005] EWCA Civ 239, [2005] Info. T.L.R. 294 at [15]; *Grand China Logistics Holding (Group) Co Ltd v Spar Shipping AS* [2016] EWCA Civ 982, [2016] 2 Lloyd's Rep. 447 at [56].

94 *Grand China Logistics Holding (Group) Co Ltd v Spar Shipping AS* [2016] EWCA Civ 982, [2016] 2 Lloyd's Rep. 447, which resolved a conflict of authority on the question whether the obligation to make punctual payment of hire is a condition of a time charterparty by concluding that it is not a condition, but an innominate term. In so concluding the Court of Appeal took account of a number of factors, including the fact that the contract contained an express term of the contract which entitled the owner of the vessel to withdraw it in the event that hire was not made punctually, the need to strike a balance between the promotion of certainty and the need to avoid disproportionate consequences in the case of trivial breaches, the understanding or reaction of the market and previous authority. The submission that a contractual right of withdrawal was equivalent to making time of the essence was rejected in *DD Classics Ltd v Chen* [2022] EWHC 1357 (Comm) at [46]. In so far as it is a relevant factor, it is one that points against the term being a condition because, if the term was a condition, there would be no need to make provision for a contractual right of withdrawal.

95 *Bunge Corp v Tradax Export SA* [1981] 1 W.L.R. 711, 719; *Samarenko v Dawn Hill House Ltd* [2011] EWCA Civ 1445, [2013] Ch. 36 at [9].

96 *The Bunge Corp case* [1981] 1 W.L.R. 711. See also *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana* [1983] 2 A.C. 694, 703–704; *Sport Internationaal Bussum BV v Inter-Footwear Ltd* [1984] 1 W.L.R. 776, 783, 793; *Hyundai Merchant Marine Co Ltd v Karander Maritime Inc (The Niizuru)* [1996] 2 Lloyd's Rep. 66, 71; *B.S. & N. Ltd (BVI) v Micado Shipping Ltd (Malta) (The "Seaflower")* [2001] 1 Lloyd's Rep. 341; *University of the Arts London v Legal & General Pensions Ltd* [2023] EWHC 994 (Ch) (failure to give notice of dissatisfaction with deci-

of readiness of the vessel so that the sellers could then nominate the port for loading, the House of Lords held time to be of the essence: performance by the buyers was a condition precedent to the sellers' ability to perform their obligation.[97] (However, under the Sale of Goods Act 1979 s.10, unless a different intention appears from the terms of the contract, stipulations as to time of *payment* are not deemed to be of the essence of the contract of sale.[98]) Similarly, a court is unlikely to be willing to infer that the parties have agreed that time is to be of the essence in the case of a contract of employment, a commercial agency contract[99] or an analogous contract.[100] In the latter contexts parties wishing to make time of the essence should make express provision to that effect in their contract.

Notice making time "of the essence"[101]

28-030 (3) Where time was not originally of the essence of the contract, but one party has been guilty of delay, the other party may give notice[102] requiring the contract

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sion of expert within agreed time limit). Where time is not of the essence and there has been unreasonable delay in performance, a court may be able to infer that the delay nevertheless amounts to a repudiation of the contract where the consequences of the delay are sufficiently serious. When deciding whether or not the delay amounts to a repudiation of the contract, the court will have regard to all the facts and circumstances of the case.

97 *The Bunge Corp* case [1981] 1 W.L.R. 711. Other illustrations given in this case of time being of the essence in mercantile contracts include the date fixed for the sailing of a ship, for the opening of a banker's credit, or for payment against documents. See also *Toepfer v Lenersan-Poortmann NV* [1980] 1 Lloyd's Rep. 143 (seller's obligation to tender documents by a specified time); *Société Italo-Belge pour le Commerce et Industrie SA v Palm and Vegetable Oils (Malaysia) Sdn Bhd* [1982] 1 All E.R. 19 (seller's obligation to provide declaration of ship); *Gill & Duffus SA v Société pour l'Exportation des Sucres SA* [1985] 1 Lloyd's Rep. 621 ("at latest"); *A v B* [2021] EWHC 793 (Comm), [2021] Bus. L.R. 882 (valid nomination of a vessel).

98 See Vol.II, para.47-128. cf. s.48(3) of the Act (Vol.II, para.47-353). Similarly, the times of payment of bills of exchange regularly given under the terms of a long-term distributorship were not treated as of the essence (*Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 W.L.R. 361), nor the time for payment under a long-term contract for the provision of services (*Jet2.com Ltd v SC Compania Nationala De Transporturi Aeriene Romane Tarom SA* [2012] EWHC 622 (QB), [2012] All E.R. (D) 218 (Mar)). See also *Dominion Corporate Trustees Ltd v Debenham Properties Ltd* [2010] EWHC 1193 (Ch), [2010] 23 E.G. 106 (C.S.) where the time of payment was held not to be of the essence of an agreement for a lease, *Simmers v Innes* [2008] UKHL 24, 2008 S.C.(H.L.) 137 where the same conclusion was reached in the context of a shareholders' agreement and *DD Classics Ltd v Chen* [2022] EWHC 1357 (Comm) where the time of payment in a contract for the sale of a classic car was held not to be of the essence of the contract. cf. however, the time for payment of a deposit: *Portaria Shipping Co v Gulf Pacific Navigation Co Ltd* [1981] 2 Lloyd's Rep. 180 and *Samarenko v Dawn Hill House Ltd* [2011] EWCA Civ 1445, [2013] Ch. 36 at [24]. While the time of payment may not be of the essence of the contract, a court may infer that a failure to pay amounts to a repudiatory breach, especially in the case where the failures to pay on time are substantial, persistent and cynical: *Alan Auld Associates Ltd v Rick Pollard Associates* [2008] EWCA Civ 655, [2008] B.L.R. 419. A court is less likely to conclude that the failure to pay on time is repudiatory where the court is satisfied that the party in breach will eventually make payment and time has not been agreed to be of the essence of the contract: *Valilas v Januzaj* [2014] EWCA Civ 436, 154 Con. L.R. 38.

99 *Crocs Europe BV v Anderson (t/a Spectrum Agencies)* [2012] EWCA Civ 1400, [2013] 1 Lloyd's Rep. 1 at [62].

100 *Warren v Burns* [2014] EWHC 3671 (QB).

101 J.E. Stannard, *Delay in the Performance of Contractual Obligations*, 2nd edn (2018), Ch.8.

102 No notice need be given if it is clear that the party in default does not intend to proceed: *Re Stone and Saville's Contract* [1963] 1 W.L.R. 163, 171. The inclusion in the contract of express provision

to be performed within a reasonable time.[103] Notice can be served at the moment of breach; it is not necessary to wait until there has been an unreasonable delay by the party in breach before serving the notice.[104] The period of notice given must, however, be reasonable and what is reasonable will depend upon all the facts and circumstances of the case.[105] Factors to which the courts will have regard in assessing the reasonableness of the period of notice include what remains to be done at the date of the notice; the fact that the party giving the notice has continually pressed for completion, or has before given similar notices which it has waived[106]; or that it is especially important for it to obtain early completion.[107] A party who elects to give notice immediately upon the breach of contract would be well advised to be "cautious" in its selection of the period to be included in the notice.[108] Notice making time of the essence of the contract can be given in relation to any term of the contract: entitlement to give notice is not confined to essential terms of the contract (although the ability to rely on the notice in order to terminate the contract will depend upon the nature of the breach that has given rise to the right to issue the notice).[109] The party serving the notice must not itself be in default.[110] Once notice has been given, both parties are bound by it so that, if the party giving the notice is not ready to perform on the expiry of the notice, the other party may be entitled to terminate.[111] If, by notice, a party has made time of the es-

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for the service of a notice requiring performance within a specified time (where the recipient of the notice has failed to complete performance on the due date) does not exclude the rights and remedies at law or in equity which subsist apart from such notice: *Woods v Mackenzie Hill Ltd* [1975] 1 W.L.R. 613 (approved by the House of Lords in *Raineri v Miles* [1981] A.C. 1050, 1085–1086. Such a notice does not waive or expunge the previous breach of contract in failing to complete at the due date).

103 *Parkin v Thorold* (1852) 16 Beav. 59; *Green v Sevin* (1879) 13 Ch. D. 589; *Compton v Bagley* [1892] 1 Ch. 313; *Stickney v Keeble* [1915] A.C. 386; *Re Bagley and Shoesmith's Contract* (1918) 87 L.J. Ch. 626; *Hartley v Hymans* [1920] 3 K.B. 475; *Charles Rickards Ltd v Oppenhaim* [1950] 1 K.B. 616 (sale of goods); *United Scientific Holdings Ltd v Burnley BC* [1978] A.C. 904, 934, 946–947. cf. *Finkielkraut v Monohan* [1949] 2 All E.R. 234; *Thorpe v Fasey* [1949] Ch. 649; *Ajit v Sammy* [1967] 1 A.C. 255. cf. s.48(3) of the Sale of Goods Act 1979. The notice must make it sufficiently clear that time has been made of the essence: *Shawton Engineering Ltd v DGP International Ltd* [2005] EWCA Civ 1359, [2006] B.L.R. 1 at [44].

104 *Behzadi v Shaftesbury Hotels Ltd* [1992] Ch. 1, in this respect overruling *Smith v Hamilton* [1951] Ch. 174 where Harman J held that it was necessary to wait until there has been an unreasonable delay before serving the notice. Where the contract does not specify a date for completion it remains necessary to wait for a reasonable time before serving the notice but that is because it is only where there has been an unreasonable delay by the other party that there will be a breach of contract which justifies the serving of the notice: see *Mahase v Ramlal* [2003] UKPC 12 at [27].

105 *Stickney v Keeble* [1915] A.C. 386; *Re Barr's Contract* [1956] Ch. 551; *Ajit v Sammy* [1967] 1 A.C. 255; *Behzadi v Shaftesbury Hotels Ltd* [1992] Ch. 1, 27; *Bidaisee v Sampath* (1995) 46 W.I.R. 461, PC; *Bedfordshire CC v Fitzpatrick Contractors Ltd* (1999) 62 Con. L.R. 64; *Barclays Bank Plc v Savile Estates Ltd* [2002] EWCA Civ 589; *Sentinel International Ltd v Cordes* [2008] UKPC 60, [2008] All E.R. (D) 141 (Dec); *North Eastern Properties Ltd v Coleman* [2010] EWCA Civ 277, [2010] 1 W.L.R. 2715.

106 *Luck v White* (1973) 26 P. & C.R. 89 (the notice may be waived by the party who gave it reopening negotiations, while failing to act upon the other party's neglect to comply with the notice). cf. *Buckland v Farmar & Moody* [1979] 1 W.L.R. 221.

107 *Charles Richards Ltd v Oppenhaim* [1950] 1 K.B. 616.

108 *Behzadi v Shaftesbury Hotels Ltd* [1992] Ch. 1, 24.

109 *Re Olympia & York Canary Wharf Ltd (No.2)* [1993] B.C.C. 159, 171.

110 *Mahase v Ramlal* [2003] UKPC 12 at [28].

111 *Finkielkraut v Monohan* [1949] 2 All E.R. 234; *Quadrangle Development and Construction Co Ltd v Jenner* [1974] 1 W.L.R. 68; *Oakdown Ltd v Bernstein & Co* (1984) 49 P. & C.R. 282; *Clarke*

sence, but later allows a further extension to another fixed date, time remains of the essence.[112] The notice procedure laid down in the contract may be held to be exhaustive of the rights of the parties so that it will not be open to them to serve a notice (for example, of shorter duration) under the general law rather than the contract.[113]

28-031 An important distinction In determining the consequences of a stipulation that time is to be "of the essence" of an obligation, it is vital to distinguish between the case where both parties agree that time is to be of the essence of the obligation and the case where, following a breach of a non-essential term of the contract, the innocent party serves a notice on the other stating that time is to be of the essence.[114] In the former case, both parties agree that time is to be of the essence of the contract, whereas in the latter case there is no such agreement and the decision to send a notice making time of the essence of the contract is the act of one party to the contract. The distinction between these two cases has important remedial consequences.

28-032 Both parties agree that time is of the essence In the case where both parties agree that time is to be of the essence the effect of so declaring is to elevate the term to the status of a "condition"[115] with the consequences that a failure to perform by the stipulated time will entitle the innocent party to: (a) terminate performance of the contract and thereby put an end to all the primary obligations of both parties remaining unperformed[116]; and then (b) claim damages from the contract-breaker on the basis that it has committed a breach "going to the root of the contract" depriving the innocent party of the benefit of the contract ("damages for loss of the whole transaction").[117]

28-033 Loss of right to terminate: relief The entitlement to terminate may, of course, be lost where the innocent party affirms the contract[118] or is held to have waived (or to be estopped from exercising) the right to terminate.[119] Additionally, equity may intervene to grant relief in cases of late payment of money due under a

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Investments Ltd v Pacific Technologies Ltd [2013] EWCA Civ 750, [2013] 2 P. & C.R. 20 at [31]–[33].

112 *Buckland v Farmar & Moody* [1979] 1 W.L.R. 221, citing *Howe v Smith* (1884) 27 Ch. D. 89 and *Lock v Bell* [1931] 1 Ch. 35; *Etzin v Reece* [2002] All E.R. (D) 405 (Jul).

113 *Rightside Properties Ltd v Gray* [1975] Ch. 72; *Country and Metropolitan Homes Ltd v Topclaim Ltd* [1996] Ch. 307, 314–315. The position is, of course, otherwise where the parties expressly reserve "any other right or remedy" available: *Dimsdale Developments (South East) Ltd v De Haan* (1983) 47 P. & C.R. 1.

114 *Ocular Sciences Ltd v Aspect Vision Care Ltd* [1997] R.P.C. 289, 432–433.

115 In the sense examined above, paras 28-014 et seq. In the case where the failure in timely performance is trivial, it is possible that the strictness of the rule may be tempered by the de minimis principle. However, to the extent that the de minimis rule has any application at all (which is doubtful), its role in commercial transactions is very narrow (*Lombard North Central Plc v European Skyjets Ltd (In Liquidation)* [2020] EWHC 679 (QB) at [44]–[45]).

116 The first consequence was the only one mentioned by Lord Diplock in *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana* [1983] 2 A.C. 694, 703, when he referred to the effect of making time of the essence of an obligation. See also below, paras 28-078 et seq.

117 *Lombard North Central Plc v Butterworth* [1987] Q.B. 527, 545, 546; *State Securities Plc v Initial Industry Ltd* [2004] EWHC 3482 (Ch.), [2004] All E.R. (D) 317 (Jan).

118 See below, paras 28-056—28-057.

119 See below, paras 28-058— 28-062.

mortgage or rent due under a lease,[120] but equity will not intervene at the request of a purchaser who has failed to comply with an essential time stipulation in a contract for the sale of land.[121] The need for certainty in such cases is paramount and the very existence of a jurisdiction to grant relief in cases where it would be unconscionable[122] for the vendor to exercise its right to terminate would detract from that need for a certain rule. The harshness of this general rule may, however, be tempered by the prospect of relief being granted in extreme cases. Where, for example, the vendor has been unjustly enriched by improvements made at the purchaser's expense, then the court may either relax the principle that specific performance will not be granted to a purchaser who has broken an essential condition as to time[123] or, preferably, recognise that the purchaser has a personal restitutionary claim against the vendor.[124]

Form of relief: additional time to pay[125] The equitable jurisdiction to grant relief is limited both in terms of the contracts which attract this type of relief and the form which the relief takes. In relation to the types of contract, the jurisdiction to grant relief against forfeiture is limited to contracts concerning the transfer or creation of proprietary or possessory rights[126] so that a charterer under a time charter[127] was held not to be entitled to relief against forfeiture when the shipowner withdrew the **28-034**

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120 *G. and C. Kreglinger v New Patagonia Meat and Cold Storage Co Ltd* [1914] A.C. 25, 35; *Shiloh Spinners Ltd v Harding* [1973] A.C. 691, 722.

121 *Union Eagle Ltd v Golden Achievement Ltd* [1997] A.C. 514; *Etzin v Reece* [2002] All E.R. (D) 405 (Jul) (*Union Eagle* applied to analogous case of an agreement to purchase freehold pursuant to the Leasehold Reform, Housing and Urban Development Act 1993); *Hush Brasseries Ltd v RLUKREF Nominees (UK) One Ltd* [2022] EWHC 3018 (Ch) at [67].

122 Such a jurisdiction has been developed in Australia: see, for example, *Legione v Hateley* (1983) 152 C.L.R. 406 and *Stern v McArthur* (1988) 165 C.L.R. 489. These developments generate too much uncertainty for English tastes.

123 As has been done in Australia (see *Legione v Hateley* (1983) 152 C.L.R. 406 and *Stern v McArthur* (1988) 165 C.L.R. 489). The occasional English example can also be found (see *In Re Dagenham (Thames) Dock Co Ex p. Hulse* (1872-73) L.R. 8 Ch. App. 1022) but the authorities are generally hostile to such an approach (see *Steedman v Drinkle* [1916] 1 A.C. 275). The English courts may "on some future occasion" have to consider whether to "relax" the principle in *Steedman v Drinkle* (see *Union Eagle Ltd v Golden Achievement Ltd* [1997] A.C. 514, 523B and see also *Bidaisee v Sampath* (1995) 46 W.I.R. 461, 466–467 where the point was left open by the Privy Council).

124 It seems clear that Lord Hoffmann's preference in *Union Eagle Ltd v Golden Achievement Ltd* [1997] A.C. 514, 523 was for the development of an appropriate restitutionary remedy. There is much to be said for this view. It avoids the land being sterilised while the courts sort out whether or not the vendor is entitled to terminate, but at the same time it gives to the court a jurisdiction to remove any unjust enrichment which a vendor has obtained as a result of the termination. A further approach would be to develop the law of estoppel to deal with the case of the vendor who leads the purchaser to believe that the contractual time-scale will not be enforced.

125 See further below, paras 30-268—30-271.

126 *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana* [1983] 2 A.C. 694; *Sport Internationaal Bussum BV v Inter-Footwear Ltd* [1984] 1 W.L.R. 776; *Vauxhall Motors Ltd v Manchester Ship Canal Co Ltd* [2019] UKSC 46, [2020] A.C. 1161; *Hush Brasseries Ltd v RLUKREF Nominees (UK) One Ltd* [2022] EWHC 3018 (Ch). The jurisdiction is not, however, confined to proprietary or possessory rights in land but extends to proprietary or possessory rights arising under a commercial contract: *BICC Plc v Burndy Corp* [1985] Ch. 232. The scope of the jurisdiction, while clear in legal terms, has resulted in the drawing of distinctions which are difficult to defend in commercial terms (for example, the distinction between *Sport International Bussum* and *BICC v Burndy* is particularly difficult to defend). Although there have been criticisms of the scope of the jurisdiction, the courts continue (subject to the occasional acknowledgement that the law may yet be capable of development: *Kulkurni v Gwent Holdings Ltd* [2023] EWHC 484 (Ch) at [37]) to affirm that the jurisdiction does not extend to mere contractual rights and is confined to

ship because the charterer had failed to make punctual payment of an instalment of hire. As to the form of the relief, the courts will seldom do more than give the contract-breaker more time in which to pay the sum it failed to pay on time.[128] This relief has the effect that the contract-breaker does not forfeit the rights which it had under the contract, provided that it pays within the time fixed by the court.

28-035 One party issues a notice making "time of the essence" Where, however, notice is given by one party purporting to make "time of the essence" in respect of a breach of a non-essential term of the contract, the consequences are altogether different. Such a notice does not serve to make time of the essence so far as the obligations in the original contract are concerned, because one party cannot unilaterally vary the terms of a contract by turning what was previously a non-essential term of the contract into an essential term[129] nor can one party by serving a notice on the other "impose *additional* obligations on a party to a contract"[130]: the notice "has in law no contractual import".[131] The effect of the notice is rather to bring to an end the interference of equity with the legal rights of the parties[132] so that the entitlement of the innocent party to terminate future performance of the contract is then governed solely by ordinary common law rules.[133] Given that the notice cannot have the effect of turning the non-essential term of the contract into a condition, the party

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the forfeiture of proprietary or possessory rights: *Cukurova Finance International Ltd v Alfa Telecom Turkey Ltd* [2013] UKPC 20, [2016] A.C. 923 at [94].

127 Had the charter been by demise, the charterer could potentially have invoked the equitable jurisdiction because in such a case the charterer would have had a possessory interest in the ship.

128 *Re Dagenham (Thames) Dock Co* (1872–73) L.R. 8 Ch. App. 1022; *John H. Kilmer v British Columbia Orchard Lands Ltd* [1913] A.C. 319; *Steedman v Drinkle* [1916] 1 A.C. 275; *Starside Properties Ltd v Mustapha* [1974] 1 W.L.R. 816; *BICC Plc v Burndy Corp* [1985] Ch. 232. While in the ordinary course relief will take the form of giving the party in breach a longer period of time in which to perform its contractual obligation, this is not an "inflexible rule". In an appropriate case a court can grant relief in other forms, particularly "where there are strong countervailing considerations of equity or unconscionability associated with events subsequent to a forfeiture": *Cukurova Finance International Ltd v Alfa Telecom Turkey Ltd* [2013] UKPC 20, [2016] A.C. 923 at [13].

129 *Behzadi v Shaftesbury Hotels Ltd* [1992] Ch. 1, 12, 24; *Re Olympia & York Canary Wharf Ltd (No.2)* [1993] B.C.C. 159, 171–173; *Ocular Sciences Ltd v Aspect Vision Care Ltd* [1997] R.P.C. 289, 432–433; *Etzin v Reece* [2002] All E.R. (D) 405 (Jul); *Alegrow SA v Yayla Agro Gida San Ve Nak SA* [2020] EWHC 1845 (Comm), [2021] 1 Lloyd's Rep. 565 at [56]–[57].

130 *Samarenko v Dawn Hill House Ltd* [2011] EWCA Civ 1445, [2013] Ch. 36 at [65]; *Urban I (Blonk Street) Ltd v Ayres* [2013] EWCA Civ 816, [2014] 1 W.L.R. 756 at [44]; *Spar Shipping SA v Grand China Logistics Holding (Group) Co Ltd* [2015] EWHC 718 (Comm), [2015] 1 All E.R. (Comm) 879 at [184].

131 [1992] Ch. 1, 24.

132 *Behzadi v Shaftesbury Hotels Ltd* [1992] Ch. 1, 12; *Re Olympia & York Canary Wharf Ltd (No.2)* [1993] B.C.C. 159, 173: *Dalkia Utilities Services Plc v Celtech International Ltd* [2006] EWHC 63 (Comm), [2006] 1 Lloyd's Rep. 599 at [131]; *BNP Paribas v Wockhardt EU Operations (Swiss) AG* [2009] EWHC 3116 (Comm), 132 Con. L.R. 177; *Samarenko v Dawn Hill House Ltd* [2011] EWCA Civ 1445, [2013] Ch. 36 at [65]; *Urban I (Blonk Street) Ltd v Ayres* [2013] EWCA Civ 816, [2014] 1 W.L.R. 756 at [44].

133 In *Multi Veste 226 BV v NI Summer Row Unitholder BV* [2011] EWHC 2026 (Ch), 139 Con. L.R. 23 Lewison J stated (at [201]) that the service of a notice making time of the essence had the effect of changing the question from whether delay amounts to a repudiation to the question whether failure to perform the obligation at all amounted to a repudiation. However, in *Samarenko v Dawn Hill House Ltd* [2011] EWCA Civ 1445, [2013] Ch. 36 at [42] he conceded that his statement may have been "too prescriptive" in the sense that, where the breach is of an intermediate term, it "may be wrong to equate delay in performance (even after notice) with refusal to perform". That said, a court may be more willing to infer from non-compliance with a notice making time of the essence that the failure is attributable to a refusal to perform that obligation. In *Urban I (Blonk Street) Ltd v Ayres*

giving the notice can only terminate where the failure of the other party to comply with the terms of the notice goes to the root of the contract so as to deprive that party of a substantial part of the benefit to which it was entitled under the terms of the contract.[134] Failure to comply with the terms of the notice can therefore only be used as evidence of a breach which entitles the other party to terminate further performance of the contract; it is not such a breach per se.[135]

Where time is not of the essence Where none of the three exceptions mentioned in the preceding paragraphs applies, the effect of s.41 of the Law of Property Act 1925 (above) is that the breach of a stipulation as to time is not of itself a repudiatory breach[136] which entitles the innocent party to terminate further performance of the contract. Thus, in a contract for the sale and purchase of land, if the purchaser fails to complete on the date fixed for completion, the effect of s.41 is that the purchaser does not commit a repudiatory breach of contract (entitling the vendor to terminate the contract)[137] provided the purchaser either completes, or is ready to complete, within a reasonable time thereafter[138]: it is not essential for the purchaser to prove that he was ready and willing to complete on the date fixed for completion.[139] Even where time is not (or has not subsequently been made) of the essence in a contract for the sale and purchase of land, a failure to complete the contract on or before the date stipulated for completion is still a breach leading to liability to pay damages for any loss[140] caused by the delay in completion.[141] A further example comes from leases. The presumption is that time is not of the essence in the timetable specified in a rent review clause in a lease, under which various steps must be taken to determine the rent payable during the period following the review date[142]; strict adherence to the timetable will be necessary only if that is expressly stated, or if it is a "necessary implication" from the surrounding **28-036**

[2013] EWCA Civ 816, [2014] 1 W.L.R. 756 at [44] Sir Terence Etherton C expressed his agreement with the "further thoughts" of Lewison LJ as expressed in his judgment in *Samarenko* at [42].

134 *Behzadi v Shaftesbury Hotels Ltd* [1992] Ch. 1; *Ocular Sciences Ltd v Aspect Vision Care Ltd* [1997] R.P.C. 289, 432–433; *Dalkia Utilities Services Plc v Celtech International Ltd* [2006] EWHC 63 (Comm), [2006] 1 Lloyd's Rep. 599 at [131]; *BNP Paribas v Wockhardt EU Operations (Swiss) AG* [2009] EWHC 3116 (Comm), 132 Con. L.R. 177.

135 *Behzadi v Shaftesbury Hotels Ltd* [1992] Ch. 1; *Astea (UK) Ltd v Time Group Ltd* [2003] EWHC 725 (TCC), [2003] All E.R. (D) 212 (Apr) at [147]–[148]; *Spar Shipping SA v Grand China Logistics Holding (Group) Co Ltd* [2015] EWHC 718 (Comm), [2015] 1 All E.R. (Comm) 879 at [184]. cf. *United Scientific Holdings Ltd v Burnley BC* [1978] A.C. 904, 946–947; *Louinder v Leis* (1982) 149 C.L.R. 509, 526.

136 It would become such a breach only if it amounted to a substantial failure of performance.

137 cf. the failure to pay the deposit: *Millichamp v Jones* [1982] 1 W.L.R. 1422, although the decision in *Millichamp* has since been held to be "suspect" and of "questionable assistance": *Samarenko v Dawn Hill House Ltd* [2011] EWCA Civ 1445, [2013] Ch. 36 at [20], [58] and [63].

138 *Rightside Properties Ltd v Gray* [1975] Ch. 72, 83.

139 *Rightside Properties Ltd v Gray* [1975] Ch. 72, 82 (following *Howe v Smith* (1884) L.R. 27 Ch. D. 89, 103, and *Stickney v Keeble* [1915] A.C. 386, 404).

140 It should be noted in this context that the rule in *Bain v Fothergill* (1874-75) L.R. 7 H.L. 158 has been abolished by s.3 of the Law of Property (Miscellaneous Provisions) Act 1989 (below, para.30-190).

141 *Raineri v Miles* [1981] A.C. 1050 (following *Stickney v Keeble* [1915] A.C. 386, 415–416; *Phillips v Lamdin* [1949] 2 K.B. 33, 42). (Sometimes, however, the date for completion is "only a target": *Williams v Greatrex* [1957] 1 W.L.R. 31, 35.)

142 *United Scientific Holdings Ltd v Burnley BC* [1978] A.C. 904; *Amherst v James Walker Goldsmith & Silversmith Ltd* [1983] Ch. 305 (mere delay, however lengthy, does not destroy the landlord's right to have the rent reviewed: the tenant can always serve notice on the landlord making time of the essence: above, para.28-030); *McDonald's Property Co Ltd v HSBC Bank Plc* [2001] 3 E.G.L.R. 19.

circumstances[143] (e.g. in the inter-relation between the rent review clause and other clauses).[144] The fact that the time specified in a rent review clause is held not to be of the essence does not itself mean that there is an implied term that the right to a review must be exercised within a reasonable time.[145] In the case where time is not, and never has been, of the essence of the contract, a party may nevertheless be entitled to terminate further performance of the contract where the effect of the delay in performance is to frustrate the purpose of the contract.[146]

(c) The Nature of the Breach and its Consequences

28-037 Introduction The entitlement of a party to terminate further performance of the contract may depend on the nature of the breach and on the consequences for the innocent party of the breach which has been committed. In relation to the nature of the breach, consideration will first be given to the question whether a fundamental breach, a deliberate breach or a dishonest breach of contract gives to the other party an entitlement to terminate further performance of the contract. But the most significant development has been the recognition of a category of "intermediate" (or "innominate") terms, a breach of which may or may not entitle the innocent party to terminate further performance of the contract, depending on the nature and consequences of the breach.

28-038 Fundamental breach The principle of "fundamental breach" or the breach of a "fundamental term" was developed by the courts with a view to limiting the operation of exemption clauses, the rationale being that no party could exclude or restrict his liability for such a breach.[147] As so conceived, a fundamental breach was more far reaching in its effects (a "total breach")[148] than one which would justify the termination of further performance of the contract.[149] And, as has been noted,[150] a fundamental term was said to be something narrower than a condition: it went to the "core" or substance of the contract.[151] However, in *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale*,[152] the House of Lords expressed the view that the applicability of exemption clauses to particular breaches of a contract was in reality a rule of construction based on the presumed

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143 *The United Scientific* case [1978] A.C. 904. (No question of damages was involved in this decision, but the failure to adhere to the timetable was clearly a breach of contract: *Raineri v Miles* [1981] A.C. 1050.)

144 On the inter-relation between the timetable in a rent review clause and that in a "break" clause, see *Metrolands Investments Ltd v J.H. Dewhurst Ltd* [1986] 3 All E.R. 659 and *Central Estates Ltd v Secretary of State for the Environment* [1997] 1 E.G.L.R. 239.

145 *Amherst v James Walker Goldsmith & Silversmith Ltd* [1983] Ch. 305.

146 *Universal Cargo Carriers Corp v Citati* [1957] 2 Q.B. 401.

147 See above, para.18-023.

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

149 See above, paras 18-023—18-024.

150 See above, paras 28-022—28-025.

151 *Smeaton Hanscomb & Co Ltd v Sassoon I. Setty, Son & Co* [1953] 1 W.L.R. 1468, 1470; see above, para.28-022.

152 [1967] 1 A.C. 361; see above, para.18-024.

intention of the parties as expressed in the contract.[153] So far as the expression "fundamental breach" is concerned, Lord Reid said[154]:

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

Accordingly, the expression would seem to be no more than a restatement, in differing terminology, of the principle that a particular breach or breaches may be such as to go to the root of the contract and entitle the other party to treat such breach or breaches as a ground on which to terminate further performance of the contract.[155] Likewise, the expression "fundamental term" appears to mean no more than a condition, i.e. a stipulation which the parties have agreed (expressly or impliedly) to be, or which the general law regards as, a term which goes to the root of the contract so that any breach of that term may at once and without further reference to the facts and circumstances be regarded by the innocent party as a justification for terminating further performance of the contract.[156] This view that a fundamental breach was no more than a breach which entitles the other party to terminate further performance of the contract was confirmed by Lord Diplock in *Photo Production Ltd v Securicor Transport Ltd*.[157] In that case, the House of Lords held that discharge consequent upon a fundamental, i.e. repudiatory, breach does not disentitle the guilty party from relying on an exemption clause in respect of that breach. It is therefore submitted that there is no separate category of "fundamental" breaches, or terms, producing different effects from those already discussed.[158]

Deliberate breach The question whether or not a failure of performance is deliberate may be a relevant factor in deciding whether or not a breach of contract gives to the innocent party the right to terminate further performance of the contract,[159] since it may indicate the attitude of the party in default towards future performance and so be evidence of an intent to renounce the contract.[160] But there is no separate category of "deliberate" breaches and Lord Wilberforce has said[161]: **28-039**

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

Dishonest breach The fact that a breach of contract is accompanied by dishonesty **28-040**

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153 See above, para.18-024.

154 [1967] 1 A.C. 361, 397. See also 409–410, 421–422, 431.

155 [1967] 1 A.C. 361, 422. See also *Thompson v Corroon* (1993) 42 W.I.R. 157.

156 [1967] 1 A.C. 361, 422.

157 [1980] A.C. 827, 849; above, para.18-025.

158 See above, paras 18-027 and 28-025.

159 *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, 394, 414, 415, 429; *Rubicon Computer Systems Ltd v United Paints Ltd* (2000) 2 T.C.L.R. 453; *Future Publishing Ltd v Edge Interactive Media Inc* [2011] EWHC 1489 (Ch), [2011] E.T.M.R. 50 at [62]; *De Montfort Fine Art Ltd v Acre 1127 Ltd (In Liquidation)* [2011] EWCA Civ 87, [2011] All E.R. (D) 111 (Feb) at [43]. The fact that the breach is "covert" may also be a relevant factor: *Northern Foods Plc v Focal Foods Ltd* [2003] 2 Lloyd's Rep. 728, 747.

160 For the coincidence between renunciation and failure of performance, see *Mersey Steel and Iron Co v Naylor, Benzon & Co* (1884) 9 App. Cas. 434, 441, 444.

161 *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, 435.

does not of itself automatically convert a breach of contract into a breach which entitles the other party to terminate further performance of the contract.[162] However, dishonesty is likely to be a material factor in deciding whether or not a party is so entitled to terminate the contract where the dishonesty is destructive of a necessary relationship of trust between the parties[163] or it is indicative of an intention no longer to be bound by the contract.

28-041 Intermediate terms The most significant development in terms of attaching importance to the nature and the consequences of the breach as the critical factor in determining whether a breach gives to the innocent party a right to terminate further performance of the contract is the "more modern doctrine"[164] that, in addition to conditions and warranties, there exists a third category of "intermediate" (or "innominate") terms, the failure to perform which may or may not entitle the innocent party to treat himself as discharged, depending on the nature and consequences of the breach.[165]

28-042 Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd The modern origin of intermediate terms is to be found in the judgment of the Court of Appeal in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*,[166] in which the charterers of a ship sought to establish that they were discharged from further performance of the charterparty because of repeated breakdowns of the ship due to the fact that it was unseaworthy. It was argued on their behalf that the obligation to provide a seaworthy vessel was a condition of the contract, any breach of which entitled them to terminate further performance of the contract. This argument was rejected by the Court of Appeal. In what has become a significant passage in his judgment Diplock LJ said[167]:

> "There are, however, many contractual undertakings of a more complex character which cannot be categorised as being 'conditions' or 'warranties' … 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 he should obtain from the contract; and the legal consequences of a breach of such undertaking, unless provided for expressly[168] 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'."

Applying this approach to the facts of the case the Court of Appeal refused to ascribe to the shipowner's obligation to deliver a seaworthy vessel the character of a condition and held instead that it was an intermediate or innominate term so that

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[162] *De Montfort Fine Art Ltd v Acre 1127 Ltd (In Liquidation)* [2011] EWCA Civ 87, [2011] All E.R. (D) 111 (Feb) at [43].

[163] *Tullett Prebon Plc v BGC Brokers LP* [2011] EWCA Civ 131, [2011] I.R.L.R. 420; *Northern Foods Plc v Focal Foods Ltd* [2003] 2 Lloyd's Rep. 728 at 747; *Williams v Leeds United Football Club Ltd* [2015] EWHC 376 (QB), [2015] I.R.L.R. 383; *D&G Cars Ltd v Essex Police Authority* [2015] EWHC 226 (QB), [2015] All E.R. (D) 85 (Mar).

[164] *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 W.L.R. 989, 998.

[165] See below, paras 28-042—28-047.

[166] [1962] 2 Q.B. 26, 66.

[167] [1962] 2 Q.B. 26 at 70.

[168] Or impliedly: see *Bunge Corp v Tradax Export SA* [1981] 1 W.L.R. 711 and above, para.28-019.

it was necessary to have regard to the consequences of the breach.[169] On the facts, the delays which had already occurred, and the delay which was likely to occur,[170] as a result of unseaworthiness, and the conduct of the shipowners in taking steps to remedy the same, were not, when taken together, such as to deprive the charterers of substantially the whole benefit which it was the intention of the parties they should obtain from further use of the ship under the charterparty. The charterers were therefore not entitled to treat themselves as discharged from the contract.

The test to be applied The question whether a breach of an intermediate term is sufficiently serious to entitle the innocent party to terminate further performance of the contract is to be determined "by evaluating all the relevant circumstances".[171] In conducting this inquiry, the court is not exercising a discretion, but is engaged in a fact-sensitive inquiry[172] which involves "a multi-factorial assessment"[173] and the use of various "open-textured expressions".[174] The bar which must be cleared before there is an entitlement in the innocent party to terminate the contract is a "high" one.[175] A number of expressions have been used to describe the circumstances that warrant termination, the most common being that the breach must "go to the root of the contract".[176] It has also been said that the breach must "affect the **28-043**

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169 When considering the consequences of the breach the court may have regard to the cumulative effect of the breaches that have taken place: *Moschi v Lep Air Services Ltd* [1973] A.C. 331, 349; *Anglo Group Plc v Winther Brown & Co Ltd* (2000) 72 Con. L.R. 118, 160; *Rice (t/a Garden Guardian) v Great Yarmouth BC* [2003] T.C.L.R. 1, (2001) 3 L.G.L.R. 4; *Alan Auld Associates Ltd v Rick Pollard Associates* [2008] EWCA Civ 655, [2008] B.L.R. 419; *SK Shipping Europe Plc v Capital VLCC 3 Corp* [2020] EWHC 3448 (Comm), [2021] 2 Lloyd's Rep. 109 at [305] (where it was observed that cumulation is most likely to establish a repudiatory breach where the breaches are linked in their effect or they reflect the pursuit by the defendant of an overriding strategy).

170 Regard is to be had, not only to the actual consequences which have occurred, but also those which it can reasonably be foreseen will occur as a result of the breach: [1962] 2 Q.B. 26, 57, 63; *Phones 4U Ltd (in administration) v EE Ltd* [2018] EWHC 49 (Comm), [2018] 1 Lloyd's Rep. 204 at [40]. The date at which the court must decide whether the breach is repudiatory is the date of the purported termination, not the date of the breach: *Telford Homes (Creekside) Ltd v Ampurius Nu Homes Holdings Ltd* [2013] EWCA Civ 577, [2013] 4 All E.R. 377 at [44]; *Phones 4U Ltd (in administration) v EE Ltd* [2018] EWHC 49 (Comm), [2018] 1 Lloyd's Rep. 204 at [43].

171 *Valilas v Januzaj* [2014] EWCA Civ 436, 154 Con. L.R. 38 at [60]; *Havila Kystruten AS v Abarca Companhia de Seguros SA* [2022] EWHC 3196 (Comm) at [418].

172 [2014] EWCA Civ 436, 154 Con. L.R. 38 at [60]; *Phones 4U Ltd (in administration) v EE Ltd* [2018] EWHC 49 (Comm), [2018] 1 Lloyd's Rep. 204 at [42].

173 [2014] EWCA Civ 436, 154 Con. L.R. 38 at [53]; *Green Deal Marketing Southern Ltd v Economy Energy Trading Ltd* [2019] EWHC 507 (Ch) at [125]; *Galtrade Ltd v BP Oil International Ltd* [2021] EWHC 1796 (Comm), [2021] 2 C.L.C. 408 at [89]–[98]; *Neath Port Talbot (Recycling) Ltd v James Heys and Sons Ltd* [2021] EWHC 3157 (Comm), 201 Con. L.R. 140 at [38].

174 [2014] EWCA Civ 436, 154 Con. L.R. 38 at [59]; *Grand China Logistics Holding (Group) Co Ltd v Spar Shipping AS* [2016] EWCA Civ 982, [2016] 2 Lloyd's Rep. 447 at [75].

175 *Telford Homes (Creekside) Ltd v Ampurius Nu Homes Holdings Ltd* [2013] EWCA Civ 577, [2013] 4 All E.R. 377 at [48].

176 *Davidson v Gwynne* (1810) 12 East 381, 389; *MacAndrew v Chapple* (1866) L.R. 1 C.P. 643, 648; *Poussard v Spiers* (1876) 1 Q.B.D. 410, 414; *Honck v Muller* (1881) 7 Q.B.D. 92, 100; *Mersey Steel and Iron Co v Naylor, Benzon & Co* (1884) 9 App. Cas. 434, 443; *Guy-Pell v Foster* [1930] 2 Ch. 169, 187; *Heyman v Darwins Ltd* [1942] A.C. 356, 397; *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, 442; *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 W.L.R. 361, 374; *Cehave NV v Bremer Handelsgesellschaft mbH* [1976] Q.B. 44, 60, 73; *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc* [1979] A.C. 757, 779.

very substance of the contract",[177] or "frustrate the commercial purpose of the venture",[178] and, at the present day, a test which is frequently applied[179] is that stated by Diplock LJ in *Hongkong Fir* in the following terms:

> "Does the occurrence of the event deprive the party who has further undertakings to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?"[180]

28-044 "Frustration by breach" and frustration The language used to describe the entitlement to terminate further performance of the contract in cases concerned with intermediate terms bears some similarity to the language that has been used to describe the seriousness of the interference with performance of the contract that must be shown to have occurred to justify a discharge and to bring about a discharge of the contract by frustration.[181] Nevertheless, "frustration by breach" must be distinguished from the doctrine of frustration of a contract referred to in Ch.27.[182] Frustration by breach arises where the failure of performance is due to the act or default of one of the parties, but true frustration will only occur if the frustrating

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177 *Wallis, Son and Wells v Pratt and Haynes* [1910] 2 K.B. 1003, 1012.

178 *Tarrabochcia v Hickie* (1856) 1 Hurl. & N. 183; *MacAndrew v Chapple* (1866) L.R. 1 C.P. 643, 647, 648; *Stanton v Richardson* (1871-72) L.R. 7 C.P. 421, 433, 437; *Jackson v Union Marine Insurance Co* (1874-75) L.R. 10 C.P. 125, 145, 148; *Inverkip SS Co v Bunge* [1917] 2 K.B. 193, 201; *Astley Industrial Trust Ltd v Grimley* [1963] 1 W.L.R. 584, 599; *Trade and Transport Incorporated v Iino Kaiun Kaisha Ltd* [1973] 1 W.L.R. 210, 223.

179 *Cehave NV v Bremer Handelsgesellschaft mbH* [1976] Q.B. 44, 82; *United Scientific Holdings Ltd v Burnley BC* [1978] A.C. 904, 928; *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827, 849; *Nitrate Corp of Chile Ltd v Pansuiza Compania de Navigacion* [1980] 1 Lloyd's Rep. 638; aff'd [1982] 1 Lloyd's Rep. 570. See also *Freeman v Taylor* (1831) 8 Bing. 124, 138; *MacAndrew v Chapple* (1886) L.R. 1 C.P. 643, 648; *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 W.L.R. 361, 380; *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc* [1979] A.C. 757, 783; *Gunatunga v DeAlwis* (1996) 72 P. & C.R. 161, 171; *Alfred McAlpine Plc v BAI (Run-off) Ltd* [2000] 1 Lloyd's Rep. 437, 444; *Rubicon Computer Systems Ltd v United Paints Ltd* (2000) 2 T.C.L.R. 453; *Anglo Group Plc v Winther Brown & Co Ltd* (2000) 72 Con. L.R. 118, 160; *Astea (UK) Ltd v Time Group Ltd* [2003] EWHC 725 (TCC), [2003] All E.R. (D) 212 (Apr) at [149]; *Northern Foods Plc v Focal Foods Ltd* [2003] 2 Lloyd's Rep. 728, 745; *Seadrill Management Services Ltd v OAO Gazprom* [2009] EWHC 1530 (Comm), [2010] 1 Lloyd's Rep. 543; *Telford Homes (Creekside) Ltd v Ampurius Nu Homes Holdings Ltd* [2013] EWCA Civ 577, [2013] 4 All E.R. 377. In *Telford Homes (Creekside) Ltd* Lewison LJ also drew attention (at [49]) to a possible "tension" between the test of deprivation of "substantially the whole benefit" of the contract (as expressed by Diplock LJ in *Hongkong Fir*) and the test of deprivation of "a substantial part of the benefit to which [the innocent party] is entitled under the contract" (as expressed by Buckley LJ in *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 W.L.R. 361, 380). However, in *Urban I (Blonk Street) Ltd v Ayres* [2013] EWCA Civ 816, [2014] 1 W.L.R. 756 at [57] Sir Terence Etherton C observed that the difference in expression did not "reflect any divergence of principle but merely the application of the same principle to different facts". The preference of the Chancellor was to adhere to the "common formulation", namely that the breach must deprive the innocent party of "substantially the whole benefit" of the contract; see also *C21 London Estates Ltd v Maurice MacNeill Iona Ltd* [2017] EWHC 998 (Ch) at [85]–[89].

180 [1962] 2 Q.B. 26, 66.

181 *Jackson v Union Marine Insurance Co Ltd* (1874) L.R. 10 C.P. 125, 145, 147; *Trade and Transport Inc v Iino Kaiun Kaisha Ltd* [1973] 1 W.L.R. 210, 221; *Nitrate Corp of Chile Ltd v Pansuiza Compania de Navegacion SA* [1980] 1 Lloyd's Rep. 638, 648; aff'd sub nom. *Chilean Nitrate Sale & Corp v Marine Transportation Co Ltd* [1982] 1 Lloyd's Rep. 570; *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2016] EWCA Civ 789, [2016] 2 Lloyd's Rep. 494 at [25].

182 See above, paras 27-001 et seq.

event was not caused by the fault of either party to the contract.[183] Further, where there has been frustration by breach, the innocent party may elect to affirm the contract; but where there is true frustration, the contract is determined automatically, and it cannot be continued by affirmation.[184]

28-045 **Making the choice between a condition and an intermediate term** The advantage that arises from the classification of a particular term as a condition rather than an intermediate term is that of certainty[185]: the party affected by the breach of such a term knows at once where he stands, i.e. that he is immediately and unequivocally entitled to terminate further performance of the contract and, for example in a contract of sale of goods, to reject the goods.[186] On the other hand, since *any* breach of a condition gives rise to this right, it may be exercised irrespective of the gravity of the breach or of the consequences resulting from the breach. The innocent party may have suffered no, or only trifling, loss or damage by reason of the breach, but is nevertheless entitled to refuse further performance of the contract.[187] The harsh outcome that can follow from the classification of a term as a condition has led modern courts to prefer the classification of a term as an intermediate term where such classification would not be inconsistent with the objectively identified intention of the parties to the contract.

28-046 **Instances of classification** This being the case, in the absence of classification as a condition by the parties or by a statute or binding authority classifying the disputed term as a condition, modern courts seem more inclined to classify a term as an intermediate term rather than as a condition: "the modern approach is that a term is innominate unless a contrary intention is made clear."[188] A term is most likely to be classified as intermediate if it is capable of being broken either in a manner that is trivial and capable of remedy by an award of damages or in a way that is so fundamental as to undermine the whole contract. In other words, where the consequences of a breach of a particular term can vary significantly, the response that the term is intermediate is more appropriate because it gives to the court the flexibility to tailor the response to meet the justice of the case. Thus, for example,

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183 See above, paras 27-091—27-095. For consideration of "mixed causes", see *Nitrate Corp of Chile Ltd v Pansuiza Compania de Navegacion SA* [1980] 1 Lloyd's Rep. 638, 649.

184 *Hirji Mulji v Cheong Yue SS Co Ltd* [1926] A.C. 497, 509. cf. *B.P. Exploration Co (Libya) Ltd v Hunt (No.2)* [1979] 1 W.L.R. 783; aff'd [1983] 2 A.C. 352 (waiver).

185 *A/S Awilco of Oslo v Fulvia Spa (The Chikuma)* [1981] 1 W.L.R. 314, 322; *Bunge Corp v Tradax Export SA* [1981] 1 W.L.R. 711, 715, 718, 720, 725; *Compagnie Commerciale Sucres et Denrees v Czarnikow Ltd* [1990] 1 W.L.R. 1337, 1348; *Richco International Ltd v Bunge & Co Ltd* [1991] 2 Lloyd's Rep. 93, 99.

186 Sale of Goods Act 1979 ss.11(3), 12(5A), 13(1A), 14(6), 15(3). But see the modification of remedies for breach of condition contained in s.15A of the 1979 Act; Vol.II, para.47-070. These provisions do not apply to contracts which fall within the scope of Ch.2 of Pt 1 of the Consumer Rights Act 2015 (see below, Vol.II, para.41-497). In the case of the latter contracts the right to reject the goods (whether of a short term or final nature) is set out in ss.20, 22 and 24 of the Act: see further paras 41-545 et seq.

187 *Heritage Oil and Gas Ltd v Tullow Uganda Ltd* [2014] EWCA Civ 1048, [2014] 2 C.L.C. 61 at [33].

188 *Grand China Logistics Holding (Group) Co Ltd v Spar Shipping AS* [2016] EWCA Civ 982, [2016] 2 Lloyd's Rep. 447 at [93]; *Ark Shipping Co LLC v Silverburn Shipping (IoM) Ltd* [2019] EWCA Civ 1161, [2019] 2 Lloyd's Rep. 603 at [81]; *EMFC Loan Syndications LLP v Resort Group Plc* [2021] EWCA Civ 844, [2022] 1 W.L.R. 717 at [89]; *Galtrade Ltd v BP Oil International Ltd* [2021] EWHC 1796 (Comm), [2021] 2 C.L.C. 408 at [66]–[70]; *Havila Kystruten AS v Abarca Companhia de Seguros SA* [2022] EWHC 3196 (Comm) at [416].

a shipowner's obligation in a charterparty to provide a seaworthy vessel,[189] to load containers without any stability problem[190] or to commence and carry out the voyage agreed on with reasonable despatch,[191] or a clause by which the master of the ship was to act under the charterer's orders,[192] have been classified as intermediate terms, the breach of which does not entitle the charterer to terminate the contract unless the consequences are such as to deprive the charterer of substantially the whole benefit of the contract or to frustrate the object of the charterer in chartering the ship.[193]

28-047 Classification of terms in sale of goods contracts The Sale of Goods Act 1979 and the Supply of Goods (Implied Terms) Act 1973 expressly define certain implied terms in contracts of sale of goods or hire-purchase as being "conditions" or "warranties".[194] There can be no doubt that such classification is binding. But in *Cehave NV v Bremer Handelsgesellschaft mbH*[195] it was argued that s.11(1) of the Sale of Goods Act 1893 created a statutory dichotomy which divided all terms in contracts for the sale of goods into conditions and warranties. The Court of Appeal rejected that argument and held that an express term "shipment to be made in good condition" was an intermediate term the breach of which had to be so serious as to go to the root of the contract in order to entitle the buyer to reject the goods. In *Reardon Smith Line Ltd v Yngvar Hansen-Tangen*[196] two charterparties were entered into in similar terms for the charter of a ship "to be built by the Osaka Shipbuilding Co Ltd and known as Hull No. 354". Owing to her size, the ship was built at a new yard by Oshima Shipbuilding Co Ltd (a company in which Osaka had a 50 per cent interest) and bore the yard or hull number Oshima 004, although she was still referred to in external documents as "called Osaka 354". The charterers sought to reject the vessel on the ground that, by analogy with contracts of sale of goods, the description of the ship was a condition of the contract, any departure from which justified rejection. The House of Lords held that they were not entitled to do so. On the other hand, terms, for example, in contracts of sale of goods that the goods contracted to be sold are afloat or already shipped,[197] or on board a ship

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189 *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 Q.B. 26; *Nitrate Corp of Chile Ltd v Pansuiza Compania de Navegacion SA* [1980] 1 Lloyd's Rep. 638.

190 *Compagnie Generale Maritime v Diakan Spirit SA* [1982] 2 Lloyd's Rep. 574.

191 *Freeman v Taylor* (1831) 8 Bing. 124; *Clipsham v Vertue* (1843) 5 Q.B. 265; *MacAndrew v Chapple* (1866) L.R. 1 C.P. 643.

192 *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc* [1979] A.C. 757.

193 *MacAndrew v Chapple* (1866) L.R. 1 C.P. 643, 648.

194 See Vol.II, paras 42-395, 47-056, 47-074—47-115. The Consumer Rights Act 2015 (see below, Vol.II, para.41-497) does not refer to the terms to be treated as included in contracts that fall within the scope of Ch.2 of Pt 1 of the Act as conditions or warranties but rather sets out the remedies to which the consumer is entitled if his statutory rights under such contracts are not met in ss.19–24: see below, Vol.II, paras 41-545 et seq.

195 [1976] Q.B. 44. See also *Tradax International SA v Goldschmidt* [1977] 2 Lloyd's Rep. 604 (provision as to impurities); *Aktion Maritime Corp of Liberia v S. Kasmas & Brothers Ltd* [1987] 1 Lloyd's Rep. 283 (condition of vessel on delivery); *Total International Ltd v Addax BV* [1996] 2 Lloyd's Rep. 333 (provision as to quality); *R G Grain Trade LLP v Feed Factors International Ltd* [2011] EWHC 1889 (Comm), [2011] 2 Lloyd's Rep. 432 (provision as to impurities). Contrast *Tradax Export SA v European Grain & Shipping Co* [1983] 2 Lloyd's Rep. 100 (fibre content included in description).

196 [1976] 1 W.L.R. 989. See also *Sanko Steamship Co Ltd v Kano Trading Ltd* [1978] 1 Lloyd's Rep. 156.

197 *Benabu & Co v Produce Brokers Co Ltd* (1921) 37 T.L.R. 609, 851; *Macpherson Train & Co Ltd v Howard Ross & Co Ltd* [1955] 1 W.L.R. 640, 642.

"now at Rangoon"[198] or on a ship that will sail direct to the port of destination,[199] or that they are "under deck",[200] or as to the date of shipment,[201] have been held to be part of the description of the goods, and hence conditions. Also, a stipulation as to the place of delivery in an FOB contract[202] and a stipulation "linerterms Rotterdam" in a CIF contract[203] have been held to be conditions. In each case, when deciding the appropriate classification of the term, it is necessary to pay careful attention to the facts and circumstances of the individual case.

(d) Renunciation[204]

Introduction A renunciation of a contract occurs when one party by words or conduct evinces an intention not to perform, or expressly declares that he is or will be unable to perform, his obligations under the contract in some essential respect.[205] The renunciation may occur before or at the time fixed for performance.[206] An absolute refusal by one party to perform his side of the contract will entitle the other party to terminate further performance of the contract,[207] as will also a clear and unambiguous assertion by one party that he will be unable to perform when the time for performance should arrive.[208] Short of such an express refusal or declaration, however, the test is to ascertain whether the action or actions of the party in default are such as to lead a reasonable person to conclude that he no longer intends to be bound by its provisions.[209] The renunciation is then evidenced by conduct. Also the party in default: **28-048**

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198 *Oppenheimer v Fraser* (1876) 34 L.T. 524.

199 *Bergerco USA v Vegoil Ltd* [1984] 1 Lloyd's Rep. 440.

200 *Montagu L. Meyer Ltd v Travaru A/B; H Cornelius of Gambleby* (1930) 46 T.L.R. 553; *Messers Ltd v Morrison's Export Co Ltd* [1939] 1 All E.R. 92.

201 *Bowes v Shand* (1877) 2 App. Cas. 455.

202 *Petrotrade Inc v Stinnes Handel GmbH* [1995] 1 Lloyd's Rep. 142.

203 *Soon Hua Seng Co Ltd v Glencore Grain Co Ltd* [1996] 1 Lloyd's Rep. 398.

204 Andrews, Tettenborn and Virgo, *Contractual Duties: Performance, Breach, Termination and Remedies*, 3rd edn (2020), Ch.6.

205 See also *Martin v Stout* [1925] A.C. 359; *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandelgesellschaft mbH* [1980] 2 Lloyd's Rep. 556; aff'd [1983] 2 A.C. 34 (place of renunciation); *Grand China Logistics Holding (Group) Co Ltd v Spar Shipping AS* [2016] EWCA Civ 982, [2016] 2 Lloyd's Rep. 447 at [66]–[78]; *Teekay Tankers Ltd v STX Offshore & Shipbuilding Co Ltd* [2017] EWHC 253 (Comm), [2017] 1 Lloyd's Rep 387 at [217]. The words "in some essential respect" are important given that not every breach or threatened breach of contract amounts to a renunciation: *SK Shipping Europe Plc v Capital VLCC 3 Corp* [2020] EWHC 3448 (Comm), [2021] 2 Lloyd's Rep. 109 at [300]. The question whether there has been a renunciation depends on what a reasonable person would understand from the conduct of the party alleged to have renounced the contract and all of the circumstances prevailing at the time of the termination, including the history of the transaction or relationship (*Green v White Lantern Film (Britannica) Ltd* [2023] EWHC 930 (Ch) at [207]). Silence, being equivocal, will generally not amount to a renunciation (*Alegrow SA v Yayla Agro Gida San Ve Nak SA* [2020] EWHC 1845 (Comm), [2021] 1 Lloyd's Rep. 565 at [69]–[73]) but it may do so where the silence is held to "speak", that is to say, it does, in the circumstances, communicate an intention to renounce the contract (*Stocznia Gdanska SA v Latvian Shipping Co* [2002] EWCA Civ 889, [2002] 2 Lloyd's Rep. 436 at [96]).

206 Where the renunciation takes place before the time fixed for performance, it is known as an anticipatory breach: below, para.28-070.

207 *Freeth v Burr* (1874) L.R. 6 C.P. 208, 214; *Thompson v Corroon* (1992) 42 W.I.R. 157.

208 *Anchor Line Ltd v Keith Rowell Ltd* [1980] 2 Lloyd's Rep. 351; *The Munster* [1983] 1 Lloyd's Rep. 370; *Texaco Ltd v Eurogulf Shipping Co Ltd* [1987] 2 Lloyd's Rep. 541.

209 *Universal Cargo Carriers Corp v Citati* [1957] 2 Q.B. 401, 436; aff'd in part [1957] 1 W.L.R. 979 and rev'd in part [1958] 2 Q.B. 254. See also *Morgan v Bain* (1874) L.R. 10 C.P. 15; *Bloomer v Bernstein* (1874) L.R. 9 C.P. 588; *Forslind v Becheley-Crundall*, 1922 S.C. (H.L.) 173; *Maple Flock*

> "… may intend in fact to fulfil (the contract) but may be determined to do so only in a manner substantially inconsistent with his obligations,"[210]

or may refuse to perform the contract unless the other party complies with certain conditions not required by its terms.[211] In such a case, there is little difficulty in holding that the contract has been renounced.[212] Nevertheless, not every intimation of an intention not to perform or of an inability to perform some part of a contract will amount to a renunciation. Even a deliberate breach, actual or threatened, will not necessarily entitle the innocent party to terminate further performance of the contract, since it may sometimes be that such a breach can appropriately be sanctioned in damages.[213] If the contract is entire and indivisible,[214] that is to say, if it is expressly or impliedly agreed that the obligation of one party is dependent or conditional upon complete performance by the other, then a refusal to perform or declaration of inability to perform any part of the agreement will normally entitle the party in default to treat himself as discharged from further liability.[215] But in any other case:

> "It is not a mere refusal or omission of one of the contracting parties to do something which he ought to do, that will justify the other in repudiating the contract; but there must be an absolute refusal to perform his side of the contract."[216]

28-049 Renunciation of some but not all obligations If one party evinces an intention not to perform or declares his inability to perform some, but not all, of his obligations under the contract, then the right of the other party to terminate further performance of the contract depends on whether the non-performance of those obligations will amount to a breach of a condition of the contract[217] or deprive him of substantially the whole benefit which it was the intention of the parties that he should obtain from the obligations of the parties under the contract then remain-

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Co v Universal Furniture Products (Wembley) Ltd [1934] 1 K.B. 148, 157; *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 1 W.L.R. 698; *Chilean Nitrate Sale & Corp v Marine Transportation Co Ltd* [1982] 1 Lloyd's Rep. 570, 580; *Re Olympia & York Canary Wharf Ltd (No.2)* [1993] B.C.C. 159, 168; *Nottingham Building Society v Eurodynamics Plc* [1995] F.S.R. 605, 611–612; *Seadrill Management Services Ltd v OAO Gazprom* [2009] EWHC 1530 (Comm), [2010] 1 Lloyd's Rep. 543 at [249]. cf. below, para.28-050.

210 *Ross T. Smyth & Co v Bailey, Son & Co* [1940] 3 All E.R. 60, 72; *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc* [1979] A.C. 757; *Kuwait Rocks Co v AMN Bulkcarriers Inc (The "Astra")* [2013] EWHC 865 (Comm), [2013] 2 Lloyd's Rep. 69; *Spar Shipping SA v Grand China Logistics Holding (Group) Co Ltd* [2015] EWHC 718 (Comm), [2015] 1 All E.R. (Comm) 879 at [208].

211 *BV Oliehandel Jongkind v Coastal International Ltd* [1983] 2 Lloyd's Rep. 463.

212 *Withers v Reynolds* (1831) 2 B. & Ad. 882; *Booth v Bowron* (1892) 8 T.L.R. 641.

213 *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, 365. See above, para.28-038.

214 See above, para.25-026.

215 *Longbottom & Co Ltd v Bass Walker & Co Ltd* [1922] W.N. 245. See also *Ebbw Vale Steel Co v Blaina Iron Co* (1901) 6 Com. Cas. 33.

216 *Freeth v Burr* (1878) L.R. 9 C.P. 208, 213, 214; *Chilean Nitrate Sales Corp v Marine Transportation Co Ltd* [1982] 1 Lloyd's Rep. 570, 572; *Aktion Maritime Corp of Liberia v S. Kasmas & Brothers Ltd* [1987] 1 Lloyd's Rep. 283, 306; *Torvald Klaveness A/S v Arni Maritime Corp* [1994] 1 W.L.R. 1465, 1476.

217 See above, para.28-014.

ing unperformed.[218] Words or conduct which do not amount to a renunciation will not justify a discharge.[219]

Unequivocal The renunciation must be "made quite plain".[220] In particular, where there is a genuine dispute as to the construction of a contract, the courts may be unwilling to hold that an expression of an intention by one party to carry out the contract only in accordance with his own erroneous interpretation of it amounts to a breach which entitles the other party to terminate performance of the contract[221]; and the same is true of a genuine mistake of fact[222] or law.[223] Even the giving of notice of rescission, or the commencement of proceedings by one party claiming rescission of the contract, does not necessarily amount to a breach which entitles the other party to terminate further performance of the contract, since such action may be taken in order to determine the respective rights of the parties, and so not evince an intention to abandon the contract.[224] On the other hand, it is, generally, no defence for a party who is alleged to have committed a breach which entitles the **28-050**

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218 *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc* [1979] A.C. 757; *Afovos Shipping Co SA v Pagnan & Filli* [1983] 1 W.L.R. 195, 203; *Weeks v Bradshaw* [1993] E.G.C.S. 65; *Amoco (UK) Exploration Co v British American Offshore Ltd* Unreported 16 November 2001, QB at [105]; *Dalkia Utilities Services Plc v Celtech International Ltd* [2006] EWHC 63 (Comm), [2006] 1 Lloyd's Rep. 599 at [133]; *Grand China Logistics Holding (Group) Co Ltd v Spar Shipping AS* [2016] EWCA Civ 982, [2016] 2 Lloyd's Rep. 447 at [73]–[76]. When assessing the nature and effects of the breach the court is concerned to do so objectively: *Shyam Jewellers Ltd v Cheeseman* [2001] EWCA Civ 1818 at [58].

219 *Franklin v Miller* (1836) 4 A. & E. 499; *Wilkinson v Clements* (1872) L.R. 8 Ch. App. 96; *Re Phoenix Bessemer Steel Co* (1876) 4 Ch. D. 108; *Cornwall v Henson* [1900] 2 Ch. 298; *Dominion Coal Co Ltd v Dominion Iron and Steel Co Ltd* [1909] A.C. 293; *Household Machines v Cosmos Exports* [1947] K.B. 217; *Thorpe v Fasey* [1949] Ch. 649; *Peter Dumenil & Co Ltd v James Ruddin Ltd* [1953] 1 W.L.R. 815.

220 *Spettabile Consorzio Veneziana di Armamento di Navigazione v Northumberland Shipbuilding Co Ltd* (1919) 121 L.T. 628, 634, 635; *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 W.L.R. 277, 287, 288; *Anchor Line Ltd v Keith Rowell Ltd* [1980] 2 Lloyd's Rep. 351, 353; *Thompson v Corroon* (1993) 42 W.I.R. 157; *Nottingham Building Society v Eurodynamics Plc* [1995] F.S.R. 605; *Jaks (UK) Ltd v Cera Investment Bank SA* [1998] 2 Lloyd's Rep. 89, 92–93; *Donovan v Grainmarket Asset Management LLP* [2021] EWCA Civ 686 at [59]; *EMFC Loan Syndications LLP v Resort Group Plc* [2021] EWCA Civ 844, [2022] 1 W.L.R. 717 at [87]. This proposition applies to words and conduct said to demonstrate that a party is persisting in an earlier repudiation as well as to the earlier repudiation itself (*Safehaven Investments Inc v Springbok Ltd* (1996) 71 P. & C.R. 59, 69). See also *Warinco A.G. v Samor SpA* [1979] 1 Lloyd's Rep. 450; *Metro Meat Ltd v Fares Rural Co Pty Ltd* [1985] 2 Lloyd's Rep. 13; *Sanko SS Co Ltd v Eacom Timber Sales Ltd* [1987] 1 Lloyd's Rep. 487; *Alfred C. Toepfer International GmbH v Itex Itagram Export SA* [1993] 1 Lloyd's Rep. 360, 361; *Thompson v Corroon* (1993) 42 W.I.R. 157.

221 *James Shaffer Ltd v Findlay Durham & Brodie* [1953] 1 W.L.R. 106; *Sweet & Maxwell Ltd v Universal News Services Ltd* [1964] 2 Q.B. 699; *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 W.L.R. 277; *Telfair Shipping Corp v Athos Shipping Co SA* [1983] 1 Lloyd's Rep. 127; *Design Co v King* Unreported 7 July 1992, CA; *Vaswani v Italian Motors (Sales and Services) Ltd* [1996] 1 W.L.R. 270; *Mitsubishi Heavy Industries Ltd v Gulf Bank K.S.C.* [1997] 1 Lloyd's Rep. 343, 354; *Orion Finance Ltd v Heritable Finance Ltd* Unreported 10 March 1997, CA.

222 *Kent v Godts* (1855) 26 L.T.(O.S.) 88; *Peter Dumenil & Co Ltd v James Ruddin Ltd* [1953] 1 W.L.R. 815; *Alfred C. Toepfer v Peter Cremer* [1975] 2 Lloyd's Rep. 118.

223 *Freeth v Burr* (1874) L.R. 9 C.P. 208, 214; *Mersey Steel & Iron Co v Naylor Benzon & Co* (1884) 9 App. Cas. 434. Contrast *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc* [1979] A.C. 757.

224 *Spettabile Consorzio Veneziano di Armamento di Navigazione v Northumberland Shipbuilding Co Ltd* (1919) 121 L.T. 628; *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 W.L.R. 277.

other party to terminate the contract to show that he acted in good faith.[225] The courts have struggled to reconcile the latter proposition with their reluctance to conclude that a party who has acted in good faith but was mistaken has thereby committed a breach which entitles the other party to terminate the contract.

28-051 Reconciliation of the case-law The result of this tension is that the cases are not at all easy to reconcile[226] and have been said to be "highly fact sensitive".[227] The test that is applied by the courts can, however, be set out in straightforward terms: it is whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contact.[228] It is the application of this test to the facts of individual cases which has proved to be less than straightforward. All of the circumstances must be taken into account insofar as they bear on an objective assessment of the intention of the contract breaker.[229] Thus, in an appropriate case, a court may have regard to the motive of the contract breaker where it reflects something of which the innocent party was, or a reasonable person in his position would have been, aware.[230] In the case where the breach takes the form of a notice which does not comply with the terms of the contract, a court is unlikely to find the breach is one which entitles the other party to terminate further performance of the contract where the notice-giver had made a genuine mistake in issuing the deficient notice, the recipient of the notice was aware of the mistake and deliberately refrained from pointing out the mistake until after the notice-giver purported to terminate the contract in reliance upon the deficient notice.[231]

(e) Impossibility Created by One Party

28-052 Impossibility Where one party has, by his own act or default,[232] disabled himself from performing his contractual obligations in some essential respect, the other

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[225] *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc* [1979] A.C. 757.

[226] In particular, the decisions of the House of Lords in *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 W.L.R. 277 and *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc* [1979] A.C. 757 are not at all easy to reconcile. However, it may be that a comparison with other cases will be of "limited value"; *Eminence Property Developments Ltd v Heaney* [2010] EWCA Civ 1168, [2011] 2 All E.R. (Comm) 223 at [62]; *Green v White Lantern Film (Britannica) Ltd* [2023] EWHC 930 (Ch) at [208].

[227] *Eminence Property Developments Ltd v Heaney* [2010] EWCA Civ 1168, [2011] 2 All E.R. (Comm) 223 at [62]; *Green v White Lantern Film (Britannica) Ltd* [2023] EWHC 930 (Ch) at [209].

[228] [2010] EWCA Civ 1168, [2011] 2 All E.R. (Comm) 223 at [61]. For cases in which this test was satisfied see *Flanagan v Liontrust Investment Partners LLP* [2015] EWHC 2171 (Ch) and *Al Giorgis Oil Trading Ltd v AG Shipping & Energy Pte Ltd (The "Marquessa")* [2021] EWHC 2319 (Comm), [2022] 1 Lloyd's Rep. 357, and for cases in which it was not satisfied see *Mr H TV Ltd v ITV2 Ltd* [2015] EWHC 2840 (Comm) at [269]–[275] and *Olympic Council of Asia v Novans Jets LLP* [2022] EWHC 88 (Comm) at [154]. It is also important to recall that any renunciation does not of itself bring the contract to an end (see below, para.28-054) so that, for example, it is open to the recipient of any notice to treat it as invalid and to affirm the contract (*Topalsson GmbH v Rolls-Royce Motor Cars Ltd* [2023] EWHC 1765 (TCC) at [291]).

[229] [2010] EWCA Civ 1168, [2011] 2 All E.R. (Comm) 223 at [63].

[230] [2010] EWCA Civ 1168, [2011] 2 All E.R. (Comm) 223 at [63].

[231] [2010] EWCA Civ 1168, [2011] 2 All E.R. (Comm) 223 at [63]; *Oates v Hooper* [2010] EWCA Civ 91, [2011] 1 P. & C.R. DG15.

[232] See also above, paras 27-091—27-094.

party will be entitled to treat himself as discharged.[233] The inability to perform his contractual obligations must be established on the balance of probabilities and the fact that a party has:

> "… entered into inconsistent obligations does not in itself necessarily establish such inability, unless these obligations are of such a nature or have such an effect that it can truly be said that the party in question has put it out of his power to perform his obligations."[234]

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

> "A party is deemed to have incapacitated himself from performing his side of the contract, not only when he deliberately puts it out of his power to perform the contract, but also when by his own act or default circumstances arise which render him unable to perform his side of the contract or some essential part thereof."[235]

So, where a person undertook to transfer certain furniture, but before he could do so a judgment creditor took the furniture in execution and sold it, his inability to perform, though not due to his own deliberate act, constituted a breach of the agreement.[236] However, where part only of one party's obligations are rendered impossible of performance, the other party will not be entitled to terminate further performance of the contract unless the resulting non-performance would amount to a breach of condition[237] or would deprive him of substantially the whole benefit of the contract.[238]

Impossibility and renunciation In most cases where the impossibility created by one party has manifested itself by conduct, the innocent party will rely upon renunciation by conduct rather than impossibility, because renunciation is so much easier to establish.[239] Renunciation is to be preferred because the innocent party need only show that the conduct of the party in default was such as to lead a reasonable man to believe that he did not intend, or was not able, to perform his promise; whereas if the innocent party relies upon impossibility he must show that the contract was *in fact* impossible of performance due to the other party's default.[240] Nevertheless the innocent party would be well advised to rely on both grounds for treating the contract as at an end, because: (1) renunciation may not, for some **28-053**

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[233] *Sir Anthony Main's Case* (1595) 5 Co. Rep. 20; *Bodwell v Parsons* (1808) 10 East 359; *Amory v Brodrick* (1822) 5 B. & Ald. 712; *Short v Stone* (1846) 8 Q.B. 358; *Caines v Smith* (1846) 15 M. & W. 189; *O'Neil v Armstrong* [1895] 2 Q.B. 418; *Ogdens Ltd v Nelson* [1905] A.C. 109; *Measures Bros Ltd v Measures* [1910] 2 Ch. 248; *British and Beningtons Ltd v North Western Cachar Tea Co Ltd* [1923] A.C. 48, 72.

[234] *Alfred C. Toepfer International GmbH v Itex Itagrani Export SA* [1993] 1 Lloyd's Rep. 360, 362; *Geden Operations Ltd v Dry Bulk Handy Holdings Inc (M/V "Bulk Uruguay")* [2014] EWHC 885 (Comm), [2014] 2 Lloyd's Rep. 66.

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

[236] *Keys v Harwood* (1846) 2 C.B. 905; *Powell v Marshall, Parkes & Co* [1899] 1 Q.B. 710 (bankruptcy); cf. *Re Agra Bank* (1867-68) L.R. 5 Eq. 160; *Jennings' Trustees v King* [1952] Ch. 899.

[237] See above, para.28-014.

[238] *Afovos Shipping Co SA v Pagnan & Filli* [1983] 1 W.L.R. 195, 203; see below, para.28-012.

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

[240] *Universal Cargo Carriers Corp v Citati* [1957] 2 Q.B. 401, 449–450; *Re Simoco Digital UK Ltd, Thunderbird Industries LLC v Simoco Digital UK Ltd* [2004] EWHC 209 (Ch) [2004] 1 B.C.L.C. 541 at [22]–[23].

reason,[241] be open to him; and (2) if he has misinterpreted the conduct of the other party and so terminated the contract for an inadequate reason he may still fall back on impossibility if it should subsequently appear that the other party was in fact incapable of performing his promise.[242]

3. The Response of the Innocent Party

28-054 Introduction A breach of contract, even a breach of a condition or a breach of an intermediate term where the consequences of the breach are such as to deprive the innocent party of substantially the whole benefit which it was intended that he should obtain, does not bring the contract between the parties to an end. It is for the innocent party to decide whether or not to bring the contract to an end. In this respect, the innocent party has a decision to make. He can terminate further performance of the contract or he can decide not to do so. A party who decides not to do so may either simply withhold its performance or it may decide to affirm the contract. A party may withhold performance where performance by the other party is a condition precedent or a concurrent condition to its own obligation to perform.[243] In such a case, its obligation to perform is effectively in suspension pending performance by the other party. Alternatively, he may elect to affirm the contract, in which case the contract continues in existence for the benefit of both parties[244] and the innocent party is given a right to recover damages in respect of the loss occasioned by the breach.[245]

28-055 A middle way? The decision to be taken by the innocent party is sometimes described as an "election" between termination and affirmation and the impression given thereby is that the innocent party must choose between the two extremes and that there is no "middle way" or "third choice" open to it. It is true that there is no:

"… third choice, as a sort of via media, to affirm the contract and yet be absolved from

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

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

243 See above, paras 25-023—25-024.

244 *Avery v Bowden* (1855) 5 E. & B. 714; (1856) 6 E. & B. 953; *Frost v Knight* (1871-72) L.R. 7 Ex. 111, 112; *Johnstone v Milling* (1886) 16 Q.B.D. 460, 470; *Michael v Hart & Co* [1902] 1 K.B. 482, 492; *Tredegar Iron and Coal Co Ltd v Hawthorn Bros & Co* (1902) 18 T.L.R. 716; *Hain SS Co Ltd v Tate & Lyle Ltd* (1936) 41 Com. Cas. 350, 355, 363; *Heyman v Darwins Ltd* [1942] A.C. 356, 361; *Chandris v Isbrandtsen Moller Co Inc* [1951] 1 K.B. 240, 248; *Howard v Pickford Tool Co Inc* [1951] 1 K.B. 417, 421; *White & Carter (Councils) Ltd v McGregor* [1962] A.C. 413; *Cranleigh Precision Engineering Ltd v Bryant* [1965] 1 W.L.R. 1293; *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, 398, 418; *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 W.L.R. 361, 368, 375, 381; *Mayfair Photographic Supplies Ltd v Baxter Hoare & Co Ltd* [1972] 1 Lloyd's Rep. 410, 417; *Lakshmijit v Sherani* [1974] A.C. 605; *Thomas Marshall (Exports) Ltd v Guinle* [1979] Ch. 227; *Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory* [1979] A.C. 91; *Fercometal SARL v Mediterranean Shipping Co SA* [1989] A.C. 788; *Vitol SA v Norelf* [1996] A.C. 800; *Geys v Société Générale, London Branch* [2012] UKSC 63, [2013] 1 A.C. 513.

245 *Bentsen v Taylor, Sons & Co* [1893] 2 Q.B. 274; *Wallis, Son and Wells v Pratt and Haynes* [1911] A.C. 394; *Hain SS Co Ltd v Tate & Lyle Ltd* (1936) 41 Com. Cas. 350; *Chandris v Isbrandtsen Moller Co Inc* [1951] 1 K.B. 240; *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361; Sale of Goods Act 1979 s.11(2). See also below, para.28-056 (affirmation).

> tendering further performance unless and until [the breaching party] gives reasonable notice that he is once again able and willing to perform."[246]

But the proposition that there is no middle way can be over-stated. There is a sense in which there is a middle way open to the innocent party in that he is given a period of time in which to make up his mind what he is going to do by way of response to the breach. This point was well expressed by Rix LJ in *Stocznia Gdanska SA v Latvian Shipping Co (No.2)*[247] when he stated:

> "In my judgment, there is of course a middle ground between acceptance of repudiation and affirmation of the contract, and that is the period when the innocent party is making up his mind what to do. If he does nothing for too long, there may come a time when the law will treat him as having affirmed. If he maintains the contract in being for the moment, while reserving his right to treat it as repudiated if his contract partner persists in his repudiation, then he has not yet elected. As long as the contract remains alive, the innocent party runs the risk that a merely anticipatory repudiatory breach, a thing 'writ in water' until acceptance, can be overtaken by another event which prejudices the innocent party's rights under the contract—such as frustration or even his own breach. He also runs the risk, if that is the right word, that the party in repudiation will resume performance of the contract and thus end any continuing right in the innocent party to elect to accept the former repudiation as terminating the contract."[248]

The length of the period given to the innocent party in order to make up his mind will very much depend upon the facts of the case, including whether there was any urgency attaching to the performance of the contract[249] or whether any detriment was suffered by the party in breach as a result of the failure of the innocent party to notify him of the breach in order that it might be remedied.[250] The period may not be a long one because a party who does nothing for too long may be held to have affirmed the contract.[251] Nor can a party extend the period of time which it has

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246 *Fercometal SARL v Mediterranean Shipping Co SA* [1989] A.C. 788, 801; *Energy Works (Hull) Ltd v MW High Tech Projects UK Ltd* [2022] EWHC 3275 (TCC) at [75]–[76]. English law does not permit a contracting party unilaterally to cure a repudiatory breach once it has been committed. The party in breach can attempt to persuade the innocent party to affirm the contract. But the choice whether to affirm or not is the choice of the innocent party. It cannot be taken away from him by the party in breach making an offer of amends: *Bournemouth University Higher Education Corp v Buckland* [2010] EWCA Civ 121, [2010] I.C.R. 908.

247 [2002] EWCA Civ 889, [2002] 2 Lloyd's Rep. 436; *Astea (UK) Ltd v Time Group Ltd* [2003] EWHC 725 (TCC), [2003] All E.R. (D) 212 (Apr).

248 [2002] EWCA Civ 889, [2002] 2 Lloyd's Rep. 436 at [87]; *Force India Formula One Team Ltd v Etihad Airways PJSC* [2010] EWCA Civ 1051, [2011] E.T.M.R. 10 at [113]–[116]; *White Rosebay Shipping SA v Hong Kong Chain Glory Shipping Ltd* [2013] EWHC 1355 (Comm), [2013] 2 All E.R. (Comm) 449 at [22]; *Edge Tools & Equipment Ltd v Greatstar Europe Ltd* [2018] EWHC 170 (QB) at [54]; *Pharmapac (UK) Ltd v HBS Healthcare Ltd* [2022] EWHC 23 (Comm) at [36].

249 *Force India Formula One Team Ltd v Etihad Airways PJSC* [2010] EWCA Civ 1051, [2011] E.T.M.R. 10 at [122]. Thus, 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.

250 *Force India Formula One Team Ltd v Etihad Airways PJSC* [2010] EWCA Civ 1051, [2011] E.T.M.R. 10 at [122]; *Havila Kystruten AS v Abarca Companhia de Seguros SA* [2022] EWHC 3196 (Comm) at [283].

251 Although mere inactivity after the breach does not, of itself, amount to an affirmation: see below para.28-056.

to make up his mind by simply seeking to reserve its rights.[252] The length of time will also depend upon the time at which the innocent party's obligations fall due for performance. A contract remains in force until it has been terminated for breach so that a contracting party who has not elected to terminate the contract remains bound to perform his obligations unless the effect of the other party's breach is to prevent performance of the innocent party's obligation becoming due, in which case he is entitled to withhold performance.[253]

28-056 Affirmation Where the innocent party, being entitled to choose whether to treat the contract as continuing or to accept the repudiation and terminate further performance of the contract, elects to treat the contract as continuing, he is usually said to have "affirmed" the contract.[254] He will not be held to have elected to affirm the contract unless, first, he has knowledge of the facts giving rise to the breach,[255] and, secondly, he has knowledge of his legal right to choose between the alternatives open to him.[256] When deciding whether the innocent party has affirmed the contract, a court is not conducting a "mechanical exercise" but is exercising a judgment.[257] The acceptance of the repudiation (as the decision to terminate is often termed) must be "real", that is to say, there must be a "conscious intention to bring the contract to an end, or the doing of something that is inconsistent with its continuation".[258] Affirmation may be express or implied. It will be implied if, with knowledge of the breach and of his right to choose, he does some unequivo-

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[252] *Havila Kystruten AS v Abarca Companhia de Seguros SA* [2022] EWHC 3196 (Comm) at [285]; *Antaios v Salen Rederierna (The Antaios)* [1983] 1 W.L.R. 1362, 1370–1371.

[253] See Peel (ed.), *Treitel on The Law of Contract*, 15th edn (2020), paras 18-001—18-029 and also above para.25-025; *Energy Works (Hull) Ltd v MW High Tech Projects UK Ltd* [2022] EWHC 3275 (TCC) at [77] (where it is observed that the period of time available to a party in which to make up its mind "is not … a right to suspend performance").

[254] *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, 398; *Peyman v Lanjani* [1985] Ch. 457; *Tele2 International Card Co SA v Kub 2 Technology Ltd* [2009] EWCA Civ 9, [2009] All E.R. (D) 144 (Jan). Affirmation following a repudiatory breach and affirmation following a misrepresentation (on which see above paras 10-144—10-145) are both species of waiver by election (*SK Shipping Europe Plc v Capital VLCC 3 Corp* [2022] EWCA Civ 231, [2022] 2 All E.R. (Comm) 784 at [73]), although there may be practical differences, at least in terms of consequences, between a delay in exercising a right to rescind a contract and delay in exercising a right to terminate a contract (*SK Shipping Europe Plc v Capital VLCC 3 Corp* [2020] EWHC 3448 (Comm), [2021] 2 Lloyd's Rep. 109 at [205]).

[255] *Matthews v Smallwood* [1910] 1 Ch. 777, 786; *U.G.S. Finance Ltd v National Mortgage Bank of Greece* [1964] 1 Lloyd's Rep. 446, 450; *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, 426; *Panchaud Frères SA v Etablissements General Grain Co* [1970] 1 Lloyd's Rep. 53, 57; *Kammins Ballrooms & Co Ltd v Zenith Investments (Torquay) Ltd* [1971] A.C. 850; *Peyman v Lanjani* [1985] Ch. 457; *Yukong Line Ltd of Korea v Rendsberg Investments Corp of Liberia* [1996] 2 Lloyd's Rep. 604, 607; *SK Shipping Europe Plc v Capital VLCC 3 Corp* [2020] EWHC 3448 (Comm), [2021] 2 Lloyd's Rep. 109 at [202]; aff'd on appeal [2022] EWCA Civ 231, [2022] 2 All E.R. (Comm) 784 at [73].

[256] *Kendall v Hamilton* (1879) 4 App. Cas. 504, 542; *Peyman v Lanjani* [1985] Ch. 457. cf. *Sea Calm Shipping Co SA v Chantiers Navals de L'Esterel* [1986] 2 Lloyd's Rep. 294; *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India* [1990] 1 Lloyd's Rep. 391, 398 where the issue was noted but not resolved; *Yukong Line Ltd of Korea v Rendsberg Investments Corp of Liberia* [1996] 2 Lloyd's Rep. 604, 607; *SK Shipping Europe Plc v Capital VLCC 3 Corp* [2020] EWHC 3448 (Comm), [2021] 2 Lloyd's Rep. 109 at [202]; aff'd on appeal [2022] EWCA Civ 231, [2022] 2 All E.R. (Comm) 784 at [73].

[257] *White Rosebay Shipping SA v Hong Kong Chain Glory Shipping Ltd* [2013] EWHC 1355 (Comm), [2013] 2 All E.R. (Comm) 449 at [38].

[258] *Geys v Société Générale, London Branch* [2012] UKSC 63, [2013] 1 A.C. 513 at [17].

cal[259] act from which it may be inferred that he intends to go on with the contract regardless of the breach or from which it may be inferred that he will not exercise his right to treat the contract as terminated.[260] Affirmation must be total: the innocent party cannot approbate and reprobate by affirming part of the contract and disaffirming the rest, for that would be to make a new contract.[261] Equally a party cannot affirm the contract for a limited period of time and then abrogate it on the expiry of that period of time.[262] Mere inactivity after breach does not of itself amount to affirmation,[263] nor (it seems) does the commencement of an action claiming damages for breach.[264] The mere fact that the innocent party has called on the party in breach to change his mind, accept his obligations and perform the contract will not generally, of itself, amount to an affirmation:

> "… the law does not require an injured party to snatch at a repudiation and he does not automatically lose his right to treat the contract as discharged merely by calling on the other to reconsider his position and recognize his obligation."[265]

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[259] *China National Foreign Trade Transportation Corp v Evolgia Shipping Co SA of Panama* [1979] 1 W.L.R. 1018; *Peyman v Lanjani* [1985] Ch. 457; *State Securities Plc v Initial Industry Ltd* [2004] EWHC 3482 (Ch), [2004] All E.R. (D) 317 (Jan) (acceptance of rental payment held not to have amounted to an election to continue with the contract); *Garside v Black Horse Ltd* [2010] EWHC 190 (QB), [2010] All E.R. (D) 98 (Mar) at [28]; *Motortrak Ltd v FCA Australia Pty Ltd* [2018] EWHC 990 (Comm), [75]–[82].

[260] *Pust v Dowie* (1865) 5 B. & S. 33; *Bentsen v Taylor, Sons & Co* [1893] 2 Q.B. 274; *Matthews v Smallwood* [1910] 1 Ch. 777; *Hain SS Co Ltd v Tate & Lyle Ltd* (1936) 41 Com. Cas. 350, 355, 363; *Temple SS Co v V/O Sovfracht* (1946) 79 Ll. L. Rep. 1, 11; *Chandris v Isbrandtsen Moller Inc* [1951] 1 K.B. 240; *Denmark Productions Ltd v Boscobel Productions Ltd* [1969] 1 Q.B. 699, 731; *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361; *Sea Calm Shipping Co SA v Chantiers Navals de L'Esterel* [1986] 2 Lloyd's Rep. 294; *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India* [1990] 1 Lloyd's Rep. 391, 398; *Laing Management Ltd v Aegon Insurance Co (UK) Ltd* (1998) 86 Build. L.R. 70, 108 (although the conclusion that the contract remained alive for the benefit of both parties does not sit easily with the fact that the plaintiffs had expressly relied upon an express power to terminate contained in the contract).

[261] *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, 398. See also *Johnstone v Milling* (1886) 13 Q.B.D. 460; *Lanes Group Plc v Galliford Try Infrastructure Ltd* [2011] EWHC 1035 (TCC), [2011] B.L.R. 438 at [26].

[262] *Norwest Holst Ltd v Harrison* [1985] I.C.R. 668, 683; *Walkinshaw v Diniz* [2001] 1 Lloyd's Rep. 632, 643. However, it is unlikely that there is an "inflexible rule that an acceptance of a repudiation can only be effective if it purports to bring about immediate termination in circumstances where the contract calls for no performance from either party in the interval before termination is expressed to take effect": *Shell Egypt West Manzala GmbH v Dana Gas Egypt Ltd* [2010] EWHC 465 (Comm), [2010] All E.R. (D) 156 (Mar) at [27].

[263] *Perry v Davis* (1858) 3 C.B.(N.S.) 769; *Cranleigh Precision Engineering Ltd v Bryant* [1965] 1 W.L.R. 1293; *Nichimen Corp v Gatoil Overseas Inc* [1987] 2 Lloyd's Rep. 46; *Edge Tools & Equipment Ltd v Greatstar Europe Ltd* [2018] EWHC 170 (QB) at [55] (although on the facts inaction over a 10-month period would have sufficed to amount to an affirmation of the contract by conduct: at [65]). See also *Clough v L.N.W. Ry* (1871) 7 Ex. 26; *Allen v Robles* [1969] 1 W.L.R. 193; *Cantor Fitzgerald International v Bird* [2002] I.R.L.R. 867. But see *Denmark Productions Ltd v Boscobel Productions Ltd* [1969] 1 Q.B. 699; *Scandinavian Trader Tanker Co AB v Flota Petrolea Ecuatoriana* [1981] 2 Lloyd's Rep. 425, 430; aff'd [1983] 2 A.C. 694.

[264] *General Billposting Co Ltd v Atkinson* [1909] A.C. 118; *Garnac Grain Co Ltd v H.M. Fauré & Fairclough Ltd* [1966] 1 Q.B. 650; aff'd [1968] A.C. 1130n. Equally, a decision not to pursue the remedy of specific performance does not commit the innocent party to accept a repudiatory or an anticipatory breach: *Bear Stearns Bank Plc v Forum Global Equity Ltd* [2007] EWHC 1576 (Comm) at [127].

[265] *Yukong Line Ltd of Korea v Rendsberg Investments Corp of Liberia* [1996] 2 Lloyd's Rep. 604, 608. Moore-Bick J added that, in his view, the courts should generally be "slow" to accept that the in-

But if the innocent party unreservedly[266] continues to press for performance or accepts performance by the other party after becoming aware of the breach and of his right to elect, he will be held to have affirmed the contract. Reliance upon a term of the contract (such as a term giving a party the right to claim a refund) will not be held to amount to an affirmation, at least in the case where the party who is alleged to have affirmed the contract has made it clear that it was treating the contract as discharged.[267]

28-057 Affirmation irrevocable Once the innocent party has elected to affirm the contract, and this has been communicated to the other party, then the choice becomes irrevocable.[268] There is no need to establish reliance or detriment by the party in default.[269] Thus the innocent party, having affirmed, cannot subsequently change his mind and rely on the breach to justify treating himself as discharged.[270] Nevertheless, in the case of a breach which is persisted in by the other party, the fact that the innocent party has continued to press for performance will not normally preclude him at a later stage from terminating the contract.[271] In such a case the innocent party is not terminating on account of the original repudiation and going

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nocent party has committed itself irrevocably to going on with the contract and then leave it to "the doctrine of estoppel" (below, para.28-059) to remedy any potential injustice which may arise in the case where the party in breach has relied upon a representation by the innocent party which suggests that the contract has been affirmed. See also *Internet Trading Clubs Ltd v Freeserve (Investments) Ltd* [2001] All E.R. (D) 185 (Jun); *Jet2.com Ltd v SC Compania Nationala de Transporturi Aeriene Romane Tarom SA* [2012] EWHC 622 (QB), [2012] All E.R. (D) 218 (Mar) at [67]; *Ampurius Nu Homes Holdings Ltd v Telford Homes (Creekside) Ltd* [2012] EWHC 1820 (Ch), [2012] B.L.R. 387 at [123]; *Flanagan v Liontrust Investment Partners LLP* [2015] EWHC 2171 (Ch) and *Atlas Residential Solutions Management UK Ltd v Greengate SARL* [2020] EWHC 366 (Comm) at [110].

266 *Bremer Handelsgesellschaft mbH v Deutsche Conti Handelsgesellschaft mbH* [1983] 2 Lloyd's Rep. 45; *Cobec Brazilian Trading & Warehousing Corp v Alfred C. Toepfer* [1983] 2 Lloyd's Rep. 386 (waiver).

267 *Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2009] EWCA Civ 75, [2009] 1 Lloyd's Rep. 461 at [45]. This paragraph was cited with approval in *Pharmapac (UK) Ltd v HBS Healthcare Ltd* [2022] EWHC 23 (Comm) at [23].

268 *Hain SS Co Ltd v Tate & Lyle Ltd* (1936) 41 Com. Cas. 350, 355; *Peyman v Lanjani* [1985] Ch. 457; *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India* [1990] 1 Lloyd's Rep. 391; *Yukong Line Ltd of Korea v Rendsberg Investments Corp of Liberia* [1996] 2 Lloyd's Rep. 604, 607; *Laing Management Ltd v Aegon Insurance Co (UK) Ltd* (1998) 86 Build. L.R. 70, 108. However, affirmation may not be irrevocable in the case of an anticipatory breach of contract. In the case of an anticipatory breach, it has been argued that the innocent party ought to be entitled to go back upon his affirmation unless there has been some change of position by the party in breach in reliance upon the affirmation which would be prejudiced by the change of mind by the innocent party (see Treitel (1998) 114 L.Q.R. 22 and Peel (ed.), *Treitel on The Law of Contract*, 15th edn (2020), paras 17-094 et seq., a view which gains some support in principle from Thomas J in *Stocznia Gdanska SA v Latvian Shipping Co* [2001] 1 Lloyd's Rep. 537, 566 and from Rix LJ on appeal to the Court of Appeal, [2002] EWCA Civ 889, [2002] 2 Lloyd's Rep. 436 at [97]–[99]).

269 *Edm. J.M. Mertens & Co PVBA v Veevoeder Import Export Vimex BV* [1979] 2 Lloyd's Rep. 372, 384; *Telfair Shipping Corp v Athos Shipping Co SA* [1981] 2 Lloyd's Rep. 74, 87–88; aff'd [1983] 1 Lloyd's Rep. 127; *Peter Cremer v Granaria BV* [1981] 2 Lloyd's Rep. 583, 589; *Peyman v Lanjani* [1985] Ch. 457, 493, 500; *Sea Calm Shipping Co SA v Chantiers Navals de l'Esterel SA* [1986] 2 Lloyd's Rep. 294, 298; *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India* [1990] 1 Lloyd's Rep. 391, 398; *Yukong Line Ltd of Korea v Rendsberg Investments Corp of Liberia* [1996] 2 Lloyd's Rep. 604, 607.

270 *Bentsen v Taylor Sons & Co* [1893] 2 Q.B. 274.

271 *Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory* [1979] A.C. 91; *Johnson v Agnew* [1980] A.C. 367; *Stocznia Gdanska SA v Latvian Shipping Co* [2002] EWCA Civ 889, [2002] 2 Lloyd's Rep. 436 at [94]–[100]. In the context of an ongoing relationship such as a contract of employment it was

back on his election to affirm but rather is "treating the contract as being at an end on account of the continuing repudiation reflected in the other party's behaviour after the affirmation".[272] Nor, in the case of an ongoing contract, will affirmation in respect of one breach preclude the innocent party from terminating further performance of the contract by reason of further subsequent breaches.[273]

Loss of right to terminate There are, however, circumstances where the innocent party may be deprived of his right to terminate further performance of the contract notwithstanding that he has no knowledge of the breach or of the right to choose which the law gives to him. For example, there will be circumstances where, even in the absence of an actual election, the innocent party will be regarded as having made its election, and decided not to terminate, when a reasonable time has passed and it has not sought to bring the contract to an end.[274] A statutory example is provided by s.11(4) of the Sale of Goods Act 1979 whereby a buyer may, in certain circumstances, be deprived of his right to reject the goods and to terminate the contract by his acceptance of the goods, regardless of his lack of knowledge of the breach.[275] **28-058**

"Inchoate doctrine" of consistency The example given in the last paragraph was relied on and extended by the Court of Appeal in *Panchaud Frères SA v Etablisse-* **28-059**

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held in *Vairea v Reed Business Information Ltd* UKEAT/0177/15/BA at [81] that an "entirely innocuous" act cannot "revive" a previous fundamental breach so that it is necessary, in order to be entitled to terminate the contract on the ground of the other party's breach, to establish that there has been a new breach entitling the innocent party to make a second election. Where there has been a series of breaches, followed by an affirmation of what would otherwise have been the "last straw" entitling the innocent party to terminate the contract, the scale does not remain loaded and ready to be tipped by adding another "straw". Rather, the scale has been emptied by the affirmation and the new "straw" lands in an empty scale (*Vairea* at [84]).

272 *Safehaven Investments Inc v Springbok Ltd* (1996) 71 P. & C.R. 59, 68; *Stocznia Gdanska SA v Latvian Shipping Co* [2002] EWCA Civ 889, [2002] 2 Lloyd's Rep. 436 at [40] and [96]; *White Rosebay Shipping SA v Hong Kong Chain Glory Shipping Ltd* [2013] EWHC 1355 (Comm), [2013] 2 All E.R. (Comm) 449. In cases of this type a court must "carefully consider whether there were words or conduct after affirmation which demonstrate that the renunciation of the contract is continuing, so that a later acceptance of the continuing renunciation will be a legitimate termination of the contract" ([2013] EWHC 1355 (Comm) at [50]). In *Primera Maritime (Hellas) Ltd v Jiangsu Eastern Heavy Industry Co Ltd* [2013] EWHC 3066 (Comm), [2014] 1 All E.R. (Comm) 813 Flaux J declined to draw a distinction between a repeated renunciation and a continuing renunciation, stating (at [25]) that "any distinction between repetition and continuation of a renunciation is more apparent than real". It may not always be easy to distinguish between a continuing breach and a breach which has continuing or ongoing consequences but the breach occurred only at a single point in time and the cause of action accrued at that date: *Prakash Industries Ltd v Peter Beck und Partner Vermögensverwaltung GmbH* [2022] EWHC 754 (Comm) at [99], and see below para.30-015.

273 *Segal Securities Ltd v Thoseby* [1963] 1 Q.B. 887 (lease); *Yukong Line Ltd of Korea v Rendsberg Investments Corp of Liberia* [1996] 2 Lloyd's Rep. 604, 607; *Flanagan v Liontrust Investment Partners LLP* [2015] EWHC 2171 (Ch) at [217].

274 *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India* [1990] 1 Lloyd's Rep. 391, 398; *Kosmar Villa Holidays Inc v Trustees of Syndicate 1243* [2008] EWCA Civ 147, [2008] 1 C.L.C. 307 at [74].

275 *Wallis Son & Wells v Pratt and Haynes* [1910] 2 K.B. 1003, 1015; decision rev'd [1911] A.C. 394; *Peyman v Lanjani* [1985] Ch. 457. See *Benjamin's Sale of Goods*, 11th edn (2021), para.12-040. The Consumer Rights Act 2015 provides that s.11(4) will not apply to a contract to which Ch.2 of Pt 1 of the Consumer Rights Act applies. However, in the case of contracts falling within the scope of Ch.2 of Pt 1, a rather different remedial regime has been enacted (see ss.19–26 of the Act), including a short-term right to reject, the right to repair or replacement and the right to a price reduction or the final right to reject (see below, Vol.II, paras 41-497 et seq.).

ments General Grain Co,[276] a case which concerned a CIF contract for the sale of goods. Buyers of maize to be shipped in June/July 1965 accepted without objection shipping documents which included a bill of lading showing shipment on 31 July and also a certificate of quality which stated that the maize had been loaded in August. On arrival of the vessel the buyers rejected the maize on a ground subsequently found to be inadequate. Some three years later, at the hearing of an arbitration appeal, they became aware of late shipment, and then sought to justify their rejection on this ground. It was held that they were not entitled to do so. The case is best considered to have been decided on the relatively straightforward ground that a buyer under a CIF contract who accepts the documents will lose his right to reject the goods on the ground of their late shipment if he fails to notice the late shipment date when he takes up the documents.[277] Lord Denning MR, however, stated[278] that the buyers were estopped by their conduct from setting up late shipment as a ground for rejection, in that they had led the sellers to believe that they were not relying on that ground and it would be unjust or unfair to allow them to do so when they had had full opportunity of finding out from the contract documents what the real date of shipment was, but did not trouble to do so. Winn LJ agreed[279] that, having accepted the documents, the buyers could not properly thereafter turn round and say that the goods tendered were not contract goods. While doubting that there was anything which could be strictly described as an estoppel or quasi-estoppel, he considered that:

> "… there may be an inchoate doctrine stemming from the manifest convenience of consistency in pragmatic affairs, negativing any liberty to blow hot and cold in commercial conduct."[280]

The difficulty with the estoppel analysis is that there does not appear to have been any reliance by the sellers on any representation which was made by the buyers when they took up the documents. The "inchoate doctrine" referred to by Winn LJ has received "no support"[281] in subsequent cases and has generally been invoked as an argument of "last resort".[282] In so far as the case can be analysed as an example of estoppel by conduct, it is now clear that there is no "separate doctrine"[283] which can be derived from *Panchaud Frères* alone and the conventional requirements of

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[276] [1970] 1 Lloyd's Rep. 53. See also *Woodhouse A.C. Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1971] 2 Q.B. 23; aff'd [1972] A.C. 741; *Alma Shipping Corp v Union of India* [1971] 2 Lloyd's Rep. 494; *Alfred C. Toepfer v Cremer* [1975] 2 Lloyd's Rep. 118; *Waren Import Gesellschaft Krohn & Co v Alfred C. Toepfer* [1975] 1 Lloyd's Rep. 322; *Surrey Shipping Co Ltd v Cie Continentale (France) SA* [1978] 1 Lloyd's Rep. 191; *Bunge GmbH v Alfred C. Toepfer* [1978] 1 Lloyd's Rep. 506; *Avimex SA v Dewulf & Cie* [1979] 2 Lloyd's Rep. 57; *Procter & Gamble Philippine Manufacturing Corp v Peter Cremer GmbH & Co* [1988] 3 All E.R. 843, 848–852; *Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce* [1997] 4 All E.R. 514. cf. *V. Berg & Son Ltd v Vanden Avenne-Izegem PVBA* [1977] 1 Lloyd's Rep. 499.

[277] *B.P. Exploration Co (Libya) Ltd v Hunt* [1979] 1 W.L.R. 783, 810–811; *Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce* [1997] 4 All E.R. 514, 528, 530.

[278] [1970] 1 Lloyd's Rep. 53, 57–58. The estoppel explanation was preferred by Hirst J in *Procter & Gamble Philippine Manufacturing Corp v Peter Cremer GmbH & Co* [1988] 3 All E.R. 843, 852.

[279] [1970] 1 Lloyd's Rep. 53, 60.

[280] [1970] 1 Lloyd's Rep. 53, 59.

[281] *Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce* [1997] 4 All E.R. 514, 529.

[282] *B.P. Exploration Co (Libya) Ltd v Hunt* [1979] 1 W.L.R. 783, 811.

[283] *Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce* [1997] 4 All E.R. 514, 530.

estoppel by conduct must be satisfied on the facts of any future case.[284]

Waiver and estoppel Affirmation is sometimes regarded as a species of waiver, the innocent party "waiving" his right to terminate further performance of the contract.[285] But the word "waiver" is used in the law in a variety of different senses and so bears "different meanings".[286] Two types of waiver are relevant here. The first type may be called "waiver by election" and waiver is here used to signify the "abandonment of a right which arises by virtue of a party making an election".[287] Thus it arises when a person is entitled to alternative rights inconsistent with one another and that person acts in a manner which is consistent only with his having chosen to rely on one of them.[288] Affirmation is an example of such a waiver, since the innocent party elects or chooses to exercise his right to treat the contract as continuing and thereby abandons his inconsistent right to terminate further performance of the contract.[289] It is important to appreciate that, in this context, the party who makes the election only abandons his right to terminate the contract; he does not abandon his right to claim damages for the loss suffered as a result of the breach.[290] A second type of waiver may be called "waiver by estoppel" and it arises when the innocent party agrees with the party in default that he will not exercise his right to terminate the contract[291] or so conducts himself as to lead the party in default to believe that he will not exercise that right.[292] This type of waiver does not **28-060**

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284 *Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce* [1997] 4 All E.R. 514; *Alfred Street Properties Ltd v National Asset Management Agency* [2020] EWHC 397 (Comm) at [111].

285 See, e.g. Sale of Goods Act 1979 s.11(2).

286 *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India* [1990] 1 Lloyd's Rep. 391, 397; *Kosmar Villa Holidays Inc v Trustees of Syndicate 1243* [2008] EWCA Civ 147, [2008] 1 C.L.C. 307 at [36]–[38]. See also Wilken and Ghaly, *The Law of Waiver, Variation and Estoppel*, 3rd edn (2012), Ch.3 and above, paras 6-089, 26-043; below, para.28-062.

287 *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India* [1990] 1 Lloyd's Rep. 391, 398.

288 *Kammins Ballroom & Co Ltd v Zenith Investments (Torquay) Ltd* [1971] A.C. 850, 882–883; *China National Foreign Trade Transportation Corp v Evlogia Shipping Co SA of Panama* [1979] 1 W.L.R. 1018, 1024, 1034–1035; *Telfair Shipping Corp v Athos Shipping Co SA* [1981] 2 Lloyd's Rep. 74, 87; aff'd [1983] 1 Lloyd's Rep. 127; *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India* [1990] 1 Lloyd's Rep. 391, 398. Where the rights are not inconsistent but equivalent, no question of election arises: see *Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2009] EWCA Civ 75, [2009] 1 Lloyd's Rep. 461 at [44], where it was held that, where a contractual right to terminate corresponds to the right to terminate under the general law, no election is necessary. Similarly, it has been held that the doctrine of election did not apply to the exercise of a right to claim "performance relief" under an express contract term because the right did not present the contracting party with a "binary, all-or-nothing choice" between termination and affirmation but rather created a right which could be exercised at any point over the period of time for which performance of the contract had been interrupted: *Delta Petroleum (Caribbean) Ltd v British Virgin Islands Electricity Corp* [2020] UKPC 23, [2021] 1 W.L.R. 5741.

289 *Peyman v Lanjani* [1985] Ch. 457; *Sea Calm Shipping Co SA v Chantiers Navals d'Esterel SA* [1986] 2 Lloyd's Rep. 294; *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India* [1990] 1 Lloyd's Rep. 391, 399; *Yukong Line Ltd of Korea v Rendsberg Investments Corp of Liberia* [1996] 2 Lloyd's Rep. 604, 607.

290 The latter type of waiver, sometimes called "total waiver", is discussed, above, para.26-050; below para.28-062.

291 See above, para.28-058.

292 *Panchaud Frères SA v Etablissements General Grain Co* [1970] 1 Lloyd's Rep. 53; *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1971] 2 Q.B. 23; aff'd [1972] A.C. 741; *Alma Shipping Corp v Union of India* [1971] 2 Lloyd's Rep. 494; *Alfred C. Toepfer v Cremer* [1975] 2 Lloyd's Rep. 118.

exist as a separate principle[293] but is in fact an application of the principle of equitable estoppel deriving from the classic statement of Lord Cairns in *Hughes v Metropolitan Ry Co*.[294]

28-061 Similarities and differences Both waiver by election and waiver by estoppel share some common elements. The principal similarity is that both would appear to require that the party seeking to rely on it (i.e. the party in default) must show a clear and unequivocal representation, by words or conduct, by the other party that he will not exercise his strict legal rights to terminate the contract.[295] But there are also important differences between the two types of waiver. In the case of waiver by election the party who has to make the choice must either know[296] or have obvi-

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[293] *Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce* [1997] 4 All E.R. 514, 530, where the Court of Appeal rejected the argument that any separate doctrine could be derived from the decision of the Court of Appeal in *Panchaud Frères SA v Etablissements General Grain Co* [1970] 1 Lloyd's Rep. 53, above, para.28-059.

[294] (1877) 2 App. Cas. 439, see above, para.7-032. There would also appear to be a common law species of waiver (sometimes referred to as "forbearance", see above, para.6-089) but the differences between the two appear to be very slight. The equitable variety is most frequently relied upon in the courts.

[295] *Woodhouse A.C. Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] A.C. 741, 758; *V. Berg & Son Ltd v Vanden Avenne-Izegem PVBA* [1977] 1 Lloyd's Rep. 499; *Finagrain SA v Kruse SA* [1976] 2 Lloyd's Rep. 508; *Bremer Handesgesellschaft mbH v C. Mackprang Jr* [1979] 1 Lloyd's Rep. 221, 228; *Avimex SA v Dewulf & Cie* [1979] 2 Lloyd's Rep. 57, 67; *Peter Cremer v Granaria BV* [1981] 2 Lloyd's Rep. 583; *Telfair Shipping Corp v Athos Shipping Co SA* [1981] 2 Lloyd's Rep. 74, 87; *Peyman v Lanjani* [1985] Ch. 457, 501; *Cobec Brazilian Trading and Warehousing Corp v Alfred C. Toepfer* [1983] 2 Lloyd's Rep. 386; *Bremer Handelsgesellschaft mbH v Deutsche Conti-Handelsgesellschaft mbH* [1983] 2 Lloyd's Rep. 45; *Nichimen Corp v Gatoil Overseas Inc* [1987] 2 Lloyd's Rep. 46; *Yukong Line Ltd of Korea v Rendsberg Investments Corp of Liberia* [1996] 2 Lloyd's Rep. 604, 607; *Tameside MBC v Barlow Securities Group Services Ltd* [2001] EWCA Civ 1, [2001] B.L.R. 113, 122 ("it is not the function of the court to resolve ambiguities and, unless it can find a reasonably clear and definite meaning, then it is not entitled to make the finding that the representation was indeed clear and unequivocal"); *Persimmon Homes (South Coast) Ltd v Hall Aggregates (South Coast) Ltd* [2009] EWCA Civ 1108, [2009] N.P.C. 118; *Lancashire Insurance Co Ltd v MS Frontier Reinsurance Ltd* [2012] UKPC 42. When deciding whether or not the representation is clear and unequivocal, the court should consider the relevant communications as a whole: *Force India Formula One Team Ltd v 1 Malaysia Racing Team Sdn Bhd* [2013] EWCA Civ 780, [2013] R.P.C. 36 at [38]. More difficult is the question whether a demand for payment (or acceptance of payment) amounts to a waiver of the right to terminate. There is authority in the field of landlord and tenant law for the proposition that a demand for future instalments of rent accruing due in the future amounts to a waiver of the right to terminate for breach (*David Blackstone Ltd v Burnetts (West End) Ltd* [1973] 1 W.L.R. 1487) but it has been doubted whether such a principle, assuming that it exists, forms part of the general law of contract (*Parbulk II A/S v Heritage Maritime Ltd SA (The Mahakam)* [2011] EWHC 2917 (Comm), [2012] 1 Lloyd's Rep. 87 at [22]). A court may infer that a demand for payment is not consistent with an unequivocal communication that the contract is at an end (*Force India Formula One Team Ltd v 1 Malaysia Racing Team Sdn Bhd* [2013] EWCA Civ 780, [2013] R.P.C. 36 at [40]) but it may not be willing to conclude that a demand (as opposed to acceptance) of payment will in all circumstances amount to an affirmation of the contract (*Parbulk II A/S v Heritage Maritime Ltd SA (The Mahakam)* [2011] EWHC 2917 (Comm), [2012] 1 Lloyd's Rep. 87 at [22]). Much will depend on the surrounding circumstances and, this being the case, it is dangerous to attempt to extract a universal rule as to whether a demand for payment does or does not amount to an affirmation or a waiver of the right to terminate. cf. *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep. 109, 126. See also above, paras 7-039—7-042.

[296] *U.G.S. Finance Ltd v National Mortgage Bank of Greece* [1964] 1 Lloyd's Rep. 446, 450; *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361,

ous means of knowledge[297] of the facts giving rise to the right, and possibly of the existence of the right.[298] But in the case of waiver by estoppel neither knowledge of the circumstances nor of the right is required on the part of the person estopped; the other party is entitled to rely on the apparent election conveyed by the representation.[299] Waiver by election is final and so has permanent effect,[300] whereas the effect of an estoppel may be suspensory only.[301] This difference may not be so marked in the context of waiver of breach because here the waiver may have permanent effect because, in some circumstances, it would be inequitable to allow the innocent party to retract his waiver. For example, in the case where a buyer assures a seller that the goods are in conformity with the contractual specifications, and the seller, in reliance upon these assurances, does not make a fresh conforming tender when he could have done, the buyer will be held to have waived any breach relating to the conformity of the goods and so the waiver will have permanent effect.[302] Finally, waiver by estoppel requires that the party to whom the representation is made rely on that representation so as to make it inequitable for the representor to go back upon his representation.[303] There is, however, no such requirement in the case of waiver by election; once the election has been made it is final whether or not the party has acted in reliance upon the election having been made.[304] Waiver by estoppel is thus the "more flexible"[305] of the two doctrines.

Other waivers Affirmation must be distinguished from a waiver by one party of a term of the contract inserted for his benefit,[306] or a "total" waiver by the innocent party of the breach itself by which he forgoes, not merely his right to terminate further performance of the contract, but also any claim for damages for the breach.[307] **28-062**

425; *Panchaud Frères SA v Etablissements General Grain Co* [1970] 1 Lloyd's Rep. 53, 57; *Kosmar Villa Holidays Inc v Trustees of Syndicate 1243* [2008] EWCA Civ 147, [2008] 1 C.L.C. 307 at [38].

297 *Bremer Handelsgesellschaft mbH v C. Mackprang Jr* [1979] 1 Lloyd's Rep. 221, 228; *Avimex SA v Dewulf & Cie* [1979] 2 Lloyd's Rep. 57, 67–68.

298 *Peyman v Lanjani* [1985] Ch. 457 (affirmation).

299 *Panchaud Frères SA v Etablissements General Grain Co* [1970] 1 Lloyd's Rep. 53, 57, 59 (see above, para.28-059); *Peyman v Lanjani* [1985] Ch. 457, 501; *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India* [1990] 1 Lloyd's Rep. 391, 399.

300 *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India* [1990] 1 Lloyd's Rep. 391, 398; *Kosmar Villa Holidays Inc v Trustees of Syndicate 1243* [2008] EWCA Civ 147, [2008] 1 C.L.C. 307 at [38]. See also above, para.28-057.

301 *Hughes v Metropolitan Ry Co* (1877) 2 App. Cas. 439, see above, para.7-047.

302 *Toepfer v Warinco AG* [1978] 2 Lloyd's Rep. 569, 576. See above, paras 7-045, 7-048.

303 *Finagrain SA v Kruse SA* [1976] 2 Lloyd's Rep. 508, 535; *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep. 109, 127; *Bunge SA v Schleswig-Holsteinische Landweretschaftliche Hauptgenossenschaft GmbH* [1978] 1 Lloyd's Rep. 480; *Société Italo-Belge pour le Commerce et l'Industrie SA v Palm and Vegetable Oils (Malaysia) Sdn Bhd* [1982] 1 All E.R. 19; *Peter Cremer v Granaria BV* [1981] 2 Lloyd's Rep. 583; cf. *Alfred C. Toepfer v P. Cremer* [1975] 2 Lloyd's Rep. 118, 123. See also above, paras 7-043—7-045.

304 *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India* [1990] 1 Lloyd's Rep. 391, 399; *Yukong Line Ltd of Korea v Rendsburg Investments Corp of Liberia* [1996] 2 Lloyd's Rep. 604, 607; *Force India Formula One Team Ltd v 1 Malaysia Racing Team Sdn Bhd* [2013] EWCA Civ 780, [2013] R.P.C. 36 at [37].

305 *Kosmar Villa Holidays Inc v Trustees of Syndicate 1243* [2008] EWCA Civ 147, [2008] 1 C.L.C. 307 at [38].

306 See above, para.26-049.

307 Sale of Goods Act 1979 s.11(2); *Benjamin's Sale of Goods*, 11th edn (2021), paras 12-036—12-038. cf. *European Grain & Shipping Ltd v Peter Cremer* [1983] 1 Lloyd's Rep. 211.

28-063 Effect of affirmation Where the innocent party, being entitled to terminate further performance of the contract as a result of the other's breach, nevertheless elects to affirm the continued existence of the contract, he does not thereby necessarily relinquish his claim for damages for any loss sustained as a result of the breach.[308] Further, he may insist on holding the other party to the bargain and continue to tender due performance on his part.[309] In *White and Carter (Councils) Ltd v McGregor*,[310] the appellants, advertising contractors, agreed with the respondent, a garage proprietor, to display advertisements for his garage for three years. On the same day, the respondent repudiated the agreement and requested cancellation, but the appellants refused to cancel and performed their obligations under the contract. They then sued for the full contract price. The House of Lords, by a majority of three to two, upheld the claim. The appellants had elected to treat the contract as continuing and it remained in full effect. The decision in this case has not passed without criticism,[311] and one of the majority (Lord Reid) considered that the right to complete the contract and claim the price would not apply:

> "… if it can be shown that a person has no legitimate interest, financial or otherwise, in performing the contract rather than claiming damages."[312]

Further, if the innocent party is unable to complete the contract without the co-

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[308] *Bentsen v Taylor, Sons & Co* [1893] 2 Q.B. 274; *Hain SS Co Ltd v Tate & Lyle Ltd* (1936) 41 Com. Cas. 350, 363; *Chandris v Isbrandtsen Moller Co Inc* [1951] 1 K.B. 240, 248; *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, 395.

[309] *Heyman v Darwins Ltd* [1942] A.C. 356, 361.

[310] [1962] A.C. 413. See also *Tredegar Iron and Coal Co Ltd v Hawthorn Bros & Co* (1902) 18 T.L.R. 716; *International Correspondence Schools v Ayres* (1912) 106 L.T. 845; *Anglo-African Shipping Co of New York Inc v Mortner* [1962] 1 Lloyd's Rep. 81, 94; *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 W.L.R. 361, 373; *Gator Shipping Corp v Trans-Asiatic Oil Ltd SA* [1978] 2 Lloyd's Rep. 357; *Asamera Oil Corp Ltd v Sea Oil and General Corp* (1979) 89 D.L.R. (3d) 1, 26.

[311] Goodhart (1962) 78 L.Q.R. 263; Furmston (1962) 25 M.L.R. 364; Scott [1962] Camb. L.J. 12. cf. Nienaber [1962] Camb. L.J. 213; Peel (ed.), *Treitel on The Law of Contract*, 15th edn (2020), paras 21-012—21-017 and, for a more general review of the case law, see Liu (2011) 74 M.L.R. 171.

[312] [1962] A.C. 413, 431. This dictum was applied or approved in *Attica Sea Carriers Corp v Ferrostaal Poseidon Bulk Reederei GmbH* [1976] 1 Lloyd's Rep. 250, 255; *Gator Shipping Corp v Trans-Asiatic Oil Ltd SA* [1978] 2 Lloyd's Rep. 357, 372–374; *Clea Shipping Corp v Bulk Oil International Ltd* [1983] 2 Lloyd's Rep. 645; *Stocznia Gdanska SA v Latvian Shipping Co* [1995] 2 Lloyd's Rep. 592, 600–602 (Clarke J), [1996] 2 Lloyd's Rep. 132, 138–139, CA. (It was unnecessary for the House of Lords in *Stocznia Gdanska* to consider this point on appeal ([1998] 1 W.L.R. 574, 581)); *Ocean Marine Navigation Ltd v Koch Carbon Inc (The "Dynamic")* [2003] EWHC 1936 (Comm), [2003] 2 Lloyd's Rep. 693 at [23]; *Ministry of Sound (Ireland) Ltd v World Online Ltd* [2003] EWHC 2178 (Ch) at [64]–[66]; *Reichman v Beveridge* [2006] EWCA Civ 1659, [2007] Bus L.R. 412 at [17]; *Isabella Shipowner SA v Shagang Shipping Co Ltd* [2012] EWHC 1077 (Comm), [2012] 2 Lloyd's Rep. 61 at [42]–[50]; *Barclays Bank Plc v Unicredit Bank AG* [2012] EWHC 3655 (Comm), [2013] 2 Lloyd's Rep. 1 at [107]; and *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2015] EWHC 283 (Comm), [2015] 1 Lloyd's Rep. 359 (where it was suggested by Leggatt J at [94]–[98] that this line of cases should be seen alongside the cases concerned with the limits which the courts have implied on the exercise of a contractual discretion and the "increasing recognition in the common law world of the need for good faith in contractual dealings"). However, the Court of Appeal in *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2016] EWCA Civ 789, [2016] 2 Lloyd's Rep. 494 at [45] did not find it necessary to invoke a duty of good faith in order to decide the outcome of the case and expressed its concern about the dangers which may follow were a general principle of good faith to be established and invoked in a case such as the present. In any event, the Court of Appeal concluded that Lord Reid's legitimate interest test was not applicable in a case where the commercial purpose of the adventure had been frustrated such that further performance had become impossible (at [42]–[43] and [61]).

operation of the other party, his only remedy is to sue for damages and not for the contract sum.[313] So an employee who is wrongfully dismissed can ordinarily only sue for damages[314] and not for his wages or salary.[315] But the fact that the remedies of the innocent party are restricted to damages does not mean that termination occurs at the moment of breach[316]; he may (in the case of an anticipatory breach) refuse to accept the breach and await the time fixed for performance, keeping the contract alive during the interval. In such a case, the innocent party is not required to mitigate his loss before the time for performance arrives.[317] Finally, it would appear that the innocent party cannot continue to hold the contract open in a case where the contractual purpose of the adventure has been frustrated such that further performance of the contract is either impossible or would be something radically different from what had been agreed by the parties at the time of entry into the contract.[318]

Effect if repudiation not accepted If the innocent party elects to treat the contract as continuing, then it remains in existence for the benefit of the wrongdoer as well as of himself.[319] The wrongdoer is entitled to complete the contract and to take advantage of any supervening circumstance which would excuse[320] him from **28-064**

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313 [1962] A.C. 413, 430, 432, 439; *Finelli v Dee* (1968) 67 D.L.R. (2d) 293; *Denmark Productions Ltd v Boscobel Productions Ltd* [1969] 1 Q.B. 699; *Hounslow LBC v Twickenham Garden Developments Ltd* [1971] Ch. 233, 251–254; *Attica Sea Carriers Corp v Ferrostaal Poseidon Bulk Reederei GmbH* [1976] 1 Lloyd's Rep. 250, 256; *Telephone Rentals v Burgess Salmon & Co* [1987] 5 C.L. 52; *Ministry of Sound (Ireland) Ltd v World Online Ltd* [2003] EWHC 2178 (Ch) at [49]–[61]; *Isabella Shipowner SA v Shagang Shipping Co Ltd* [2012] EWHC 1077 (Comm), [2012] 2 Lloyd's Rep. 61 at [35]–[41].

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

315 *Denmark Productions Ltd v Boscobel Productions Ltd* [1969] 1 Q.B. 699; cf. *Boyo v Lambeth LBC* [1994] I.C.R. 727, 747 where Staughton LJ inclined to the view that the wrongfully dismissed employee should be able to sue for his wages. The criticism made by Staughton LJ was noted by Lord Wilson in *Geys v Société Générale, London Branch* [2012] UKSC 63, [2013] 1 A.C. 513, at [79] but the Supreme Court was not asked to resolve the issue on the facts. In *Sunrise Brokers LLP v Rodgers* [2014] EWCA Civ 1373, [2015] I.C.R. 272, [58] Longmore LJ noted that in the light of *Geys* the question may arise as to why the employee should not be allowed to sue for his salary or wages in such a situation. However, in the absence of clear authority that the employee is entitled to sue for his or her wages, it would appear that the remedy of the employee remains that he or she must sue for damages and therefore is subject to the duty to mitigate. See Vol.II, paras 43-206—43-208.

316 See (contracts of employment): Vol.II, para.43-197. See also *Heymans v Darwins Ltd* [1942] A.C. 356, 371.

317 *Shindler v Northern Raincoat Co Ltd* [1960] 1 W.L.R. 1038, 1048. When the time for performance arrives the doctrine of mitigation does come into play. The inapplicability of the doctrine of mitigation to cases of anticipatory breach has been criticised: see Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs*, 4th edn (2019), p.132.

318 *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2016] EWCA Civ 789, [2016] 2 Lloyd's Rep. 494 at [41]–[44] and [61]–[64].

319 *Frost v Knight* (1871-72) L.R. 7 Ex. 111, 112; *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, 395, 419, 437–438; *Fercometal SARL v Mediterranean Shipping Co SA* [1989] A.C. 788.

320 *Frost v Knight* (1871-72) L.R. 7 Ex. 111, 112; *Avery v Bowden* (1855) 5 E. & B. 714; (1856) 6 E. & B. 953 (below, para.28-073); *Heyman v Darwins Ltd* [1942] A.C. 356, 361; *Fercometal SARL v Mediterranean Shipping Co SA* [1989] A.C. 788; *Cantt Pak Ltd v Pak Southern China Property Investment Ltd* [2018] EWHC 2564 (Ch) (below, para.28-074).

or diminish[321] his liability. The question, however, arises whether the wrongdoer may raise as a defence to liability the fact that the innocent party has failed to perform or is unable to perform his own obligations in some fundamental respect at the time appointed for performance. The answer to this question turns on the difficult case of *Braithwaite v Foreign Hardwood Co Ltd*.[322] In that case, it was held that buyers of goods under a CIF[323] contract, who had wrongfully repudiated the contract, could not, in an action by the seller for damages for non-acceptance of a particular consignment of the goods, rely as a defence to liability upon the fact that part of the consignment covered by documents tendered to and refused by them did not answer to the quality specified by the contract. The case has been taken to establish the proposition that, if the innocent party elects to keep the contract alive notwithstanding a prior repudiation by the party in default, then so long as the repudiating party persists in his refusal to perform, he absolves the innocent party from his obligation to perform the contract in accordance with its terms.[324] Such a proposition may be defended on the ground that it would be an empty formality to require the innocent party to carry out his obligations under the contract in the face of a clear refusal by the other party to perform. But it is inconsistent with the principle that, if a repudiation is not accepted, the contract is kept alive for the benefit of *both* parties and the liabilities and obligations of the innocent party continue. In subsequent cases the facts of *Braithwaite* have been the subject of scrutiny,[325] and the opinion has been expressed that the documents covering the defective consignment were never tendered, but only offered to be tendered, and that at this stage the seller in fact accepted the buyers' repudiation and the contract was brought to an end.[326] Alternatively, the House of Lords has stated[327] that the proposition sought to be derived from *Braithwaite* is wrong: there is no half-way house between affirmation (in which case the rights and obligations of both parties continue) and termination (in which case the rights and obligations of both parties which remain unperformed are discharged).[328]

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321 *Leigh v Paterson* (1818) 8 Taunt. 540; *Brown v Muller* (1872) L.R. 7 Ex. 319; *Tredegar Iron and Coal Co Ltd v Hawthorn Bros & Co* (1902) 18 T.L.R. 716; *Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory* [1979] A.C. 91, 104.

322 [1905] 2 K.B. 543. See Dawson (1980) 96 L.Q.R. 229; Carter [1989] L.M.C.L.Q. 81.

323 This appears from, e.g. the report in (1905) 74 L.J. K.B. 688. On the significance of this fact, see *Benjamin's Sale of Goods*, 11th edn (2021), paras 19-286—19-291, and see *Gill & Duffus SA v Berger & Co Inc* [1984] A.C. 382.

324 [1905] 2 K.B. 543, 551. See *Brett v Schneideman Bros Ltd* [1923] N.Z.L.R. 938; *Peter Turnbull & Co Pty Ltd v Mundas Trading Co (Australia) Pty Ltd* (1954) 90 C.L.R. 235, 246; *Cerealmangimi SpA v Toepfer* [1981] 1 Lloyd's Rep. 337; *Bunge Corp v Vegetable Vitamin Foods (Private) Ltd* [1985] 1 Lloyd's Rep. 613.

325 *Benjamin's Sale of Goods* at paras 9-012—9-016, 19-286—19-291.

326 *Taylor v Oakes, Roncoroni & Co* (1922) 38 T.L.R. 349, 351; aff'd (1922) 38 T.L.R. 517; *Esmail v J. Rosenthal & Sons Ltd* [1964] 2 Lloyd's Rep. 447, 466 (this point was not discussed on appeal in *J. Rosenthal & Sons Ltd v Esmail* [1965] 1 W.L.R. 1117, HL); *Fercometal SARL v Mediterranean Shipping Co SA* [1989] A.C. 788.

327 *Fercometal SARL v Mediterranean Shipping Co SA* [1989] A.C. 788. The correctness of *Braithwaite's Case* [1905] 2 K.B. 543 had been previously left open by the House of Lords in *J. Rosenthal & Sons Ltd v Esmail* [1965] 1 W.L.R. 1117, 1132–1133 (Lord Pearson) and in *Gill & Duffus Ltd v Berger & Co Inc* [1984] A.C. 382, 395. See also *Cohen & Co v Ockerby & Co Ltd* (1917) 24 C.L.R. 288; *Taylor v Oakes, Roncoroni & Co* (1922) 38 T.L.R. 349, 517; *Bowes v Chaleyer* (1923) 32 C.L.R. 159, 169, 192, 197–199.

328 But in *Segap Garages Ltd v Gulf Oil (Great Britain) Ltd*, *The Times* 24 October 1988 (below, para.28-074); the Court of Appeal considered that a breach by the affirming party would be excused

Exceptions where innocent party is released from obligation to perform Nevertheless, it may be that there are certain circumstances in which the innocent party may be released from performance of one or more of his obligations under the contract, notwithstanding the fact that he has not terminated further performance of the contract as a result of the wrongdoer's breach. The first arises where the party in breach has, by words or conduct, represented to the innocent party that he will no longer require performance of a particular obligation under the contract, and the innocent party acts upon that representation. In such a case the party in breach will be estopped from contending that the innocent party still remains bound by that obligation.[329] Secondly, where the party in breach, by means of a breach of contract or other default, prevents the innocent party from performing his obligations under the contract he cannot rely upon that non-performance to reduce or eliminate his liability.[330] Finally, where the party in breach stipulates for a mode of performance which is at variance with the terms of the contract and the innocent party attempts to comply with the new stipulation, the party in breach cannot rely on a failure by the innocent party to perform his original obligations where that failure is attributable to his attempt to comply with the fresh stipulation.[331] **28-065**

Acceptance of repudiation Where there is an anticipatory breach, or the breach of an executory contract, and the innocent party wishes to terminate further performance of the contract, he must, in the language traditionally employed by the courts, "accept the repudiation".[332] An act of acceptance of a repudiation requires no particular form.[333] It is usually done by communicating the decision to terminate to the party in default,[334] although it may be sufficient to lead evidence of an: **28-066**

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if he proved that it had been caused by or was due to the repudiatory breach. cf. *Foran v Wight* (1989) 168 C.L.R. 385, 409–410, 421–422, 447–449, 459. Equally, the fact that there is "no half-way house" does not deprive the innocent party of a period of time in which to decide whether to affirm or terminate: *Stocznia Gdanska SA v Latvian Shipping Co* [2002] EWCA Civ 889, [2002] 2 Lloyd's Rep. 436 at [87] and see above, para.28-055.

329 *Fercometal SARL v Mediterranean Shipping Co SA* [1989] A.C. 788, 805–806; *Cantt Pak Ltd v Pak Southern China Property Investment Ltd* [2018] EWHC 2564 (Ch) at [131]. Estoppel could also arise if the repudiating party represents that he will not exercise a right conferred on him by the contract. A wider role for estoppel was acknowledged by Brennan J in *Foran v Wight* (1989) 168 C.L.R. 385, 421–422.

330 *Bulk Oil (Zug) AG v Sun International Ltd* [1984] 1 Lloyd's Rep. 531.

331 *BV Oliehandel Jonglarid v Coastal International Ltd* [1983] 2 Lloyd's Rep. 463.

332 *Heyman v Darwins Ltd* [1942] A.C. 356, 361. The appropriateness of the word "acceptance" has, however, been questioned: Smith, "Anticipatory Breach of Contract" in Lomnicka and Morse (eds), *Contemporary Issues in Commercial Law: Essays in Honour of A.G. Guest*, pp.175, 184–188.

333 *Vitol SA v Norelf Ltd* [1996] A.C. 800, 810–811; *Carter v Lifeplan Products Ltd* [2013] EWCA Civ 453 at [18]; *Stocznia Gdanska SA v Latvian Shipping Co* [2001] 1 Lloyd's Rep. 537, 563, 566. (Where the acceptance took the form of a notice to rescind which was in fact invalid. The important fact was held to be that the letter which constituted the acceptance unequivocally stated that the contractual obligations were at an end. The claimants had a right to terminate the contract and the fact that they did not set that ground out in the letter which constituted the acceptance was held to be irrelevant. The analysis of Thomas J was upheld by the Court of Appeal but not without some hesitation: see [2002] EWCA Civ 889, [2002] 2 Lloyd's Rep. 436 at [88]–[92]. The safest course of action would have been for the innocent party expressly to have reserved its common law rights.) The latter case demonstrates that an invalid invocation of a right to terminate contractually, on account of a breach of contract, is capable of amounting to an acceptance of a repudiatory breach if it unequivocally demonstrates an intention to treat the contractual obligations as at an end as a result of the breach of contract. Given that the same conduct is capable of giving rise both to a contractual right to terminate and to a common law entitlement to accept a repudiatory breach, recourse to the

"Unequivocal overt act which is inconsistent with the subsistence of the contract … without any concurrent manifestation of intent directed to the other party."[335]

In an appropriate case an acceptance of a repudiation may take the form of reliance on a contractual term which entitles the innocent party to terminate the contract. Where the conduct of the party in breach is such as to entitle the innocent party to terminate the contract either pursuant to a term of the contract or under the general law, the innocent party is not required to elect between its two rights to terminate and so can be treated as having terminated the contract both under the appropriate term of the contract and in accordance with its rights at common law.[336] Unless and until the repudiation is accepted the contract continues in existence for "an unaccepted repudiation is a thing writ in water".[337] Acceptance of a repudiation must be clear and unequivocal[338] and mere inactivity or acquiescence

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former does not necessarily constitute an affirmation of the contract since in both cases the innocent party is electing to terminate the contract (see also *Gold Group Properties Ltd v BDW Trading Ltd* [2010] EWHC 1632 (TCC), [2010] All E.R. (D) 18 (Jul) at [110]). Matters are otherwise, however, in the case where a termination notice makes explicit reference only to a particular contractual clause. In such a case the notice might demonstrate that the giver of the notice was only relying upon the contractual clause and was not intending to accept the repudiation (*Shell Egypt West Manzala GmbH v Dana Gas Egypt Ltd* [2010] EWHC 465 (Comm), [2010] All E.R. (D) 156 (Mar) at [31]) but in each case it is necessary to pay careful attention to the terms of the notice that has been given and all the facts and circumstances of the case (*Vannin Capital PCC v RBOS Shareholders Action Group Ltd* [2018] EWHC 2821 (Ch) at [105]–[111]).

334 *Heyman v Darwins Ltd* [1942] A.C. 356, 361; *The Mihalis Angelos* [1971] 1 Q.B. 164, 204. The innocent party need not personally, or by an agent, notify the repudiating party of his election to treat the contract as at an end. It is sufficient that the fact of the election is brought to the attention of the repudiating party, for example, by notification by an unauthorised broker or by another intermediary may be sufficient: *Vitol SA v Norelf Ltd* [1996] A.C. 800, 811.

335 *State Trading Corp of India Ltd v M. Golodetz Ltd* [1989] 2 Lloyd's Rep. 277, 286; *Holland v Wiltshire* (1954) 90 C.L.R. 409, 416; *Hine Solicitors Ltd v Jones* [2023] EWHC 1708 (KB) at [22]. See also Dawson [1981] C.L.J. 83, 103. cf. *Vitol SA v Norelf Ltd (The Santa Clara)* [1993] 2 Lloyd's Rep. 301, 304 where Phillips J preferred to leave open the question whether "an innocent party can accept an anticipatory repudiation by conduct which is not communicated to the party in anticipatory breach". When deciding whether or not inconsistent actions amount to an acceptance of a repudiation, the courts apply an objective test: *Enfield London BC v Sivanandan* [2004] EWHC 672 (QB), [2004] All E.R. (D) 73 (Apr) at [38]–[39].

336 *Dalkia Utilities Services Plc v Celtech International Ltd* [2006] EWHC 63 (Comm), [2006] 1 Lloyd's Rep. 599 at [135]–[144]. Matters are otherwise in the case where the innocent party's rights under the general law differ from those arising under the express term of the contract. In such a case the innocent party must elect between the two rights and the terms in which it informs the other party of its decision may be significant (*Stocznia Gdanska SA v Latvian Shipping Co* [2002] EWCA Civ 889, [2002] 2 Lloyd's Rep. 436 at [44] and *Vivergo Fuels Ltd v Redhall Engineering Solutions Ltd* [2013] EWHC 4030 (TCC) at [514]–[519]). See, more generally, Peel [2013] L.M.C.L.Q. 519.

337 *Howard v Pickford Tool Co* [1951] 1 K.B. 417, 421. See also *Cranleigh Precision Engineering Ltd v Bryant* [1965] 1 W.L.R. 1293; *Thomas Marshall (Exports) Ltd v Guinle* [1979] Ch. 227; *Gunton v Richmond-on-Thames LBC* [1981] Ch. 448; *London Transport Executive v Clarke* [1981] I.C.R. 355; *State Trading Corp of India Ltd v M. Golodetz Ltd* [1989] 2 Lloyd's Rep. 277, 285; *ADS Aerospace Ltd v EMS Global Tracking Ltd* [2012] EWHC 2310 (TCC), 145 Con. L.R. 29 at [150].

338 *Harrison v Northwest Holt Group Administration* [1985] I.C.R. 668; *Boyo v Lambeth LBC* [1994] I.C.R. 727; *Vitol SA v Norelf Ltd* [1996] A.C. 800; *Holland v Glendale Industries Ltd* [1998] I.C.R. 493; *Sookraj v Samaroo* [2004] UKPC 50 at [17]; *South Caribbean Trading Ltd v Trafigura Beheer BV* [2004] EWHC 2676 (Comm), [2005] 1 Lloyd's Rep. 128 at [129]–[130]; *Banham Marshall Services Unlimited v Lincolnshire CC* [2007] EWHC 402 (QB), [2007] All E.R. (D) 02 (Mar) at [52]; *BSkyB Ltd v HP Enterprise Services UK Ltd* [2010] EWHC 86 (TCC), 129 Con. L.R. 147 at [1373]; *Vitol SA v Beta Renowable Group SA* [2017] EWHC 1734 (Comm), [2017] 2 Lloyd's Rep. 338.

will generally not be regarded as acceptance for this purpose.[339] But there may be circumstances in which a continuing failure to perform will be sufficiently unequivocal to constitute acceptance of a repudiation. It all depends on "the particular contractual relationship and the particular circumstances of the case".[340] An example of a failure to perform which has been suggested as sufficient to constitute an acceptance is the following:

> "Postulate the case where an employer at the end of the day tells a contractor that he, the employer, is repudiating the contract and that the contractor need not return the next day. The contractor does not return the next day or at all. It seems to me that the contractor's failure to return may, in the absence of any other explanation, convey a decision to treat the contract as at an end."[341]

The requirement that the acceptance be communicated "clearly and unequivocally" is likely to mean that it is only where there has been a failure to carry out an act in relation to the party in breach that silence or inactivity will be sufficiently unequivocal for this purpose.[342] Where the silence or inactivity relates to the performance of a contract to which the party in breach is not privy then it is unlikely that silence will be sufficiently unequivocal.[343] Once a repudiation has been accepted, the acceptance cannot be withdrawn.[344] If the parties thereafter resume performance of the contract, their rights are governed by a new contract, even if the terms remain the same.[345]

No reason or bad reason given The general rule is well established that, if a party refuses to perform a contract, giving a wrong or inadequate reason or no reason at all, he may yet justify his refusal if there were at the time facts in existence which would have provided a good reason, even if he did not know of them at the time of his refusal.[346] Thus when an employee brings an action against his employer, alleging that he has been wrongfully dismissed, the employer can rely **28-067**

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339 *Denmark Productions Ltd v Boscobel Productions Ltd* [1969] 1 Q.B. 699, 732; *State Trading Corp of India Ltd v M. Golodetz Ltd* [1989] 2 Lloyd's Rep. 277, 286; *Lefevre v White* [1990] 1 Lloyd's Rep. 569, 574, 576.

340 *Vitol SA v Norelf Ltd* [1996] A.C. 800, 811. In such a case the contractor may be absolved from his contractual obligation before he communicates his acceptance: *Potter v RJ Temple Plc* [2003] All E.R. (D) 327 (Dec).

341 *Vitol SA v Norelf Ltd* [1996] A.C. 800, 811.

342 However, where the innocent party does nothing, in circumstances where it is not failing to perform a particular contractual obligation, a court is likely to conclude its inactivity is at best equivocal and so does not amount to an acceptance of the repudiation: *Alan Ramsay Sales & Marketing Ltd v Typhoo Tea Ltd* [2016] EWHC 486 (Comm), [2016] E.C.C. 12 at [79].

343 *Jaks (UK) Ltd v Cera Investment Bank SA* [1998] 2 Lloyd's Rep. 89, 96 (where the party alleged to be in breach was the bank under a letter of credit but the inactivity related to the non-performance of the contract of sale).

344 *Scarf v Jardine* (1882) 7 App. Cas. 345, 361; *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India* [1990] 1 Lloyd's Rep. 391, 398. cf. Vold (1926) 5 Texas L. Rev. 9.

345 *Aegnoussiotis Shipping Corp of Monrovia v A/S Kristian Jebsens Rederi of Bergen* [1977] 1 Lloyd's Rep. 268, 276.

346 *Ridgway v Hungerford Market Co* (1835) 3 Ad. & El. 171, 177, 178, 180; *Baillie v Kell* (1838) 4 Bing. N.C. 638; *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 Ch. D. 339, 352, 364; *Taylor v Oakes Roncoroni Co* (1922) 127 L.T. 267, 269; *British & Benningtons Ltd v N.W. Cachar Tea Co* [1923] A.C. 48, 71; *Etablissements Chainbaux SARL v Harbormaster Ltd* [1955] 1 Lloyd's Rep. 303, 314; *Universal Cargo Carriers Corp v Citati* [1957] 2 Q.B. 401, 443–445; aff'd in part [1957] 1 W.L.R. 979, and rev'd in part [1958] 2 Q.B. 254; *Denmark Productions Ltd v Boscobel Productions Ltd* [1969] 1 Q.B. 699, 722, 732; *The Mihalis Angelos* [1971] 1 Q.B. 164, 195, 200, 204; *Cyril Leonard & Co v Simo Securities Trust* [1972] 1 W.L.R. 80, 85, 87, 89; *Scandinavian Trading Co*

on information acquired after the dismissal when seeking to justify the dismissal.[347] The general rule is the subject of a number of exceptions. First, a party cannot rely on a ground which he did not specify at the time of his refusal to perform "if the point which was not taken could have been put right".[348] Secondly, a party may be precluded by the operation of the doctrines of waiver or estoppel from relying on a ground which he did not specify at the time of his refusal to perform.[349] Thirdly, a party may be held to have accepted the goods so that he is no longer able to justify his refusal to perform.[350] However, there does not appear to be any separate principle which would preclude a party from setting up a different ground simply because it would be unfair or unjust to allow him to do so.[351] Fourthly, while a party who terminates a contract for no reason or for a bad reason can defend itself against a claim for wrongful termination by reference to a good reason that existed at the

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A/B v Zodiac Petroleum SA [1981] 1 Lloyd's Rep. 81, 90; *State Trading Corp of India Ltd v M. Golodetz Ltd* [1988] 2 Lloyd's Rep. 182; *Sheffield v Conrad* (1988) 22 Con. L.R. 108; *South Caribbean Trading Ltd v Trafigura Beheer BV* [2004] EWHC 2676 (Comm), [2005] 1 Lloyd's Rep. 128 at [133]–[134]. The latter case demonstrates that there are limits to the willingness of the courts to speculate about the reaction of the innocent party to the breach of which he was unaware. In *Reinwood Ltd v L Brown & Sons Ltd* [2008] EWCA Civ 1090, [2009] B.L.R. 37 Lloyd LJ observed (at [51]) that, although the principle is often used in relation to facts unknown to the party refusing at the time of its refusal, there "is no reason why it should not be used in relation to facts which were known to that party at that time. Waiver can apply to qualify that principle, but only in cases of, in effect, estoppel". Care must be also taken when applying the general rule to cases in which it is alleged that the repudiatory breach takes the form of a renunciation. In such a case an essential ingredient of the words or conduct amounting to a repudiation is that they are communicated to or otherwise known to the innocent party. If they are not, there cannot be a renunciation: *Seadrill Management Services Ltd v OAO Gazprom* [2009] EWHC 1530 (Comm), [2010] 1 Lloyd's Rep. 543 at [265]. However, the principle may not apply to an express term of a contract, such as an event of default clause, where the court may conclude, as a matter of interpretation of the clause, that a party is not entitled to rely on an event which is not set out in the notice itself: *Nakanishi Marine Co Ltd v Gora Shipping Ltd* [2012] EWHC 3383 (Comm) at [35(iii)] and *Lombard North Central Plc v European Skyjets Ltd (In Liquidation)* [2020] EWHC 679 (QB) at [62]–[68].

347 *Ridgway v Hungerford Market Co* (1835) 3 Ad. & El. 171; *Baillie v Kell* (1838) 4 Bing. N.C. 638; *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 Ch. D. 339; *Cyril Leonard & Co v Simo Securities Trust* [1972] 1 W.L.R. 80. The rule does not apply in cases of *unfair* dismissal: *Earl v Slater & Wheeler (Airline) Ltd* [1973] 1 W.L.R. 51; *W. Devis & Sons Ltd v Atkins* [1977] A.C. 931; cf. *Polkey v A.E. Dayton Services Ltd* [1988] A.C. 344; Vol.II, para.43-235.

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

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

350 This has been held to be the true interpretation of the difficult case of *Panchaud Frères SA v Etablissements General Grain Co* [1970] 1 Lloyd's Rep. 53 (para.28-059); see *B.P. Exploration Co (Libya) Ltd v Hunt* [1979] 1 W.L.R. 783, 811 and *Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce* [1997] 4 All E.R. 514, 528.

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

time of termination, even if that party was unaware of that reason, it does not necessarily follow that such a party can rely on that good reason as a basis on which to claim loss of bargain damages from the party in breach.[352]

28-068 **Both parties in breach** Where both parties are alleged to have committed a breach of contract, and it is asserted that each breach (taken independently) gives rise to a right to terminate further performance of the contract, regard must be had to the order in which the breaches occurred. Where one party (A) breaches the contract and that breach is followed by a breach by the other party (B) then, assuming that both breaches are repudiatory, the breach by party A will give party B the right to terminate future performance of the contract. If B exercises that right and accepts the repudiation his subsequent failure to perform his obligations under the contract will not constitute a breach of contract.[353] The position is rather more complex if B does not accept the breach and then himself commits a repudiatory breach of contract. In such a case can A accept the breach and terminate performance of the contract or does the fact that he has previously repudiated the contract prevent him from exercising his option to terminate? It is suggested that, in such a case, the effect of B electing to affirm the contract is to leave the primary obligations of both parties unchanged.[354] The contract therefore remains in existence for the benefit of A as well as for B so that A should be free to elect to terminate performance. Thus in *State Trading Corp of India v M. Golodetz Ltd*,[355] Kerr LJ stated that:

> "If A is entitled to treat B as having wrongfully repudiated the contract between them and does so, then it does not avail B to point to A's past breaches of contract, whatever their nature. A breach by A would only assist B if it was still continuing when A purported to treat B as having repudiated the contract *and* if the effect of A's subsisting breach was such as to preclude A from claiming that B had committed a repudiatory breach. In other words, B would have to show that A, being in breach of an obligation in the nature of a condition precedent, was therefore not entitled to rely on B's breach as a repudiation."[356]

So unless the obligation of A to perform is a condition precedent to B's obligation to perform, the fact that A is in breach of contract should not act as a barrier to A's ability to terminate on the ground of B's breach.[357]

28-069 **Both parties simultaneously in breach** Where both parties are simultaneously in breach of contract, there is authority for the proposition that neither party is entitled to terminate performance of the contract.[358] Thus, it has been held that where both parties agree to submit a dispute to arbitration, and there then follows a substantial period of delay during which neither party seeks to proceed with the reference to arbitration, each party is thereby guilty of a continuing breach of contract with the result that:

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352 *Peregrine Aviation Bravo Ltd v Laudamotion GmbH* [2023] EWHC 48 (Comm) at [168]–[181]; *Havila Kystruten AS v Abarca Companhia de Seguros SA* [2022] EWHC 3196 (Comm) at [410]–[412]; *Lonsdale Sports Ltd v Leofilis SA* [2012] EWCA Civ 985 at [33].

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

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

355 [1989] 2 Lloyd's Rep. 277; See further Treitel (1990) 106 L.Q.R. 185, 188–190.

356 [1989] 2 Lloyd's Rep. 277, 286.

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

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

"… neither [party] can rely on the other's breach as giving him a right to treat the primary obligations of each to continue with the reference as brought to an end."[359]

While a party who has committed a repudiatory breach of contract is not entitled to enforce the contract against a party who is ready and willing to perform his obligations under the contract, it is suggested that it does not follow that the fact that a party has committed a repudiatory breach should preclude him from accepting a repudiatory breach committed by the other party. As has already been stated, until the repudiatory breach has been accepted, the primary obligations of both parties remain unaffected and therefore it is suggested that the proposition that, in such a case, either party is entitled to accept the breach is more consistent with the underlying principles of English law.[360]

4. Anticipatory Breach[361]

28-070 Renunciation before performance is due If, before the time arrives at which a party is bound to perform a contract, he expresses an intention to break it, or acts in such a way as to lead a reasonable person to the conclusion that he does not intend to fulfil his part,[362] this constitutes an "anticipatory breach"[363] of the contract and entitles the other party to take one of two courses. He may "accept"[364] the renunciation, treat it as discharging him from further performance, and sue for damages forthwith, or he may wait till the time for performance arrives and then sue.[365]

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

[360] See generally Peel (ed.), *Treitel on The Law of Contract*, 15th edn (2020), para.18-109.

[361] See generally Q. Liu, *Anticipatory Breach* (2011) and Andrews, Tettenborn and Virgo, *Contractual Duties: Performance, Breach, Termination and Remedies*, 3rd edn (2020), Ch.7.

[362] *Forslind v Becheley-Crundall* 1922 S.C. (H.L.) 173; *Universal Cargo Carriers Corp v Citati* [1957] 2 Q.B. 401; aff'd in part [1957] 1 W.L.R. 979 and rev'd in part [1958] 2 Q.B. 254; *Greenaway Harrison Ltd v Wiles* [1994] I.R.L.R. 380; *Stocznia Gdanska SA v Latvian Shipping Co* [2001] 1 Lloyd's Rep. 537, 563; *Proctor & Gamble Ltd v Carrier Holdings Ltd* [2003] EWHC 83 (TCC), [2003] B.L.R. 255 at [35]; *Berkeley Community Villages Ltd v Pullen* [2007] EWHC 1330 (Ch), [2007] 3 E.G.L.R. 101 at [79].

[363] For a criticism of this expression, see *Bradley v H. Newsom Sons & Co* [1919] A.C. 16, 53; Dawson [1981] C.L.J. 83; Mustill, *Butterworth Lectures*, 1989–1990, p.1. In *Bunge SA v Nidera BV* [2015] UKSC 43, [2015] 3 All E.R. 1082 at [12] Lord Sumption stated that anticipatory breach is "probably more accurately referred to" as renunciation. A difficulty with this statement is that a renunciation may occur at the time fixed for performance and need not necessarily pre-date it.

[364] See above, para.28-066. There is authority to support the proposition that a party who purports to have accepted the renunciation as terminating the contract must also demonstrate that it subjectively believed that the relevant words or conduct were evincing an intention not to perform and further that, at the time of the alleged acceptance, it actually accepted the same as terminating the contract: *SK Shipping (S) Pte Ltd v Petroexport Ltd ("The Pro Victor")* [2009] EWHC 2974 (Comm), [2010] 2 Lloyd's Rep 158 at [90]–[97]. However the need for a subjective belief in this context has been criticised (see Liu [2010] L.M.C.L.Q. 359) and the point was left open by Carr J in *Vitol SA v Beta Renowable Group SA* [2017] EWHC 1734 (Comm), [2017] 2 Lloyd's Rep. 338 at [48] and by Andrew Baker J in *Phones 4U Ltd (in administration) v EE Ltd* [2018] EWHC 49 (Comm), [2018] 1 Lloyd's Rep. 204 at [57].

[365] In *Berkeley Community Villages Ltd v Pullen* [2007] EWHC 1330 (Ch), [2007] 3 E.G.L.R. 101 at [83] Morgan J left open the question whether, in the case where a claimant wishes not to bring the contract to an end, it is appropriate to grant an injunction to restrain a sale because it amounts to an anticipatory breach of a contingent future obligation.

On the other hand, where the anticipatory breach takes a continuing form,[366] the fact that the innocent party initially continued to press for performance does not normally preclude him from later electing to terminate the contract provided that the party in breach has persisted in his stance up to the moment of termination.[367]

Breach accepted The right to accept the repudiation, terminate the contract and sue for damages forthwith was established by *Hochster v De la Tour*,[368] where a travelling courier sued his employer who wrote before the time for performance arrived that he would not require his services. The courier sued for damages at once and it was held that he was entitled to do so. In *Johnstone v Milling*[369] the effect of an anticipatory breach was thus stated by Lord Esher MR: **28-071**

> "A renunciation of a contract, or, in other words, a total refusal to perform it by one party before the time for performance arrives, does not, by itself, amount to a breach of contract but may be so acted upon and adopted by the other party as a rescission of the contract as to give an immediate right of action. Where one party assumes to renounce the contract, that is, by anticipation refuses to perform it, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract … The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he too treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation."[370]

It is nevertheless clear that, in cases of anticipatory breach by renunciation of the contract, the cause of action is not the future breach; it is the renunciation itself.[371] The doctrine is not based on the fiction that the eventual cause of action may, in anticipation, be treated as a cause of action.[372] So, if the anticipatory breach is accepted as a discharge of the contract, it is not open to the party in breach subsequently to tender performance within the time originally fixed.[373] Further, the innocent party can claim damages at once even though his right to future

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366 Not all anticipatory breaches are of a continuing nature: see, for example, *Howard v Pickford Tool Co Ltd* [1951] 1 K.B. 417.

367 *Stocznia Gdanska SA v Latvian Shipping Co* [2002] EWCA Civ 889, [2002] 2 Lloyd's Rep. 436 at [94]–[100]; *Primera Maritime (Hellas) Ltd v Jiangsu Eastern Heavy Industry Co Ltd* [2013] EWHC 3066 (Comm), [2014] 1 All E.R. (Comm) 813.

368 (1853) 2 E. & B. 678; *Xenos v Danube, etc., Ry* (1863) 13 C.B.(N.S.) 825; *Frost v Knight* (1871-72) L.R. 7 Ex. 111; *Dominion Coal Co Ltd v Dominion Iron and Steel Co Ltd* (1909) 25 T.L.R. 309; *The Mihalis Angelos* [1971] 1 Q.B. 164.

369 (1886) 16 Q.B.D. 460. For the measure of damages, see *Roper v Johnson* (1873) L.R. 8 C.P. 167; *Melachrino v Nickoll and Knight* [1920] 1 K.B. 693; *Millett v Van Heek & Co* [1921] 2 K.B. 369; *Wright v Dean* [1948] Ch. 686; *Sudan Import Co Ltd v Société Génerale de Compensation* [1958] 1 Lloyd's Rep. 310; *Garnac Grain Co Inc v H.M.F. Faure and Fairclough Ltd* [1966] 1 Q.B. 650 (on appeal [1968] A.C. 1130); *The Mihalis Angelos* [1971] 1 Q.B. 164; *Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory* [1979] A.C. 91; *Chiemgauer Membran und Zeltbau GmbH v New Millennium Experience Co Ltd*, *The Times* 16 January 2001; and Vol.II, paras 47-383 et seq. and 47-396 et seq.

370 (1886) 16 Q.B.D. 460, 467. The proposition that a renunciation of the contract before the time for performance has arrived does not amount to a breach until it has been acted upon or adopted has been criticised on the ground that it is inconsistent with *Hochster v De la Tour* (1853) 2 E. & B. 678 and because whether or not there is a breach must depend on what the promisor does and not on what the promisee does thereafter: see Smith, "Anticipatory Breach of Contract" in Lomnicka and Morse (eds), *Contemporary Issues in Commercial Law: Essays in Honour of A.G. Guest*, pp.175, 178–182.

371 *The Mihalis Angelos* [1971] 1 Q.B. 164; *Moschi v Lep Air Services Ltd* [1973] A.C. 331, 356.

372 cf. *Frost v Knight* (1871-72) L.R. 7 Ex. 111, 114.

373 *Xenos v Danube, etc., Ry* (1863) 13 C.B.(N.S.) 825.

performance of the contract is then only contingent.[374]

28-072 Impact of acceptance on the innocent party If the breach is accepted, the innocent party is relieved from further performance of his obligations under the contract. He is likewise relieved from proving, in any action against the party in default, that he was ready and willing at the date of the renunciation to perform the contract in accordance with its terms.[375] It follows that it is no defence to liability in such an action to show that, if the contract had not been renounced, the innocent party would not at the time fixed for performance have been able to perform it,[376] although proof of such inability to perform may be material in the assessment of damages.[377]

28-073 Breach not accepted The second alternative,[378] where the innocent party chooses to wait until the arrival of the time for performance before bringing any claim, is illustrated by *Avery v Bowden*.[379] In that case there was a contract by charterparty that a ship should sail to Odessa and there take a cargo from the charterer's agent, the cargo to be loaded within a certain number of days. The ship arrived at Odessa

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374 *Frost v Knight* (1871-72) L.R. 7 Ex. 111; *Synge v Synge* [1894] 1 Q.B. 466. Damages will generally, but not inevitably, be assessed at the date of the breach of contract. Exceptionally, damages may be reduced where subsequent events, known to the court at the time of the hearing, have reduced the value of the contractual rights in respect of which the claim has been brought: *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] UKHL 12, [2007] 2 A.C. 353. See further below, para.30-107.

375 *Braithwaite v Foreign Hardwood Co Ltd* [1905] 2 K.B. 543, 551, 554; *Cooper, Ewing & Co Ltd v Hamel and Horley Ltd* (1922) 13 Ll. L. Rep. 590, 593; *Taylor v Oakes Roncoroni & Co* (1922) 38 T.L.R. 349, 517; *British and Beningtons Ltd v North Western Cachar Tea Co Ltd* [1923] A.C. 48, 66; *Continental Contractors Ltd v Medway Oil and Storage Co Ltd* (1925) 23 Ll.L. Rep. 55, 124, 128, 132; *Rightside Property Ltd v Gray* [1975] Ch. 72, 82; *Gill & Duffus SA v Berger & Co Inc* [1984] A.C. 382, 395–396; *Chiemgauer Membran und Zeltbau GmbH v New Millennium Experience Co Ltd*, *The Times* 16 January 2001; *Marplace (Number 512) Ltd v Chaffe Street (A Firm)* [2006] EWHC 1919 (Ch), [2006] All E.R. (D) 413 (Jul) at [321]. cf. Dawson (1980) 96 L.Q.R. 239. See also Lloyd (1974) 37 M.L.R. 121.

376 *Aliter*, if at the time of the renunciation, there was already a breach of contract (albeit unknown) on the part of the innocent party: *Cooper, Ewing & Co Ltd v Hamel and Horley Ltd* (1922) 13 Ll. L. Rep. 590; *British and Beningtons Ltd v North Western Cachar Tea Co Ltd* [1923] A.C. 48, 72. cf. *Gill & Duffus SA v Berger & Co Inc* [1984] A.C. 382. See also above, para.28-067. The position has also been held to be otherwise in the case where prior to the repudiatory breach the innocent party had demonstrated that it had no intention of performing its contractual obligations: *Acre 1127 Ltd v De Montfort Fine Art Ltd* [2011] EWCA Civ 87, [2011] All E.R. (D) 111 (Feb) at [51].

377 *Braithwaite v Foreign Hardwood Co Ltd* [1905] 2 K.B. 543, 552; *Taylor v Oakes Roncoroni & Co* (1922) 38 T.L.R. 349; *British and Beningtons Ltd v North Western Cachar Tea Co Ltd* [1923] A.C. 48, 71, 72; *Continental Contractors Ltd v Medway Oil and Storage Co Ltd* (1925) 23 Ll.L. Rep. 55, 132, 133; *Esmail v Rosenthal & Sons Ltd* [1964] 2 Lloyd's Rep. 447, 466, [1965] 1 W.L.R. 1117; *The Mihalis Angelos* [1971] 1 Q.B. 164; *Gill & Duffus SA v Berger & Co Inc* [1984] A.C. 382, 392, 396, 397; *Chiemgauer Membran und Zeltbau GmbH v New Millennium Experience Co Ltd*, *The Times* 16 January 2001; *Acre 1127 Ltd v De Montfort Fine Art Ltd* [2011] EWCA Civ 87, [2011] All E.R. (D) 111 (Feb) at [52]; *Flame SA v Glory Wealth Shipping PTE Ltd* [2013] EWHC 3153 (Comm), [2014] Q.B. 1080 (where Teare J, after a careful evaluation of the leading authorities, concluded, by reference to the compensatory principle applicable to the assessment of damages, that the burden of proof remained upon the innocent party to prove for the purposes of its claim to recover damages that, had there been no repudiation, it would have been able to perform its obligations under the contract).

378 *Michael v Hart & Co* [1902] 1 K.B. 482; *Braithwaite v Foreign Hardwood Co Ltd* [1905] 2 K.B. 543; *Sinason-Teicher Inter-American Grain Corp v Oilcakes and Oilseeds Trading Co Ltd* [1954] 1 W.L.R. 935, 944; aff'd [1954] 1 W.L.R. 1394.

379 (1855) 5 E. & B. 714; (1856) 6 E. & B. 953.

and the master demanded a cargo, but the charterer's agent was unable to supply one. The master nevertheless continued to demand a cargo. Before the loading days had expired war broke out between England and Russia and performance became legally impossible. When the charterer was sued for breach of the charterparty, the defence was sustained that there had been no failure of performance before war broke out. Even, however, if the agent's conduct had amounted to an anticipatory renunciation of the contract, so that the shipowner would have been entitled to accept it and claim damages at once, he had lost the right to do so by electing to keep the contract alive, and it continued in force until it was discharged by frustration. In other words, if the second alternative is chosen, the contract subsists at the risk of both parties, and the anticipatory renunciation is ineffective. This is well expressed by Cotton LJ in *Johnstone v Milling* where he says[380]:

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

28-074 **Contract kept alive for the benefit of both parties** An example of the significance of the contract continuing to subsist is provided by *Fercometal Sarl v Mediterranean Shipping Co SA*,[381] where a voyage charterparty contained a clause entitling the charterers to cancel the charter should the vessel not be ready to load on or before 9 July 1982. Prior to that date the charterers prematurely purported to cancel it. This constituted an anticipatory breach and repudiation of the contract. The repudiation was not accepted by the shipowners. Nevertheless the nominated vessel was not ready to load by the due date and the charterers then sent a second notice cancelling the charter. The House of Lords held that the shipowners, by affirming the contract, had kept it alive for the benefit of both parties, so that the charterers were entitled, notwithstanding their previous repudiation, to cancel on the ground of the vessel's non-readiness to load in accordance with the terms of the charterparty. Also in *Segap Garages Ltd v Gulf Oil (Great Britain) Ltd*,[382] the defendants, in breach of contract, failed to supply motor fuel to the plaintiffs. This would have entitled the plaintiffs, had they chosen to do so, to terminate the contract, but they elected to treat it as still continuing. The plaintiffs nevertheless refused to pay for motor fuel already supplied. This refusal, under the terms of the contract, entitled the defendants to terminate the contract and they did so terminate it. The Court of Appeal held that the plaintiffs could recover damages in respect of non-delivery of motor fuel prior to the termination, but not in respect of the period following termination. By electing not to accept the defendants' repudiatory breach, the plaintiffs had kept the contract alive for the benefit of both parties.

28-075 **Renunciation: anticipatory breach and actual breach** When establishing whether or not there has been a renunciation of the contract, there is no distinction between the tests for what is an anticipatory breach and what is a breach after the

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[380] (1886) 16 Q.B.D. 470.
[381] [1989] A.C. 788.
[382] *The Times,* 24 October 1988, CA.

time for performance has arrived.[383] It follows, therefore, that where the conduct of the promisor is such as to lead a reasonable person to the conclusion that he does not intend to fulfil his obligations under the contract when the time for performance arrives, the promisee may treat this as a renunciation of the contract and sue for damages forthwith. The innocent party is not obliged to wait for the time for performance because the renunciation, coupled with the acceptance of that renunciation, renders the breach legally inevitable and the effect of the doctrine of anticipatory breach is precisely to enable the innocent party to anticipate an inevitable breach and to commence proceedings immediately.[384]

28-076 Anticipatory breach by impossibility Anticipatory breach of contract may be constituted by impossibility as well as by renunciation, and similar principles apply to both. So where a shipowner agreed to charter a ship upon her release from government service, but before the release sold her to another person, it was held that he had put it out of his power to perform the agreement and the charterer was entitled to sue for damages forthwith. It was argued for the shipowner that he might have bought back the ship in time to fulfil the contract, but this was regarded as too speculative a possibility.[385] Also in *Universal Cargo Carriers Corp v Citati*,[386] where a charterer of a ship agreed to nominate a berth, to provide a cargo, and to finish loading, all before a certain day, and three days before this day had failed to do any of these things, it was held that the shipowner would be entitled to treat this default as an anticipatory breach of contract if it could prove that the charterer would not have been able to perform its obligations under the charterparty before the point in time at which the delay would have frustrated the commercial object of the venture. In this case it was held that it would not be sufficient for the innocent party to show that he had reasonable grounds for believing that the other party would be unable to perform at the appointed time; he would only be justified in terminating the contract if the other party was in fact unable to perform at that time: "[a]n anticipatory breach must be proved in fact and not in supposition."[387]

28-077 No anticipation of express right to terminate Where it is alleged that one party

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383 *Thorpe v Fasey* [1949] Ch. 649, 661; *Universal Cargo Carriers Corp v Citati* [1957] 2 Q.B. 401, 438. The distinction between an anticipatory breach and an actual breach may have significant implications for limitation purposes: *Proctor & Gamble Ltd v Carrier Holdings Ltd* [2003] EWHC 83 (TCC), [2003] B.L.R. 255.

384 *Universal Cargo Carriers Corp v Citati* [1957] 2 Q.B. 401, 438. The position is otherwise where the mode of anticipatory breach in issue is impossibility created by the act or default of one party. In such a case it is much more difficult to establish that the breach is inevitable, a point which was recognised by Devlin J in *Citati* at 437. These difficulties are discussed above, para.28-053.

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

386 [1957] 2 Q.B. 401; aff'd in part [1957] 1 W.L.R. 979 and rev'd in part [1958] 2 Q.B. 254. cf. *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 Q.B. 26; *Trade and Transport Inc v Iino Kaiun Kaisha Ltd* [1973] 1 W.L.R. 210; *F.C. Shepherd & Co Ltd v Jerrom* [1987] Q.B. 301, 323, 327–328; Peel (ed.), *Treitel on The Law of Contract*, 15th edn (2020), para.17-077.

387 [1957] 2 Q.B. 401, 449–450; *Re Simoco Digital UK Ltd: Thunderbird Industries LLC v Simoco Digital UK Ltd* [2004] EWHC 209 (Ch), [2004] 1 B.C.L.C. 541 at [22]–[23]. But see *Embiricos v Sydney Reid & Co* [1914] 3 K.B. 45, 59 (frustration); *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 Q.B. 26, 57 (failure of performance); Peel (ed.), *Treitel on The Law of Contract*, 15th edn (2020), paras 17-090—17-091; Carter (1984) 47 M.L.R. 422. A party may not rely on the fact that performance is impossible insofar as that was the result of its own actions: *Barclays Bank Plc v Gatpaham Properties Ltd* [2008] EWHC 721 (Ch), [2008] All E.R. (D) 262 (Apr).

has, by his own act or default, disabled himself from performing his contractual obligations at some future time and the contract also contains an express provision giving to the innocent party the right to terminate the contract in certain circumstances, care must be taken to establish the basis upon which the innocent party seeks to terminate the contract. Where the basis for the decision to terminate is the express right to determine the contract, the requirements of the clause containing the right to terminate must be complied with. On the other hand, where reliance is placed on the inability of the party to perform his obligations under the contract at some future time, it must be demonstrated that the inability to perform relates to some essential aspect of the obligations of the party in breach. To be entitled to terminate, the innocent party must establish that he had a right to terminate on one or other ground. Where he can establish neither ground, he cannot justify his decision to terminate by combining the two grounds so as to apply the doctrine of anticipatory breach to the contractual right to terminate. It is not possible to anticipate a contractual right to terminate.[388] Either the conditions necessary to exercise the right have been satisfied or they have not.

5. Consequences of Termination[389]

Prospective nature of termination When considering the consequences that follow from the termination of a contract by way of a response to a breach of contract, it is important to keep in mind that the termination operates prospectively and not retrospectively. It is at this point that it is vital to separate out the rescission ab initio of a contract in cases of fraud, misrepresentation or lack of consent from the prospective discharge of the contract which occurs when a contract has been validly terminated for breach.[390] It is also important to exercise care in relation to the statement that is sometimes made that it is the contract that has been "terminated" or "discharged" in so far as the might be taken to suggest that the contract has ceased to exist for all purposes.[391] Such an approach was indeed adopted by the Court of Appeal in *Harbutt's "Plasticine" Ltd v Wayne Tank and Pump Co Ltd*[392] so as to prevent the party in default from relying on an exemption clause inserted in a contract which had been "terminated" by breach. But this case was overruled by the House of Lords in *Photo Production Ltd v Securicor Transport Ltd*.[393] The true position was there stated to be—where the innocent party elects to terminate the contract, i.e. to put an end to all primary obligations of both parties remaining unperformed—that: **28-078**

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388 *Afovos Shipping Co SA v Pagnan & Filli* [1983] 1 W.L.R. 195. This, it is suggested, is the correct interpretation of Lord Diplock's statement (at 203) that the doctrine of anticipatory breach by conduct which disables a party to a contract from performing one of his primary obligations under the contract has no application to a breach of punctual payment of hire clause in a time charterparty of a ship. In so far as Lord Diplock suggested that the doctrine of anticipatory breach applies only to fundamental breaches, his reasoning cannot be supported: see Peel (ed.), *Treitel on The Law of Contract*, 15th edn (2020), para.17-087 and *Carter's Breach of Contract*, 2nd edn (2019), paras 4-40 and 7-38.

389 See Shea (1979) 42 M.L.R. 623; Beatson (1981) 97 L.Q.R. 389; Rose (1981) 34 C.L.P. 235.

390 *Johnson v Agnew* [1980] A.C. 367, 393. See also *Bank of Boston Connecticut v European Grain and Shipping Ltd* [1989] A.C. 1056, 1098–1099; *Howard-Jones v Tate* [2011] EWCA Civ 1330, [2012] 2 All E.R. 369. For an earlier reminder of the dangers of using the word "rescission" to encompass rescission ab initio and the prospective discharge of the contract, see the judgment of Lord Porter in *Heymans v Darwin Ltd* [1942] A.C. 356, 399. See also above, para.28-002.

391 See above, para.28-005.

392 [1970] 1 Q.B. 447.

393 [1980] A.C. 827; see above, para.18-025.

"(a) there is substituted by implication of law for the primary obligations of the party in default which remain unperformed a secondary obligation to pay money compensation to the other party for the loss sustained by him in consequence of their non-performance in the future and (b) the unperformed primary obligations of that other party are discharged."[394]

28-079 Obligations which survive discharge Of course, in assessing damages, the court must have regard to the terms of the contract in order to ascertain the performance promised in it,[395] including performance which would have fallen due after the date of discharge.[396] It must also give effect to terms of the contract which, for example, liquidate the damages recoverable[397] or exclude or restrict the remedies otherwise available for breach.[398] But, from the time of termination, as a general rule both parties are excused from further performance of the primary obligations of the contract which each has still to perform. However, obligations for the resolution of disputes will remain in full force and effect,[399] "as may other clauses having a contractual function which is ancillary or collateral to the subject-matter of the contract".[400] Arbitration clauses which state without qualification that any difference or dispute

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394 [1980] A.C. 827, 849, per Lord Diplock. See also *Moschi v Lep Air Services Ltd* [1973] A.C. 331, 345, 350, 351; *Thompson v Corroon* (1993) 42 W.I.R. 157, 172–173; *Red River UK Ltd v Sheikh* [2010] EWHC 961 (Ch) at [127].

395 *Heyman v Darwins Ltd* [1942] A.C. 356, 373; *F.J. Bloemen Pty Ltd v Council of the City of the Gold Coast* [1973] A.C. 115.

396 *O'Neil v Armstrong, Mitchell & Co* [1895] 2 Q.B. 418; *Moschi v Lep Air Services Ltd* [1973] A.C. 331; *The Mihalis Angelos* [1971] 1 Q.B. 164. In particular, damages may be reduced where, subsequent events, known to the court at the time of the hearing, have reduced the value of the contractual rights in respect of which the claim has been brought: *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] UKHL 12, [2007] 2 A.C. 353. See above, para.28-071.

397 See below, paras 30-205—30-206.

398 See above, para.18-025.

399 *Port Jackson Stevedoring Pty Ltd v Salmond and Spraggon (Australia) Pty Ltd* [1981] 1 W.L.R. 138, 145. However, a restrictive covenant in a contract of employment will not generally survive where it is the employer who has repudiated the contract: *General Billposting Co Ltd v Atkinson* [1909] A.C. 118, above, para.19-222, although the correctness of this proposition was questioned by Phillips LJ in *Rock Refrigeration Ltd v Jones* [1997] 1 All E.R. 1, 18–20 on the basis that "the law in relation to the discharge of contractual obligations by acceptance of a repudiation has been developed and clarified" since *General Billposting* was decided. The uncertainty was noted but not resolved by Lord Wilson in *Geys v Société Générale, London Branch* [2012] UKSC 63, [2013] 1 A.C. 513 at [68] (and see also Lord Sumption at [141]). Although the subject of some doubt, the rule laid down in *General Billposting* continues to apply, in particular where it is the repudiator who is seeking to enforce the covenant against the innocent party (*Brown v Neon Management Services Ltd* [2018] EWHC 2137 (QB), [2019] I.R.L.R. 30 at [171]). The employer may, however, be able to protect his property and trade secrets on the basis that his rights of property will survive the termination of the contract as a result of the employee's acceptance of his repudiatory breach (*Rock Refrigeration Ltd v Jones* [1997] 1 All E.R. 1, 14 and (on rather wider grounds) 20). The underlying uncertainty in this area relates to the scope of the decision of the House of Lords in *General Billposting*, on which see Freedland (2003) 32 I.L.J. 48 and Dawson (2013) 129 L.Q.R. 508 (where *General Billposting* is examined in the light of recent Commonwealth case law).

400 *Yasuda Fire & Marine Insurance Co of Europe Ltd v Orion Marine Insurance Underwriting Agency Ltd* [1995] Q.B. 174 (principal's contractual right to inspect documents and computer databases relating to transactions entered into by agents held to have survived the termination of the agency agreement). The position is more difficult in relation to obligations of confidence. The Court of Appeal in *Campbell v Frisbee* [2002] EWCA Civ 1374, [2003] I.C.R. 141 held that the question whether an innocent party remains bound by an obligation of confidence following a wrongful repudiation of the contract by the other party was too uncertain to be resolved in summary proceedings. At first instance, [2002] EWHC 328 (Ch), Lightman J held that the obligation of confidence of a service provider survived the acceptance by the service provider of the repudiation of her contract by the

which may arise under the contract shall be referred to arbitration will continue to apply notwithstanding the termination.[401] Ultimately, it is a question of construction whether or not the parties intended the contractual obligation in question to survive the termination of the contract.[402] Moreover, in principle, only those primary obligations falling due after the date of termination will come to an end; those which have accrued due at the time may still be enforceable as such.[403] Thus, while both parties are discharged from further performance of their primary obligations under the contract, "rights are not divested or discharged which have been unconditionally acquired".[404] The party in breach can therefore enforce against the innocent party such rights as it has "unconditionally acquired" by the date of termination.

Termination of partnership agreement In *Hurst v Bryk*[405] the House of Lords was content to assume, without finally deciding,[406] that a partnership could be dissolved by one partner accepting his partner's or partners' repudiatory breach of the partnership agreement but held that, following termination, the innocent partner remains liable for the accrued and accruing liabilities of the partnership provided that these liabilities were incurred by the partnership when the innocent partner was a partner in the firm[407] and that the innocent partner also remains liable to his fel- **28-080**

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client. While the Court of Appeal concluded that the issue was not suitable for summary determination, they did acknowledge (at [22]) that they considered it unlikely that the innocent party in *Campbell* would be able to establish that Lightman J had erred in his conclusions in a manner detrimental to her case. This suggests that obligations of confidence are likely to survive termination of the contract following a wrongful repudiation, whether the obligation of confidence survives as an express term of the contract or as a distinct equitable obligation (the latter view is preferred by Clarke (2003) 32 I.L.J. 43, 44–46, but questioned by Freedland (2003) 32 I.L.J. 48, 49). As has been noted, the underlying problem is uncertainty as to the scope of the decision of the House of Lords in *General Billposting Co Ltd v Atkinson* [1909] A.C. 118. The uncertainty in the law was confirmed by Lewison J in *Renewable Power & Light Plc v Renewable Power & Light Services Inc* [2008] All E.R. (D) 170 (Apr) at [39].

401 *Heyman v Darwins Ltd* [1942] A.C. 356; *F.J. Bloemen Pty Ltd v Council of the City of the Gold Coast* [1973] A.C. 115; *Moschi v Lep Air Services Ltd* [1973] A.C. 331, 351. Similarly, an adjudication provision in a contract will survive the discharge of the contract: *Connex South Eastern Ltd v MJ Building Services Group Plc* [2004] EWHC 1518 (TCC), [2004] B.L.R. 333 at [25].

402 *Duffen v Frabo SpA* [2000] 1 Lloyd's Rep. 180, 194; *Involnert Management Inc v Aprilgrange Ltd* [2015] EWHC 2225 (Comm), [2016] 1 All E.R. (Comm) 913 at [171]–[178]; *Plantation Holdings (FZ) LLC v Dubai Islamic Bank PJSC* [2017] EWHC 520 (Comm) at [243].

403 *Bank of Boston Connecticut v European Grain and Shipping Ltd* [1989] A.C. 1056. See Beatson (1981) 97 L.Q.R. 389.

404 *McDonald v Dennys Lascelles Ltd* (1933) 48 C.L.R. 457, 476–477; *Bank of Boston Connecticut v European Grain and Shipping Ltd* [1989] A.C. 1056, 1098–1099; *Northern Developments (Cumbria) Ltd v J. & J. Nichol* [2000] B.L.R. 158, 165–166; *Hurst v Bryk* [2002] 1 A.C. 185, 199.

405 [2002] 1 A.C. 185.

406 In *Hurst v Bryk* [2002] 1 A.C. 185, both Lord Millett (at 196D–E) and Lord Nicholls (at 189D) expressly left open the question whether a partnership agreement can be automatically dissolved by an innocent partner or partners treating the other partner's or partners' breach as repudiatory. Lord Millett was of the view (at 196C) that it was arguable that, by entering into the relationship of partnership, the parties had submitted themselves to the jurisdiction of the court of equity and had thereby renounced their right by unilateral action to bring about the automatic dissolution of their relationship by acceptance of a repudiatory breach of the partnership contract. In other words, the issue was not whether acceptance of a repudiatory breach applied to the contract of partnership, but whether it operated to bring about the automatic dissolution of the partnership relationship (at 195A–B). cf. *Hitchman v Crouch Butler Savage Associates (A Firm)* (1982) 80 L.S. Gaz. 550.

407 *Hurst v Bryk* [2002] 1 A.C. 185, 198.

low partners to contribute to these liabilities.[408] However, in *Mullins v Laughton*,[409] Neuberger J subsequently held that the dissolution of a partnership by an accepted repudiation is not possible on the basis that the relationship between partners, while contractual, is also subject to equitable principles and to the principles to be found in the Partnership Act 1890.[410] On this basis, while an agreement to enter into a partnership agreement and an agreement whereby partners mutually undertake to observe certain obligations after the partnership has come to an end can be brought to an end by the acceptance of a repudiatory breach,[411] an acceptance of a repudiatory breach cannot be invoked in order to bring about the automatic dissolution of the partnership itself. The grounds on which a partnership can be dissolved are regulated principally by the provisions of the Partnership Act 1890 and these do not include the acceptance of a repudiatory breach.

28-081 Position of innocent party Where the innocent party is entitled to, and does, terminate the contract as a result of the other's breach, he is thereby released from future performance of his obligations under the contract.[412] Termination also deprives him of any right as against the other party to continue to perform them.[413] After such termination he is not bound to accept, or pay for, any further performance by the other party. If he has paid money under the contract to the party in default, he will be entitled to recover it by an action for money had and received,[414] but only if the consideration for the payment has totally failed.[415] A deposit paid by him to secure performance is, however, recoverable.[416] The innocent party also retains his right to sue the party in breach for damages in respect of the loss sustained as a result of the breach and such a claim may include, in an appropriate case, the

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[408] *Hurst v Bryk* [2002] 1 A.C. 185, 198–199. The innocent partner may have a claim for damages against his fellow partners in respect of the breach which brought about the dissolution of the partnership but these losses cannot be measured by reference to the contribution which he must make to the partnership's liabilities because his liability to contribute to them had accrued prior to the breach of the partnership agreement (199). He can recover damages only if he can show that the dissolution of the firm caused him loss which he would not otherwise have sustained.

[409] [2002] EWHC 2761 (Ch), [2003] Ch. 250.

[410] [2002] EWHC 2761 (Ch), [2003] Ch. 250 at [87]–[93]. In this respect Neuberger J followed the reasoning of Lord Millett in *Hurst v Bryk* [2002] 1 A.C. 185. The decision of Neuberger J was in turn followed in *Golstein v Bishop* [2013] EWHC 881 (Ch), [2014] Ch. 131 at [120] and [123], albeit that it was noted that this view has the potential to "leave the innocent party in a position of some difficulty pending an application to the Court for dissolution". The Court of Appeal ([2014] EWCA Civ 10, [2014] Ch. 455) affirmed that the court's discretionary power under s.35(d) of the Partnership Act 1890 to dissolve a partnership is distinct from the principles which would be applied by a court when deciding whether a contract had been repudiated or that the repudiatory breach had been affirmed. The reasoning of Lord Millett was also followed by Henderson J in *Flanagan v Liontrust Investment Partners LLP* [2015] EWHC 2171 (Ch) in the context of limited liability partnerships.

[411] *Hurst v Bryk* [2002] 1 A.C. 185, 193D.

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

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

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

[415] See below, paras 33-063—33-066 and 33-073. The total failure requirement may not survive further judicial scrutiny, see *Goss v Chilcott* [1996] A.C. 788, 798. For academic criticism of the insistence upon a total failure see Burrows, *The Law of Restitution*, 3rd edn (2011), pp.330–334.

[416] See below, para.33-074.

recovery of expenditure which has been wasted in the performance of the contract.[417]

Rights acquired before discharge Although both parties are discharged from further performance of the contract, rights are not divested or discharged which have already been unconditionally acquired.[418] Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected.[419] Where, at the time of termination, money is due under the contract by the innocent party but that sum remains unpaid, the innocent party is not required to pay that sum if it would then be recoverable by him in an unjust enrichment claim (for example, on the ground that there had been a (total) failure of consideration). Otherwise, the innocent party can retain or recover sums paid or due before the time at which the repudiation is accepted by him[420] and may maintain an action for damages in respect of any cause of action vested in him at that time.[421] If the contract provides for payment of a deposit, which is forfeitable in the event of breach, the acceptance by the innocent party of the repudiation of the contract by the party in default does not preclude him from recovering and forfeiting the deposit if it is at that time due and unpaid.[422] Further in *Damon Compania Naviera SA v Hapag-Lloyd International SA*[423] the vendor and purchaser of three ships agreed that each would sign a memorandum of agreement within a reasonable time, whereupon the purchaser would be liable to pay a deposit of 10 per cent of the purchase price. The purchaser repudiated the contract by failing to sign the memorandum and this repudiation was accepted by the vendor. The Court of Appeal held that, even though the vendor had acquired no accrued right **28-082**

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417 *Havila Kystruten AS v Abarca Companhia de Seguros SA* [2022] EWHC 3196 (Comm) at [325]–[335] and, more generally, see below paras 30-025—30-039.

418 *Collidge v Freeport Plc* [2007] EWHC 1216 (QB), [2007] All E.R. (D) 457 (May) at [9]; *Holman Fenwick Willan LLP v Samady* [2023] EWHC 125 (KB) at [75].

419 *McDonald v Dennys Lascelles Ltd* (1933) 48 C.L.R. 457, 476–477; *Johnson v Agnew* [1980] A.C. 367, 396; *Damon Compania Naviera SA v Hapag-Lloyd International SA* [1985] 1 W.L.R. 435, 450; *Hurst v Bryk* [2002] 1 A.C. 185, 199; *SCI (Sales Curve Interactive) Ltd v Titus SARL* [2001] EWCA Civ 591, [2001] 2 All E.R. (Comm) 416 (albeit that, on the facts, it was held that the right invoked had not been unconditionally acquired prior to the termination of the contract). *Odffjell Seachem A/S v Continental des Petroles et D'Investissements* [2004] EWHC 2929 (Comm), [2005] 1 Lloyd's Rep. 275 at [35]; *Future Publishing Ltd v Edge Interactive Media Inc* [2011] EWHC 1489 (Ch), [2011] E.T.M.R. 50 at [67].

420 *Dewar v Mintoft* [1912] 2 K.B. 373, 387–388; *Damon Compania Naviera SA v Hapag-Lloyd International SA* [1985] 1 W.L.R. 435, 451; *Hardy v Griffiths* [2014] EWHC 3947 (Ch), [2015] Ch. 417. Contrast *Lowe v Hope* [1970] Ch. 94, although the latter decision has been regarded as incorrectly decided since the decision of the Court of Appeal in *Damon Compania Naviera SA v Hapag-Lloyd International SA*; see *Hardy v Griffiths* [2014] EWHC 3947 (Ch), [2015] Ch. 417 at [102] and [108].

421 *Damon Compania Naviera SA v Hapag-Lloyd International SA* [1985] 1 W.L.R. 435; *Hardy v Griffiths* [2014] EWHC 3947 (Ch), [2015] Ch. 417.

422 *Brooks v Beirnstein* [1909] 1 K.B. 98; *Leslie Shipping Co v Welstead* [1921] 3 K.B. 420; *Chatterton v Maclean* [1951] 1 All E.R. 761; *Overstone Ltd v Shipway* [1962] 1 W.L.R. 117; *Galbraith v Mitchenall Estates Ltd* [1965] 2 Q.B. 473; *Hyundai Shipbuilding & Heavy Industries Co Ltd v Pournaras* [1978] 2 Lloyd's Rep. 502; *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 1 W.L.R. 1129; *Cadogan Petroleum Holdings Ltd v Global Process Systems LLC* [2013] EWHC 214 (Comm), [2013] 2 Lloyd's Rep. 26; *Griffon Shipping LLC v Firodi Shipping Ltd (The Griffon)* [2013] EWCA Civ 1567, [2014] 1 All E.R. (Comm) 593; *Hardy v Griffiths* [2014] EWHC 3947 (Ch), [2015] Ch. 417; cf. *Wehner v Dene Steam Shipping Co* [1905] 2 K.B. 929; *China National Foreign Trade Transportation Corp v Evlogia Shipping Co SA of Panama* [1979] 1 W.L.R. 1018, HL (overpayment); *Thompson v Corroon* (1993) 42 W.I.R. 157, 173.

423 [1985] 1 W.L.R. 435.

to the deposit at the time he accepted the repudiation, nevertheless at that time he had a vested right to sue the purchaser for damages for breach of his obligation to sign the memorandum, the measure of such damages being the amount of the deposit. However, in the case of contracts for the sale of land or goods, unless the contract otherwise provides, sums due but unpaid as part payment of the purchase price from the party in default may not be recoverable.[424] If the innocent party has expended labour or money under the contract, or delivered goods to the party in default, but payment for these is not yet due, he will be entitled to sue for these on a quantum meruit or quantum valebat.[425] Otherwise, his remedy is to sue for damages for breach of contract.[426]

28-083 Position of guilty party Upon termination, the primary obligations of the party in default to perform any of the promises made by him and remaining unperformed come to an end, as does his right to perform them.[427] But for his primary obligations there is substituted by operation of law a secondary obligation to pay to the other party a sum of money to compensate him for the loss he has sustained as a result of the failure to perform the unperformed primary obligations.[428]

28-084 Recovery of deposits and part-payments The party in default will not be entitled to recover any deposit paid by him as security for the performance of his obligations.[429] In principle, other sums paid by him under the contract before the time of termination will likewise be irrecoverable.[430] But, unless the contract otherwise provides, he may be permitted to recover money paid as a part-payment of the purchase price where the contract is one for the sale of goods or land,[431] and it is possible that relief in equity may in certain circumstances be available.[432] Unpaid instalments which were due prior to the termination of the contract remain payable by the party in default unless there has been a total failure of consideration in respect of these instalments, in which case they cease to be payable.[433]

28-085 Entire and divisible obligations Whether he has any claim to be recompensed for partial performance of the contract which he has broken will depend on whether the obligation is entire or divisible. If it is entire, he will normally have no claim, unless there is evidence on which to ground the inference of a new contract or a

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424 *Palmer v Temple* (1839) 9 A. & E. 508; *Dies v British and International Mining and Finance Corp Ltd* [1939] 1 K.B. 724. See also *Mayson v Clouet* [1924] A. C. 980, 986; *McDonald v Dennys Lascelles Ltd* (1933) 48 C.L.R. 457, 477; *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 1 W.L.R. 1129, 1134, 1142, 1153; Beatson (1981) 97 L.Q.R. 389; and below, para.33-075. For the possibility of equitable relief, see below, paras 30-262 et seq.

425 See below, paras 33-076—33-080.

426 But see the effect of a buyer's repudiation on the seller's rights in respect of goods: *Benjamin's Sale of Goods*, 11th edn (2021), para.15-107.

427 *Hurst v Bryk* [1999] Ch. 1, 21–22.

428 *Moschi v Lep Air Services Ltd* [1973] A.C. 331, 345, 350, 351; *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827, 848–851; *Port Jackson Stevedoring Pty Ltd v Salmond and Spraggon (Australia) Pty Ltd* [1981] 1 W.L.R. 138, 145.

429 *Palmer v Temple* (1839) 9 A. & E. 508; *Mayson v Clouet* [1924] A.C. 980; *McDonald v Dennys Lascelles Ltd* (1933) 48 C.L.R. 457; *Dies v British and International Mining and Finance Corp Ltd* [1939] 1 K.B. 724; *BP Oil International Ltd v Vega Petroleum Ltd* [2021] EWHC 1364 (Comm) at [199]–[222].

430 See above, para.28-082, below, para.33-075.

431 See above, para.25-019 and para.28-082.

432 See below, para.30-269; Beatson (1981) 97 L.Q.R. 389.

433 *Mirimskaya v Evans* [2007] EWHC 2073 (TCC), (2007) 114 Con. L.R. 131.

claim in unjust enrichment.[434] But if the obligation is not entire but divisible, he may be entitled to claim in respect of a divisible part of the performance completed[435] (subject to a counterclaim by the innocent party in respect of that part of the contract which remains unperformed). Where goods delivered under a contract of sale are not in conformity with the contract, and are rejected by the buyer, the property in the goods revests in the seller.[436]

Effect on guarantor Where a creditor "accepts" his debtor's wrongful repudiation of the contract, and exercises his right to treat himself as discharged, this does not release a guarantor of the debtor from liability in respect of monies payable by the debtor after the date of discharge.[437] Nor is the guarantor released from liability in respect of sums due but unpaid at that time,[438] unless those sums could not have been recovered from the debtor himself[439] and the guarantee does not, on its true construction, require payment by the guarantor in the event of default in payment on the due date.[440] **28-086**

[434] See above, paras 25-029—25-030.
[435] See above, para.25-036.
[436] *Kwei Tek Chao v British Traders and Shippers Ltd* [1954] 2 Q.B. 459, 487; *Rosenthal & Sons Ltd v Esmail* [1965] 1 W.L.R. 1117, 1131.
[437] *Moschi v Lep Air Services Ltd* [1973] A.C. 331; *Holman Fenwick Willan LLP v Samady* [2023] EWHC 125 (KB) at [76]—see Vol.II, Ch.48.
[438] *Hyundai Shipbuilding and Heavy Industries Co Ltd v Pournaras* [1978] 2 Lloyd's Rep. 502; *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 1 W.L.R. 1129, HL; see below, para.33-075.
[439] See above, para.28-083.
[440] *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 1 W.L.R. 1129, HL and see Vol.II, Ch.48.