

EXCLUSION CLAUSES - DRAWING THE LINE

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*A widely drafted exclusion clause is the centrepiece of many contracts. Recent years have seen a move towards a more literal construction of exclusion clauses, by contrast with previous judicial efforts at neutralising such clauses. Such developments, whilst favouring the interests of the party seeking to avoid liability, have come at a price. The continued application of well established principles is now in doubt. Uncertainty surrounds the rules in *Canada SS Lines v. The King* and the rule in relation to deviation as well as the ability of a party to rely upon exclusion clauses in the face of its wilful or negligent conduct going to the root of the contract.*

This article examines the current state of the law in relation to exclusion clauses. It places particular emphasis on the transport industry, which is a heavy user of exclusion clauses, and consequently generates a significant proportion of the relevant case law. The proposition is advanced that the current “commercial construction” approach to exclusion clauses should not necessarily oust all of these previously well established rules. Rather, such rules may serve to control the operation of exclusion clauses which would otherwise produce absurd results.

1 INTRODUCTION

(a) Theme

Exclusion clauses have become an everyday incident of business contracts, particularly in the services sector. A good example is the road transport industry, where there is a “general practice that goods are accepted for carriage between commercial organisations on the basis of conditions stipulated in a consignment note or similar document (of which a bill of

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lading is a maritime example)”¹. Those conditions invariably include wide ranging (and verbose) exclusion clauses which are incorporated into the contract of carriage by the signature of the consignor or by a course of dealings between the consignor and the carrier.

Such clauses arguably fall within the class of conditions termed “most objectionable” by Lord Reid in *Suisse Atlantique Societe D’Armement Maritime S.A.v. N.V. Rotterdamsche Kolen Centrale*²:

...the customer has no time to read them, and if he did read them he would probably not understand them. And if he did understand and object to any of them he would generally be told he could take it or leave it.³

The verbosity of such clauses is arguably the result of a “contortionist” approach traditionally taken by common law courts to the interpretation of exclusion clauses. Recent decisions of the House of Lords and the High Court have seen a move away from the tendency to “construe language into patently not meaning what the language is patently trying to say”.⁴

The newfound resilience of the exclusion clause has come at a high price: the same decisions which have heralded a generous approach to construction of exclusion clauses have left once well established principles and doctrines in doubt. For example, the effect of deviation from the established route for carriage of goods, once considered fatal to the operation of exclusion clauses, is no longer certain. Similarly, Supreme Courts in Australia are divided as to the continued applicability of the rules of construction for exclusion clauses propounded in the oft cited decision in *Canada Steamship Lines v. The King*.⁵ Other potential moderators of the scope of exclusion clauses, such as the four corners rule, also appear to have diminished in importance. In recent times, widely drafted exclusion clauses have been held sufficient to exclude liability for loss in circumstances where the bailee’s servants and agents were found to have connived in the theft of such goods. Such an extraordinary result raises questions as to whether such a clause reduces the agreement between the parties to a mere statement of intention to perform.

¹ *McWilliams Wines Pty Ltd v. L S Booth Transport Pty Ltd*, unreported, Supreme Court, NSW, No 50179 of 1991, 11 February 1992 per Giles J.

² [1967] AC 361

³ n2 at 406.

⁴ K Llewellyn, “Notes” (1938-39) 52 *Harvard Law Review* 700 at 702.

⁵ [1952] AC 192.

The theme is developed that such rules and principles are not necessarily inconsistent with a literal approach to exclusion clauses, and indeed may be desirable to prevent one party effectively contracting out of liability even to attempt performance of the contract.

(b) The Function of the Exclusion Clause

Historically, the courts have viewed exclusion clauses as operating as a defence at the point of adjudication to accrued rights of action⁶. Thus an exclusion clause excludes or restricts rights which one party would otherwise have, or limits those rights by, for example, imposing a monetary limit on the damages which flow from breach.

An alternative approach, contended for by Professor Coote⁷, is treat exclusion clauses as qualifying the promises to which they relate, thus affecting the accrual of rights at the time of formation of the contract, either by modifying them or preventing them arising at all. Under this approach, an exclusion clause negates any implied obligation to use due care and thus if damage results, no action lies for breach of any implied condition.

The latter approach has met with some judicial favour⁸ and it has been argued that recent decisions reflect an implicit acceptance of this approach⁹. Whilst the correct approach in each case is dependant on the proper construction of the contract¹⁰, ostensibly at least, the courts appear to prefer to treat exclusion clauses as operating as shields to an action for negligence or breach of contract.

⁶ See for example *Owners of SS Istros v. FW Dahlstroem & Co* [1931] 1 KB 247; *Photo Production v. Securicor Transport Ltd* [1980] AC 827 per Lord Wilberforce (Lords Salmon, Keith and Scarman agreeing).

⁷ B Coote, *Exception Clauses*, London, Sweet and Maxwell, 1964 at Chapter 1 and B Coote, "The Second Rise and Fall of Fundamental Breach" (1981) 55 *ALJ* 788 at 792.

⁸ *Photo Production Ltd v. Securicor* [1980] AC 827 at 850 per Lord Diplock; *Thomas National Transport (Melbourne) Pty Ltd v. May and Baker (Australia) Pty Ltd* (1966) 115 CLR 353 at 385 per Windeyer J.

⁹ MH Ogilve, "Notes of Cases" (1994) 62 *Canadian Bar Review* 389 at 397.

¹⁰ *TNT v. May and Baker* (1966) 115 CLR 353 at 385 per Windeyer J.

2 CONSTRUCTION OF EXCLUSION CLAUSES

(a) “Commercial” Construction - The Present Position

Both the High Court and the House of Lords now advocate the interpretation of exclusion clauses in accordance with their “natural and ordinary meaning”¹¹ and without placing “a strained construction on words...which are clear and fairly susceptible of one meaning only”.¹²

The House of Lords decision in *Photo Production Ltd v. Securicor Transport Limited*¹³ marked a shift away from the so-called contortionist approach of analysis of the exclusion clause which was becoming “progressively more refined”¹⁴ in favour of “leaving cases to be decided straightforwardly on what the parties have bargained for”.¹⁵ The court advocated that “in commercial matters generally, where 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...for leaving the parties free to apportion the risks as they think fit and for respecting their decisions”.¹⁶

The High Court endorsed a similar approach some six years later in *Darlington Futures Limited v. Delco Australia Pty Ltd*¹⁷ although lower Australian courts had already embraced the principles of the *Photo Production* decision, as being consistent with Australian authority¹⁸.

Darlington's case concerned a contract between a futures broker and a company seeking to engage in futures trading for tax minimisation. The broker, in breach of contract, failed to close out certain contracts, resulting in heavy losses to the respondent. In an action to recover those losses, the broker relied upon the following exclusion clauses:

¹¹ *Darlington Futures Limited v. Delco Australia Pty Ltd* (1986) 161 CLR 500 at 510.

¹² *Photo Production v. Securicor Transport Limited* [1980] 1 All ER 556 at 568 per Lord Diplock.

¹³ [1980] 1 All ER 556.

¹⁴ n13 at 562 per Lord Wilberforce.

¹⁵ n13.

¹⁶ n13 at 561 per Lord Wilberforce.

¹⁷ (1986) 161 CLR 500 (hereinafter *Darlington's* case).

¹⁸ *Life Savers (Australia) Pty Ltd v. Frigmobile Pty Ltd* [1983] 1 NSWLR 431 at 435.

6 The Client...acknowledges that the Agent will not be responsible for any loss ..arising from trading by the Agent on behalf of the Client. The Client...acknowledges that the Agent will not be responsible for any loss arising in any way out of any trading activity undertaken on behalf of the Client whether pursuant to this Agreement or not...

7 c) Any liability on the Agent's part or on the part of its servants or agents for damages for or in respect of any claim for damages for or in respect of any claim arising out of or in connection with the relationship established by this agreement or any conduct under it or any orders or instructions given to the Agent by the Client, other than any liability which is totally excluded by paragraphs (a) and (b) hereof, shall not in any event (and whether or not such liability results from or involves negligence) exceed \$100.

The High Court reversed the decision of the Full Court of the Supreme Court of South Australia which held the broker responsible for the trading losses. In a unanimous decision it stressed the importance of "construing the language of (an exclusion clause) in the context of the entire contract of which it forms part"¹⁹ and "giving due weight to the context in which the clause appears including the nature and object of the contract, and, where appropriate construing the clause contra proferentum in cases of ambiguity".²⁰

The High Court held that clause 6 could, on its terms, only operate to protect the appellant where any trading activity was carried out with authority. Clause 7, by referring to any claims "in connection with" the relationship established by the agreement was, however, wide enough to allow the appellant to limit its damages notwithstanding the unauthorised nature of the trading.

That approach was reinforced in *Nissho Iwai Australia Ltd v. Malaysian International Shipping Corporation, Berhad*.²¹ In that case, which concerned an action against a carrier after the theft of cargo, the High Court stressed that the construction of an exclusion clause depends upon its language read in context and not on "any apriori notion that the nondelivery of goods was not intended to be protected".²²

¹⁹ n17 at 509.

²⁰ n17 at 510.

²¹ (1989) 167 CLR 219.

²² n21 at 227.

The general move towards a “commercial” construction of exclusion clauses leaves certain issues unaddressed. In particular, the following matters await authoritative determination:-

- (a) Does the approach outlined in *Darlington’s case*²³ have the effect of overruling the rules of construction propounded in *Canada Steamship Lines Ltd v. The King*²⁴ (“the Canada SS case”)?
- (b) Does the doctrine of deviation in relation to carriage of goods survive?
- (c) How effective is an exclusion clause in cases of serious or wilful breach of contract? Does the quasi deviation principle often termed the “four corners” rule operate to limit reliance on exclusion clauses, or can a properly drawn exclusion clause provide blanket cover for liability?

3 APPLICABILITY OF THE RULES IN THE CANADA SS CASE

In *the Canada SS case*²⁵ the Privy Council held that three rules must be applied to exclusion clauses,²⁶ namely:

- 1 If a clause contains language which expressly exempts the person in whose favour it is made from the consequence of the negligence of his own servants, effect must be given to that provision.
- 2 If there is no express reference to negligence, the court must consider whether the words used are wide enough in their ordinary meaning to cover negligence on the part of the servants of the proferens. If a doubt arises, it must be resolved against the proferens.
- 3 If the words used are wide enough for the above purpose the court must consider whether the head of damage may be based on some other ground other than negligence. That other ground must not be so fanciful or remote that the proferens cannot be supposed to have desired protection against it; but the existence of a possible head of

²³ n17.

²⁴ n5.

²⁵ n5.

²⁶ n5.

damage other than that of negligence is fatal to the proferens even if the words used are prima facie wide enough to cover negligence on the part of his servants.

The rules have been consistently applied in Australia to read down exclusion clauses not making specific reference to negligence²⁷.

Given the present insistence on a “commercial construction” there is now doubt as to whether these rules survive.

The English Courts have viewed the principles in the *Canada SS case* as “an approach to the problem of interpretation”²⁸ rather than as rules of law. They were not disapproved of in *Photo Production Ltd v. Securicor*²⁹ and indeed were referred to by Lord Wilberforce as “well known principles”.³⁰

In Australia, the courts are divided as to the applicability of the principles. In *Schenker and Co (Aust) Pty Ltd v. Maplas Equipment and Services Pty Ltd*³¹ the Full Court of the Supreme Court of Victoria concluded that the approach of the Privy Council in the *Canada SS case* was “inconsistent with the principle of the Australian cases culminating in *Delco*”.³²

The New South Wales Court of Appeal in *The Antwerpen*³³ and the Full Court of South Australia in *Valkonen v. Jennings Construction Ltd*³⁴ reached the same conclusion.

²⁷ *Commissioner for Railways v. Quinn* (1945) 72 CLR 345 at 355-6, 365, 371, 384; *Davis v. Pearce Parking Station Pty Ltd* (1954) 91 CLR 642; *Sydney City Council v. West* (1965) 114 CLR 481; *T.N.T. v. May and Baker* (1966) 115 CLR 353; *Bright v. Sampson and Duncan Enterprises Pty Ltd* (1985) 1 NSWLR 346.

²⁸ *Gillespie Brothers and Co Ltd v. Roy Bowles Transport Ltd, Rennie Hogg Ltd* [1973] 1 QB 400 at 421 per Buckley LJ and per Denning LJ at 414; *Smith v. South Wales Switchgear* [1978] 1 All ER 18 at 22 per Viscount Dilhorne.

²⁹ n13.

³⁰ n13 at 564, referring to *Alderslade v. Hendon Laundry Ltd* [1945] 1 All ER 244.

³¹ [1990] VR 834.

³² n31 at 846. Note that in an earlier unreported Victorian Supreme Court decision apparently not cited to the Court, the opposite conclusion was reached by Nicholson J (*Perklis Ginis v. Grundig Dictation Machines Pty Ltd*, unreported, O/R 76 of 1985, 13 May 1987).

³³ n5.

³⁴ unreported, Full Court, SA. SCGRG 681 of 1991, 29 November 1995 per Cox, Matheson and Perry JJ.

In *Graham v. Royal National Agricultural and Industrial Association*³⁵ Connolly J in the Supreme Court of Queensland reached the opposite conclusion. In doing so he noted that the rules had expressly been endorsed by the House of Lords in *George Mitchell Limited v. Finney Locke Seeds Ltd*,³⁶ at least in relation to exclusion clauses and had not been doubted by the House of Lords in *Photo Production*.³⁷ Furthermore, the High Court in *Darlington's case*³⁸ was not dealing with a case involving negligence but rather with the notion of fundamental breach.

Connolly J's approach was endorsed by the Western Australian Full Court in *Allied Westralian Finance Ltd v. Wenpac Pty Ltd*,³⁹ the court observing that "the principles...are not in tension with the general rule set out in the *Darlington Futures case*".⁴⁰

This stance is supported by Professor Carter, who concludes that the High Court decision in *Darlington's case* does not purport to oust the Rules.⁴¹

The better view is that the first two rules are consistent with *Darlington's case*. The third rule derives support from the endorsement by the High Court in *Darlington's case* of the comments by Windeyer J in *TNT v. May and Baker*⁴² that exclusion clauses should be interpreted having regard to "necessary implications based upon (the parties') presumed intention".⁴³ Carter persuasively argues that such presumed intentions include an intention not to exclude liability for negligence in the absence of express words. There is force in the argument that provided the third rule is used as an "aid in the process of construction"⁴⁴ rather than as a "rule" it continues to serve a useful purpose in resolving the presumed intention of the parties.⁴⁵

³⁵ [1989] 1 Qd R 624.

³⁶ [1983] 2 AC 803.

³⁷ n13.

³⁸ n17.

³⁹ unreported, No 20 & 21 of 1994, 8 November 1995.

⁴⁰ n40 at 11 per Rowland J.

⁴¹ J Carter, "Commercial Construction' and the *Canada SS Rules*" (1995) 9 *JCL* 69 at 100, cf J Swanton, "Exclusion of Liability for Negligence" (1989) 15 *UQLJ* 157 at 165.

⁴² (1966) 115 CLR 353.

⁴³ n42 at 376.

⁴⁴ *EE Caledonia Ltd v. Orbit Valve Co Europe* [1994] 1 WLR 1515 at 1522.

⁴⁵ Carter, n41 at 98.

It also does no injustice to require exclusion clauses to be specific as to their coverage. The party seeking to rely upon such a clause will usually be responsible for its drafting, and so be in a position not only to assess the potential scope of liability, but also to provide for its exclusion. Whilst to retain the third rule will do little to reduce the verbosity of exclusion clauses, this very verbosity may serve as a greater warning to the other party of the nature and extent of the exclusion. A long exclusion is arguably more likely to alert the other party as to the broad and all encompassing nature of an exclusion, than a clause which simply removes liability for “everything”.

4 DEVIATION FROM THE USUAL ROUTE

The doctrine of fundamental breach had its origins in the law of carriage of goods by sea where a deviation from the usual, customary or prescribed route of travel results in the automatic loss of the protection of any exclusion clauses.⁴⁶ The shipowner became a common carrier and thereby liable for any loss of or damage to goods (subject to the exceptions of acts of God, acts of the monarch’s enemies and inherent vice) even where such loss or damage would have occurred in any event.⁴⁷ The same principle was also applied to the carriage of goods by land.⁴⁸

The reasoning for such an approach was said by the House of Lords in *Hain Steamship Co Ltd v. Tate and Lyle Ltd*⁴⁹ to be that such a “fundamental” breach automatically rescinds the contract in futuro. The underlying policy consideration is probably that marine insurance policies were historically vitiated by deviation.

The true basis for the doctrine remains questionable. It is uncertain whether deviation has the effect of ending the contract or whether, once a deviation has occurred, any exclusion clauses are unavailable as a matter of construction, as they were only intended to avail the carrier when the voyage was performed in accordance with the contract.⁵⁰

⁴⁶ *Joseph Thorley Ltd v. Orchis S.S. Co Ltd* [1907] 1 KB 660; *Hain S.S. Co Ltd v. Tate & Lyle Ltd* [1936] 2 All ER 597.

⁴⁷ *Ellis v. Turner* (1800) 5 TR 531; 101 ER 1529.

⁴⁸ *Mallet v. Great Eastern Railway* [1899] 1 QB 309.

⁴⁹ [1936] 2 All ER 597

⁵⁰ S Baughen, “Does Deviation Still Matter” [1991] *LMCLQ* 70 at 72.

Whilst *Photo Production v. Securicor*⁵¹ did not overrule the “deviation” cases it cast doubt on whether they are still good law. Lord Wilberforce who had doubted the survival of the doctrine in the earlier decision of *Suisse Atlantique*⁵² opined that the doctrine might still survive as a “body of authority sui generis with special rules derived from historical and commercial reasons”.⁵³

Nevertheless, as one commentator observed: “it would be anomalous if the doctrine that gave birth to fundamental breach survived the death of its offspring”.⁵⁴ There is now additional dicta in support of the assimilation of the deviation cases into the general law of contract⁵⁵ and much academic writing has been devoted to the subject.⁵⁶

The better view is probably that the doctrine, in so far as it results in automatic loss of protection, regardless of the wording of the relevant exclusion, is inconsistent with the literal approach to exclusion clauses now adopted by both the High Court and the House of Lords. Nevertheless, as will be discussed in the next section, it may be that a deviation from the usual route will nevertheless prevent reliance upon an exclusion clause under the quasi deviation principle often termed the “four corners rule”.

⁵¹ [1980] AC 827.

⁵² n2 at 433.

⁵³ n51 at 845.

⁵⁴ J Livermore, “Deviation, Deck Cargo and Fundamental Breach” (1990) 2 *JCL* 241 at 262.

⁵⁵ See *George Mitchell v. Finney Locke Seeds* [1982] 3 WLR 1036 at 1056 per Kerr LJ; *The Antares* [1987] 1 Lloyd’s Rep 424 at 429-430 per Lloyd J; *State Trading Corporation of India Ltd v. M Golodetz Ltd* (“*The Sara D*”) [1989] 2 Lloyd’s Rep 424 at 430 per Lloyd J.

⁵⁶ Livermore, n54 at 104; C Debattista, “Fundamental Breach and Deviation in Carriage of Goods by Sea” (1989) *Journal of Business Law* 22; J Hubbard, “Deviation in contracts of sea carriage; after the demise of fundamental breach” (1986) 16 *VUWLR* 147.

5 BREACHES GOING TO THE ROOT OF THE CONTRACT

(a) “Commercial Construction” - How does it affect breaches going to the root of the contract?

The “commercial construction” approach advocated by the High Court in the *Darlington*⁵⁷ and *Nissho Iwai*⁵⁸ decisions has not simplified the task of courts in deciding if an exclusion clause operates in circumstances where the party seeking to rely upon the clause has committed a breach of contract which “defeats the main object of the contract”.⁵⁹ *The Nissho Iwai* decision makes it clear that the mere fact that the main object of the contract will be defeated by the proferens breach of contract will not, of itself, justify the conclusion that the exempting clause is inapplicable.

That case concerned the non-delivery of frozen prawns apparently stolen whilst in a stack at the Glebe Island terminal. An exclusion clause provided that the carrier was not liable for “any loss or damage to or in connection with the Goods arising from any clause or event which the Carrier could not reasonably avoid or the consequences of which the Carrier could not prevent by exercise of reasonable diligence”.

In response to an argument that the exemption clause had the effect of defeating the main object of the contract, the court said that:

The context in which the clause is to be construed includes...the Carrier’s agreement to deliver the Goods to the owner...But, relevant as an object is in the construction of clause 8(2), the meaning of that provision ultimately depends on its language, read in context and not on any a priori notion that the non-delivery of Goods was not intended to be protected. In determining whether an exemption clause should be construed so as to apply to an event which has defeated the main object of the contract, much must depend on the nature of the events which the clause identifies as giving rise to the exemption from liability. If the happening of a stipulated event will always result in the defeat of the main object of the contract, there will be no scope for holding the

⁵⁷ n17.

⁵⁸ n21.

⁵⁹ *Shoard v. Palmer* (1989) 98 FLR 402 at 416.

object requires the conclusion the exemption clause is not applicable to that event. But even in cases where the occurrence of the events stipulated in the exemption clause will not always defeat the main object of the contract, the nature of those events may nevertheless give rise to the inference that the clause was intended to apply to those events when they occur in circumstances which defeat the main object of the contract.⁶⁰

This approach is in stark contrast with the so-called rule of fundamental breach which held sway with the English courts until the *Photo Production*⁶¹ decision in 1980. In order to understand the impact of the High Court's present position, it is necessary to briefly consider the historical stance of both the English and Australian courts to breaches going to the root of the contract. The confused and complex judicial history of the doctrine of fundamental breach in Britain is also illustrative of the difficulties faced by courts in arriving at an approach to exclusion clauses which satisfactorily balances the interests of both parties, does not unduly interfere with freedom of contract and yet provides certainty.

(b) The English Position - the Rise and Fall of Fundamental Breach

It will be recalled that the common law considered deviation from the usual route to be a breach of such magnitude that the other party to the contract was entitled to treat it as going to the root of the contract and to declare itself no longer bound by any of its terms.⁶² In addition, the shipowner was deprived of all stipulations in the contract which limited its liability as a carrier.⁶³ In *Smeaton Hanscomb and Co v. Sassoon I Setty Son and Co*⁶⁴ Lord Devlin took the "deviation" principle "ashore" saying:

It is no doubt a principle of construction that exceptions are to be construed as not being applicable for the protection of those for whose benefit they are inserted if the beneficiary has committed a breach of a fundamental term of the contract...I do not think that what a fundamental term is has ever been clearly defined. It must be something I think, narrower than a condition of the contract...It is I think

⁶⁰ n21 at 227.

⁶¹ n51.

⁶² n49.

⁶³ *Joseph Thorley Ltd v. Orchis S.S. Co Ltd* [1907] 1 KB 660.

⁶⁴ [1953] 1 WLR 468.

something which underlies the whole contract so that, if it is not complied with, the performance becomes something totally different from that which the contract contemplates.⁶⁵

Devlin J's principle of construction became Denning LJ's substantive rule of law in *Karsales (Harrow) Ltd v. Wallis*.⁶⁶ There the contract provided that no warranty was given that the vehicle was roadworthy or "as to its age, condition or fitness for any purpose". Lord Denning considered that exemption clauses were not available "as a cover for misconduct or indifference or to enable him (the proferens) to turn a blind eye to his obligations"⁶⁷ and that there was a "general principle that a breach which goes to the root of the contract disentitles the party from relying on the exempting clause".⁶⁸

A series of Court of Appeal decisions purported to apply this "rule of law"⁶⁹ justifying it on various grounds including that "(exemption) clause(s) must therefore be limited and modified to the extent necessary to enable effect to be given to the main object and intent of the contract"⁷⁰ and "...breach going to the root of the contract ..disentitles the owners to take refuge behind an exception clause intended only to give protection to those breaches which are not inconsistent with and not destructive of the whole essence of the contract".⁷¹

The House of Lords attempted to arrest the use of "fundamental breach" as a rule of law in *Suisse Atlantique Societe D'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale*.⁷² In that case, charterers sought to avoid the operation of a demurrage clause by arguing that deliberate delays by the respondents in loading and discharging had limited the number of voyages which could be completed, and that such deliberate conduct amounted to a fundamental breach of the charterparty.

⁶⁵ n64 at 470.

⁶⁶ [1956] 1 WLR 936.

⁶⁷ n66 at 940.

⁶⁸ n67.

⁶⁹ n2 at 401 per Lord Reid.

⁷⁰ *Sze Hai Tong Bank Ltd v. Rambler Cycle Co Ltd* [1959] AC 576 at 589 per Denning LJ.

⁷¹ *Yeoman Credit Ltd v. Apps* [1962] 2 QB 508 at 517 per Holroyd Pearce LJ.

⁷² n2.

⁷³ n13 at 560 per Lord Wilberforce.

In “lengthy, and perhaps...sometimes indigestible speeches”⁷³ the House of Lords unanimously rejected the notion of a rule of law which nullified clauses exempting liability for fundamental breach or breach of a fundamental term.⁷⁴ Rather it was a question of construction requiring the examination of the exclusion clause to see whether it was intended to give exemption from the consequences of fundamental breach.⁷⁵ By explaining the earlier “fundamental breach” decisions as depending on the true construction of the contract rather than overruling them, however, their Lordships left open the way for “fundamental breach” to continue to neutralise exclusion clauses, albeit under a different banner.⁷⁶

Indeed, in *Harbutt’s “Plasticine” Ltd v. Wayne Tank and Pump Co Ltd*⁷⁷ Lord Denning considered that the *Suisse* case affirmed “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”.⁷⁸

Harbutt’s case was subject to extensive academic criticism.⁷⁹ Perhaps the most notable critique of the decision and of the basis of the fundamental breach doctrine came from Professor Coote who sought to argue that exemption clauses operate at the point of formation of the contract so as to qualify the promises to which they relate rather than as defences which take effect at the point of adjudication.⁸⁰

Ultimately, in a victory for the advocates of freedom of contract, *Harbutt’s* case was overruled by the House of Lords decision in *Photo Production*.⁸¹ In that case, the facts of which are set out above, it was held

⁷⁴ n2 at 392 per Viscount Dilhorne.

⁷⁵ n74.

⁷⁶ Coote, “The Second Rise and Fall of Fundamental Breach”, n7 at 793.

⁷⁷ [1970] 1 QB 447.

⁷⁸ n77 at 467.

⁷⁹ See for example JF Wilson, “The Plot Thickens” (1971) *NZULR* 254; AM Shea, “Discharge from Performance of Contracts by Failure of Condition” (1979) 42 *MLR* 623; B Coote, “The Effect of Discharge by Breach on Exception Clauses” [1970] *CLJ* 221.

⁸⁰ Coote, *Exception Clauses*, n7 at Ch 1; Coote, “The Second Rise and Fall of Fundamental Breach”, n7 at 792; Coote, “The Rise and Fall of Fundamental Breach” (1967) 40 *ALJ* 336 at 337-41.

⁸¹ n13.

that “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”.⁸² Subsequent application of that decision has seen the courts uphold limitation clauses in bills of lading notwithstanding the shipowner’s breach of contract in failing to carry goods below deck⁸³ and in circumstances where theft of cargo was alleged.⁸⁴

Appealing simple as the reasoning of the House of Lords seems, uncertainty remains as to the courts’ approach in cases where the party seeking to rely upon the exclusion clause commits a negligent or wilful breach going to the root of the contract.

Other than the discredited fundamental breach doctrine, the courts have also used the “four corners” rule to limit the ability to rely upon an exclusion clause. That rule stems from the cases in relation to deviation and “quasi deviation”. Lord Scrutton in *Gibaud v. Great Eastern Railway Co*⁸⁵ stated the rule thus:

...if you undertake to do a thing in a certain way, or to keep a thing in a certain place, with certain conditions protecting it, and have broken the contract by not doing the thing contracted for in the way contracted for, or not keeping the article in the place in which you have contracted to keep it, you cannot rely on the conditions which were only intended to protect you if you carried out the contract in the way in which you had contracted to do it.⁸⁶

Notwithstanding the rule’s link with the cases in relation to deviation, the courts have seemingly dealt with cases of quasi-deviation under the general law of contract: whether or not a quasi deviation has the effect of preventing reliance on exclusion clauses is a question of construction.⁸⁷ In addition, there has been no adoption of the reasoning of *Hain v. Tate and Lyle*⁸⁸ which treated deviation as a special case where, after the breach by

⁸² n13 at 561 per Lord Wilberforce.

⁸³ *Kenya Railways v. Antares Co Pty Ltd. The Antares (Nos 1 & 2)* [1987] 1 Lloyd’s Rep 424.

⁸⁴ *Cia Portorafii Commerciale SA v. Ultramar Panama Inc (“The Captain Gregos”)* [1990] 3 All ER 967.

⁸⁵ [1921] 2 KB 426.

⁸⁶ n85 at 435.

⁸⁷ See for example *The Berkshire* [1974] Lloyd’s Rep 185; *J Evans v. Andrea Merzario* [1976] 1 WLR 1078; Baughen, n50 at 92.

⁸⁸ n49.

deviation it is for the innocent party to affirm and in the absence of such affirmation, the contract is at an end.⁸⁹

The continued application of the four corners rule in England is uncertain. The recent case of *Tor Lines A.B. v. Alltrans Group of Canada Ltd* (“*The TFL Prosperity*”)⁹⁰ provides an interesting illustration of the post-Photo Production reasoning to a case where a shipowner’s breach of contract went to the root of the contract.

In that case, the defendants let a vessel on time charter to the plaintiffs. The contract required the vessel supplied to have a main deck of 6-10 metres in height. As a consequence of the vessel supplied not meeting this specification the plaintiff suffered damage as standard trailers could not be used. Clause 13 of the Baltimore charterparty provided as follows:

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 the goods on board if such delay or loss has been caused by want of due diligence on the part of the owners...in making the vessel seaworthy and fit for the voyage or any personal act or omission or default of the owners...Owners not to be responsible in any other case nor for damage or delay whatsoever and howsoever caused.

The House of Lords held that on a proper construction of the exclusion clause, it did not protect the owners from a claim brought by the charterers for loss suffered because of the misdescription of deck height. The words of the second sentence were linked to the first and related to delay and physical loss due to the causes set out in the first sentence.

Lord Roskill, however, also held that if the words “in any other case” were construed literally then “the owners would be under no liability if they never delivered the vessel at all for service under the charter”.⁹¹ Such a construction would “allow a breach of the warranties as to description in clause 26 to be committed or a failure to deliver the vessel at all to take place without financial redress to the charterers”.⁹²

⁸⁹ Baughen, n50 at 93.

⁹⁰ [1984] 1 All ER 103.

⁹¹ n90 at 108 per Roskill LJ.

⁹² n90 at 112.

Arguably the same result could have been achieved by use of the four corners rule: the action by the shipowners in supplying a vessel which did not meet the specifications in the charterparty amounted to a failure to provide the vessel contracted for. Whilst the court did not purport to apply the “four corners rule” it is difficult to see how the two approaches are distinguishable.

The Court’s approach in *The TFL Prosperity* has been termed an application of the “rule against absurdity”⁹³ - a literal construction of an exclusion clause should not be taken where this would deprive the contract of contractual force or permit performance of something essentially different from that which was contracted for.⁹⁴

In a more recent case, Hirst J in *The Chanda*⁹⁵ placed specific reliance on the “four corners” rule in concluding that a package limitation could not have been intended to protect a shipowner in breach of its obligation to stow goods below deck. The rule, however, was clearly based on contractual intention.⁹⁶ This decision has been criticised as requiring “acceptance of the proposition that stowage of cargo on deck in breach of contractual obligations...nullifi(ies) the effect of exempting provisions”⁹⁷ and as reintroducing the concept of fundamental breach.

(c) The Australian Position

Australian courts never embraced the notion of fundamental breach⁹⁸ and have continually stressed the need for an examination of the exclusion clause itself, read in context.

In *Council of the City of Sydney v. West*,⁹⁹ the respondent parked his car in the appellant’s car park. The conditions of parking contained a condition excluding liability for “loss or damage to any vehicle...however such loss or

⁹³ Clarke M, “Fundamental Breach is Dead! Long Live the Rule against Absurdity!” [1984] CLJ 32.

⁹⁴ See also *U.G.S. Finance v. National Mortgage Bank of Greece* [1964] 1 Lloyd’s Rep 446 at 453 per Pearson LJ.

⁹⁵ *Wibau Maschinenfabric Hartman SA v. Mackinnon Mackenzie & Co (“The Chanda”)*[1989] 2 Lloyd’s Rep 494.

⁹⁶ n95 at 505.

⁹⁷ Livermore, n54 at 261.

⁹⁸ *In Council of the City of Sydney v. West* (1965) 114 CLR 481, Barwick CJ and Taylor, Kitto and Windeyer JJ all doubted the existence and wisdom of such a doctrine.

⁹⁹ (1965) 114 CLR 481.

damage may arise or be caused.” The ticket also contained a notation saying “Important - this ticket must be presented for time stamping and payment before taking delivery of the vehicle.” The evidence suggested that a replacement ticket had wrongly been issued, allowing a thief to exit the car park with the respondent’s vehicle. The respondent sought damages for breach of contract and in detinue.

The High Court concluded that the exclusion clause did not protect the Council, based on a proper construction of the terms of the exclusion clause. The clause offered protection only in the performance of the contract: it could not have been intended to protect the Council from “negligence on the part of the council’s servants in doing something which it is neither authorised nor permitted to do by the terms of the contract”.¹⁰⁰ Whilst the court’s decision appears to be based on the “four corners” rule,¹⁰¹ their Honours were anxious to stress that the court’s task was not to apply rules but to interpret the clause itself.¹⁰² As Windeyer J explained:

It is not for a court to say that persons may not contract out of the obligations that the law of bailment imposes, or put new limits on their power to do so. The question for a court is only whether they have done so.¹⁰³

This notion of examining the clause in light of the proferens’ obligations under the contract was expanded upon by the High Court in *Thomas National Transport (Melbourne) Pty Ltd v. May and Baker*.¹⁰⁴

In that case, the appellant carrier engaged a subcontractor to collect goods belonging to the respondent. The appellant’s depot closed for the evening before the subcontractor could drop off the goods, in accordance with his usual practice. He therefore stored the goods in his garage where they were destroyed by fire. The consignment note purported to exclude liability for “loss, damage or misdelivery of goods in transit or in storage for any reason whatsoever.”

¹⁰⁰ n99 at 488 per Barwick CJ and Taylor J.

¹⁰¹ n99 at 495 per Kitto J, and at 503 per Windeyer J specifically refer to the principle in *Gibaud’s Case*. Barwick CJ and Taylor J refer to the principle without citing authority (at 488).

¹⁰² n99 at 488 per Barwick CJ and Taylor J, at 493 per Kitto J, at 499 per Menzies J and at 503 per Windeyer J.

¹⁰³ n99 at 503.

¹⁰⁴ n42.

The majority of the court implied a term into the contract that the goods collected would be taken to TNT's depot at the conclusion of the pickup round because it was "unthinkable that it was within the contemplation of the parties that an extremely valuable consignment of goods was to be kept overnight by TNT's servant or subcontractor in the yard of a suburban cottage".¹⁰⁵ The carrier's breach of that implied term amounted to a breach of a "primary obligation" to conduct a pickup service which returned to the TNT depot with the result that TNT "must be held liable for the damage which occurred whether or not it can be said to have resulted from the lack of care or to have been directly caused by TNT's unauthorized departure from the terms of the contract".¹⁰⁶

In a dissenting judgement, Windeyer J stated the principle, conveniently called the "four corners rule" thus:

A condition absolving a party from liability, in particular exonerating a bailee from liability for the loss of goods in his care, is construed as referring only to a loss which occurs where the party is dealing with the goods in a way that can be regarded as in intended performance of his contractual obligation. He is not relieved of liability if, having obtained possession of the goods, he deals with them in a way that is quite alien to his contract.¹⁰⁷

In Windeyer J's view, the correct approach is to look to what the party who relies upon the exemption clause contracted to do and then to see whether there was such "a radical breach by him of his obligations under the contract that, upon the true construction of the contract as a whole including the exemption clause, he cannot rely upon the exemption clause"¹⁰⁸.

Such an approach seems to treat exemption clauses in the manner contended for by Professor Coote¹⁰⁹, namely as defining substantively the limits of the parties' duties by negating obligations that the law would otherwise impose. The other approach, upon which the rule in relation to

¹⁰⁵ n42 at 365 per McTiernan, Taylor and Owen JJ.

¹⁰⁶ n42 at 366 per McTiernan, Taylor and Owen JJ.

¹⁰⁷ n42 at 377.

¹⁰⁸ n42 at 379.

¹⁰⁹ Coote, n7.

fundamental breach arguably depends, is to treat exclusion clauses as absolving a party from liability for his breach of contract. The former approach cannot embrace the concept of fundamental breach because, if the exclusion clause operates in this manner, there is no breach of the contract.

There is also some Australian authority in support of the proposition advanced in the recent House of Lords decision in *The TFL Prosperity*¹¹⁰ discussed above.¹¹¹ In *H and E Van der Sterren v. Cibernetics (Holdings) Pty Ltd*¹¹² Walsh J observed that “the terms of exclusion clauses must sometimes be read down if they cannot be applied literally without an absurdity or defeating the main object of the contract...But such a modification by implication of the language which the parties have used in an exception clause is not to be made unless it is necessary to give effect to what the parties must be understood to have intended.”¹¹³

In neither *Darlington's case*¹¹⁴ nor *Nissho Iwai*¹¹⁵ were the principles in *Sydney City Council v. West*¹¹⁶ nor *TNT v. May and Baker*¹¹⁷ doubted. Nevertheless, the High Court's unanimous decisions in both cases have been seen as widening the scope for excluding liability for breaches going to the root of the contract. The subsequent decisions are difficult to reconcile and show a trend towards literal construction of exclusion clauses even where such construction arguably deprives the contract of contractual force.

5 THE AUSTRALIAN CONVERSION AND MISAPPROPRIATION CASES

In a series of cases since *Darlington's case* and *Nissho Iwai* conflicting results have been reached where the carrier's servants and agents have been guilty of conversion or misappropriation. It will be recalled that the latter High Court decision involved the theft of cargo but that such theft was not

¹¹⁰ n90.

¹¹¹ n90.

¹¹² [1970] ALR 751.

¹¹³ n112 at 760.

¹¹⁴ n17.

¹¹⁵ n21.

¹¹⁶ n99.

¹¹⁷ n42.

alleged to have occurred with the knowledge or connivance of the stevedore or its servants or agents.

In *Rick Cobby Haulage Pty Ltd v. Sims Metal Pty Ltd*¹¹⁸ the carrier subcontracted carriage of the goods to a subcontractor who was never seen again. Clause 2 of the consignment note provided that no responsibility was accepted for “any loss of or damage to or misdelivery or nondelivery of goods...either in transit or in storage for any reason whatsoever”. In the South Australian Full Court, Mohr J considered that the loss occurred during transit but that the loss did not occur during the carrying out of the contract: to hold that the exclusion clause was effective would mean that “the carrier would be free to convert or otherwise misappropriate goods entrusted to it without being liable.”¹¹⁹ Bollen J considered that the exclusion clause was ineffective because “transit” must be read down to mean transit during the course of the journey contemplated by the contract: the words used were not wide enough to “exempt the appellant from the consequences of conduct far outside the work and activity contemplated by the contract”.¹²⁰

In *Glebe Island Terminals Pty Ltd v. Continental Seagram Pty Ltd* (“*The Antwerpen*”)¹²¹ containers of scotch whiskey were discharged by The Antwerpen at the Glebe Island Terminal. Despite elaborate security the containers could not be located when a road carrier arrived to collect them. Carruthers J at first instance found that containers had been stolen and that on the balance of probabilities the thieves had the co-operation of one or more terminal employees.¹²²

The conditions of the Bill of Lading which applied to the terminal by virtue of a Himalaya clause provided, inter alia:

4 The Carrier shall not in any circumstances whatsoever be liable for any loss of or damage to the goods howsoever caused occurring after they are discharged at the ocean vessel's rail at the port of discharge.

8(3) The exemptions limitations terms and conditions in this bill of lading shall apply whether or not loss or damage is caused by negligence

¹¹⁸ (1986) Aust Torts Reports 80-026.

¹¹⁹ n118 at 67,747.

¹²⁰ n118 at 67,749.

¹²¹ [1994] 1 Lloyd's Rep 213.

¹²² n122.

or actions constituting fundamental breach of contract.

In the Court of Appeal Sheller JA (with whom Cripps JA agreed) found that clause 4 was wide enough to encompass the unauthorised delivery of the goods which had occurred but considered that such general terms should not be read “as excluding liability for acts done by the bailee or the carrier with respect to a bailor’s goods other than in intended performance of the contract”.¹²³ Expressly applying the “four corners rule”, he found that clause 4 alone did not operate to protect “an unauthorised delivery amounting to conversion of the goods”.¹²⁴

Clause 8(3) however, was interpreted as extending the protection of clause 4 to the circumstances of the case on the basis that the employees of Glebe Island were “in fundamental breach of the contract”¹²⁵ and the meaning of clause 8 was plain.

In a spirited dissent, Handley JA considered that if clause 8 had the effect of protecting the carrier from a deliberate breach of its contractual obligations to release the cargo only on the presentation of a bill of lading, the express term to this effect would impose no effective legal obligation on the carrier and would at best be an illusory promise.¹²⁶

In Handley JA’s view, whilst there is no general principle that an exclusion clause cannot protect a party from breach of an express term, based on *Sydney City Council v. West*¹²⁷ and *Sze Hai Tong Bank v. Rambler Cycle*¹²⁸ the exclusion clause, when read in the light of the contract as a whole, could not be construed as covering “deliberate breaches of contract or conversions by or with the privity of the carrier”.¹²⁹

In *Kamil Export (Aust) Pty Ltd v. N.P.L. (Australia) Pty Ltd*¹³⁰ the carrier’s agent released the shipper’s goods without production of the relevant bills of lading. It was common ground that such release amounted to conversion

¹²³ n122 at 245 per Sheller JA.

¹²⁴ n122 at 246 per Sheller JA.

¹²⁵ n122 at 247 per Sheller JA.

¹²⁶ n121 at 226.

¹²⁷ n99.

¹²⁸ [1959] AC 576.

¹²⁹ n121 at 230.

¹³⁰ [1996] 1 VR 538.

of the goods.¹³¹ A widely drawn exclusion in the bill of lading provided that the carrier would not be liable for “any loss, damage or delay howsoever caused to the goods arising after discharge”. In the Victorian Full Court, Marks J (with whom Fullagar J agreed) considered the question facing the court to be “whether the words of exemption should be interpreted to mean what they seem in clear language to say or whether they should be read down...not to apply to loss due to conduct which would defeat the main object of the contract of carriage, namely delivery to the consignee ..of the bill of lading”.¹³²

After reviewing all of the British and Australian authorities, Marks J attempted a summary of the law, as follows:

First, the parties may agree to conditions of carriage which protect the carrier against liability for loss which may defeat the main object of the carriage contract...Next, if the exemption clause specifies events on the happening of which loss occurs, then the exemption clause will apply even although the event, when it happens, may defeat the main object of the contract...It is another way of saying that the power to imply a limitation does not exist where it is clear that the parties have expressly stated in clear and unambiguous language that on the occurrence of certain events there will be no consequential liability for loss of the goods...It follows that the question ordinarily is whether, on the proper construction of the contract, it can be said that the language of the exception clause clearly applies to the event...which has actually happened, notwithstanding that its effect may defeat the main object of the carriage contract.¹³³

Marks J considered that the decision in *The Antwerpen*¹³⁴ could be distinguished. Unlike that case, the terms and conditions contained on the bill of lading did not purport to extend the protection of the exclusion clauses to cases where loss or damage was caused by a fundamental breach of contract.

¹³¹ n130 at 540.

¹³² n130 at 545.

¹³³ n130 at 552.

¹³⁴ n121.

The approach taken by the courts in these cases is open to criticism. Whilst the primary task of the court must, in accordance with the High Court in *Delco* and *Nissho*, be to give words their natural meaning, such analysis cannot take place in a vacuum. If the rules of construction advocated in *Canada SS Lines*¹³⁵ are removed and the “four corners” rule cannot operate to override express stipulations in the contract the courts are left to determine what the parties to the contract must have intended.

Such an approach is artificial. The complete intentions of the parties are rarely expressed and it is dangerous and productive of uncertainty for the court to embark on a process of ascertaining “presumed intention” particularly without the aid of rules of construction.

To say that the position of the parties in *The Antwerpen*¹³⁶ (where the exclusion clause was held to be operative) was different to that of the parties in *Rick Cobby Haulage Pty Ltd v. Sims Metal Pty Ltd*¹³⁷ and *Kamil Export (Aust) Pty Ltd v. N.P.L. (Australia) Pty Ltd*¹³⁸ because of the insertion of a clause which purported to absolve the offending party of liability for fundamental breach creates an artificial distinction. There is no doubt that the clauses limiting liability in *Rick Cobby* and *Kamil Export* were broad enough to encompass such liability.¹³⁹ On the reasoning of the New South Wales Court of Appeal, however, they were not explicit enough.

Such an approach may be criticised on the basis that it “rest(s) on the admission that the clauses in question are permissible in purpose and content (and), they invite the draftsman to recur the attack”.¹⁴⁰ It is also likely to result in the proliferation of exclusion clauses written in language “intelligible only to a lawyer or a person of education and perspicacity”.¹⁴¹

¹³⁵ n5.

¹³⁶ n121.

¹³⁷ n118.

¹³⁸ n130.

¹³⁹ See discussion of the distinction between general and specific words of exception in Coote, “Exception Clauses, Deliberate Acts and the Onus of Proof in Bailment Cases”, (1997) 12 *JCL* 169 at 170-2.

¹⁴⁰ Llewellyn, n4 at 703.

¹⁴¹ *McCutcheon v. McBrayne*[1964] 1 WLR 125 at 138 per Lord Pearce.

All three decisions could have been dealt with by reasoning similar to that applied by the House of Lords in *The TFL Prosperity*¹⁴² and set out by the High Court in *H and E Van der Sterren v. Cibernetics (Holdings) Pty Ltd.*¹⁴³ To say that parties intended a carrier to be at liberty to convert goods rather than to deliver them is to contradict the notion that the parties intended to enter into a contract at all.¹⁴⁴ The better view is that the conduct of the bailees in each of the three Australian cases was such that under the four corners rule, they were not entitled to protection of their exclusion clauses. In no case was the language used sufficiently explicit to displace the presumption that the parties intended the carrier to be contractually bound to attempt the performance of the contract, rather than having an option as to performance.

If the opposite position is taken, namely that a contract can be reduced to a “mere statement of intention” by use of appropriate exclusion clauses, the carrier is put in the position of being free to convert goods or to deliberately fail to deliver them. Public policy must stand between the wording of the exclusion clause and this possibility. Without access to a doctrine such as the four corners rule, the courts are forced into the position of “using tools of intentional and creative misconstruction”¹⁴⁵ to do justice in particular cases.

The decision in *Shoard v. Palmer*,¹⁴⁶ provides a useful example of such contortionism. It concerned a hire purchase contract between General Credits and Shoard in relation to a vessel. The contract was **not** subject to the *Hire Purchase Act* but contained reference to that Act. It also contained a term to the effect that “so far as the law permits, all other conditions and warranties which might be implied are also negated and excluded”. There was a defect in title at the time Shoard purported to exercise an option in the contract to purchase the vessel and onsell it. Shoard contended that a wide construction of the exclusion would render nugatory the option and the principal purpose of the agreement. In order to give force to the principal purpose of the agreement (and to avoid the reasoning of *Nissho Iwai*¹⁴⁷ to

¹⁴² n90.

¹⁴³ n112.

¹⁴⁴ See Coote, n139 at 175.

¹⁴⁵ Llewellyn, n4 at 703.

¹⁴⁶ n59.

¹⁴⁷ n21.

the effect that the mere fact that the main object of the contract will be defeated does not justify the conclusion that the exempting clause is inapplicable), the New South Wales Court of Appeal held the *Hire Purchase Act* resulted in the implication of a warranty as to title. According to Kirby P (as he then was), whatever other implied terms were excluded by the exclusion clause, the implied term as to title could not be excluded because “to do so is to destroy the central understanding of the contract between the appellant and General Credits”.¹⁴⁸

Whilst not doubting that the correct result was reached by the court, it would have been preferable for the exclusion clause to be held inapplicable on the basis that supply of a vessel with an impediment to title was so far outside the “four corners” of the contract that a general exclusion clause could have no application.

The present situation is unsatisfactory, not only because it requires the courts to guess at the parties’ true intentions (which will not necessarily be the same), but also because of the uncertainty attendant upon such an approach. Exclusion clauses are commonly used in industry in lieu of, or in addition to insurance. For example, in the road transport industry, carriers will frequently hold carriers’ legal liability insurance, a condition of which is invariably the use of a broad exclusion clause in all contracts of carriage. If that exclusion clause does not prevent a claim for loss or damage (for whatever reason) the insurance policy will cover the amount of any claim for damage to the cargo. Whilst uncertainties and inconsistencies remain in the courts’ approach to exclusion clauses, carriers cannot properly assess whether it is necessary to take out such insurance, and insurers cannot properly assess premiums. The result is arguably higher premiums and a price differential between the prudent carrier who chooses to carry insurance, and carriers content to self insure and simply rely upon their exclusion clauses in the event of a claim.

¹⁴⁸ n59.

6 CONCLUSION

The business and insurance communities may welcome the High Court's new found insistence on parties' freedom to contract out of liabilities exemplified by the decisions in *Darlington's*¹⁴⁹ and *Nissho Iwai*.¹⁵⁰ To simply say, however, that parties are free to contract on any terms they see fit, and that such words should, in all cases, be interpreted according to their natural and ordinary meaning, is to shy away from the difficult issue of the extent to which one party can avoid any obligation to perform or attempt to perform the contract. An exclusion clause which gives one party a discretion as to performance is arguably not a contract at all.

The courts have traditionally relied upon doctrines such as the rules in *the Canada SS case*, the rule against deviation and the "four corners rule" as control devices to prevent one party from relying upon an exclusion clause where to do so would, in the court's view, be unjust or result in an absurdity. Whilst the rule in respect of deviation is inconsistent with a literal approach to exclusion clauses, the other two approaches arguably are not. The rules in *the Canada SS case* remain a useful guide to interpretation of exclusion clauses. The four corners rule should also continue to be available in order to curb the excesses of the enthusiastic draftsman who attempts to remove all liability consequent upon performance, but also the obligation to at least attempt to perform the contract in the manner contemplated by the parties.

¹⁴⁹ n17.

¹⁵⁰ n21.