DISCHARGE OF CONTRACTS FOR BREACH

BY JANE SWANTON*

[In this article Ms Swanton canvasses the problems which arise because no single test has been devised for distinguishing those breaches of contract which give rise to a right to rescind from those which do not. The plethora of overlapping, and in some circumstances, redundant categories of breach result in undesirable imprecision of language and diversity of approach. Ms Swanton considers that a history of ambiguous judicial phraseology coupled with the operation of the doctrine of precedent, render the adoption by the courts of a uniform approach impossible, and concludes that statutory intervention is the only means to achieve standardization of terminology and of approach to breach of contract.]

From a practical point of view perhaps the most important single task for the law of contract is determining the circumstances in which a party is entitled to treat himself as discharged from his contractual obligations because of the other party's breach. It is also a determination which has caused judges immense difficulty. However recent English cases have considerably clarified the law, the most valuable exposition being that of Lord Diplock in *Photo Production Ltd v. Securicor Transport Ltd.*[1] His analysis of the situation following on breach of contract (specifically endorsed by three other members of the House of Lords[2]) is that a breach of what he describes as a 'primary' contractual obligation gives rise to a substituted or 'secondary' obligation on the part of the party in default. The secondary obligation on the part of the contract breaker 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 damages for non-performance of primary obligations Lord Diplock calls the 'general secondary obligation'. It applies in the case of the two exceptions as well.

The two exceptions of course relate to the circumstances in which the party not in default is entitled to and elects to treat himself as discharged from his obligations by reason of the guilty party's breach. These circumstances 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

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[1] [1980] 2 W.L.R. 283, 294-5; see also *per* Lord Diplock, *Moschi v. Lep Air Services* [1973] A.C. 331, 350 and *Hardwick Game Farm v. Suffolk Agricultural Poultry Producers Association* [1966] 1 W.L.R. 287, 341-2.

[2] Lord Keith and Lord Scarman agree with Lord Wilberforce who specifically endorses Lord Diplock's analysis. The Privy Council, on appeal from the High Court of Australia, in *Port Jackson Stevedoring Pty Ltd v. Salmond and Spraggon (Australia) Pty Ltd* (1980) 54 A.L.J.R. 552 also adopted Lord Diplock's analysis.

of substantially the whole benefit which it was the intention of the parties he should obtain from the contract, and (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 remaining, unperformed primary obligations of both parties.

Where such an election is made 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 the unperformed primary obligations of that other party are discharged. This secondary obligation is additional to the general secondary obligation and is described as the 'anticipatory secondary obligation'. Reference to a contract being terminated, rescinded, discharged or brought to an end[3] by the innocent party's election should be understood in the sense of a cessation of primary obligations. But it must be borne in mind that for unperformed primary obligations of the party in default there are substituted by operation of law secondary obligations, and that the contract is just as much the source of secondary as of primary obligations.

In this analysis Lord Diplock is restating the effects of two leading cases in particular: *Hongkong Fir Shipping Co. Ltd v. Kawasaki Kisen Kaisha Ltd*[4] and *Maredelanto Compania Naviera S.A. v. Bergbau-Handel G.m.b.H., The Mihalis Angelos*.[5] In the *Hong Kong Fir Shipping* case the Court of Appeal might be thought to have favoured the view that for the most part a party is only entitled to treat himself as discharged for the other's breach if the effect[6] of the breach is substantially to deprive him of the benefit of the contract and that if the term 'condition' were to be retained it would generally (apart from statutory conditions) refer to those terms of which it could be said *any* breach would deprive the party not in default of substantially the whole benefit of the contract. In *The Mihalis Angelos* however the Court of Appeal appears to have accepted that the distinction between conditions and warranties is still valuable[7] and that it may well

[3] *Cf.* Shea A. M., 'Discharge from Performance of Contracts by Failure of Condition' (1979) 42 *Modern Law Review* 623, who challenges the view that a contract can be said to be at an end or terminated when one party is discharged from further performance by reason of the other party's breach.

[4] [1962] 2 Q.B. 26.

[5] [1971] 1 Q.B. 164.

[6] There is a difference between the formulations of Diplock L.J. and Upjohn L.J.: the former places importance on the 'event' resulting from the breach, the latter on the 'nature' of the breach and its 'foreseeable consequences'; for criticisms of both see Lord Devlin, 'The Treatment of Breach of Contract' [1966] *Cambridge Law Journal* 192, 197-8.

[7] This was the view of Lord Devlin in 'The Treatment of Breach of Contract'

be the case that parties intend that breach of a particular term should give rise to a right to terminate irrespective of the gravity of the consequences of the breach.[8] Courts should not be reluctant to give effect to such an intention especially if there is an established interpretation to this effect.[9] Such an approach has the merit of promoting predictability which is important in relation to contractual clauses in common use.[10]

Lord Diplock's analysis is directed to the situation where there has been actual failure of performance, total or partial. Another important kind of breach is of course anticipatory breach or renunciation.[11] This occurs when, prior to the time for performance, a party evinces an intention to repudiate his obligations or indicates an unwillingness or inability to perform. However it seems that the question whether such a breach has occurred involves application of the same criteria. Despite some earlier Australian dicta to the contrary,[12] it appears now to be accepted that anticipatory breach must be a refusal to perform the contract as a whole or in an essential respect,[13] and that a refusal to perform an inessential obligation does not justify rescission.

Thus the determination of whether a party is entitled to treat himself as discharged for breach still involves classification of the term broken as a condition, warranty or 'intermediate term'. The appropriate classification depends on the intention of the parties but a term will, in the absence of an indication of a contrary intention, be a warranty if it relates only to a

[1966] *Cambridge Law Journal* 192, 200; *cf.* the recommendations for abolition of the distinction by Professor D. E. Allan and Lord Denning in 'The Scope of the Contract' (1967) 41 *A.L.J.* 274 and The Law Reform Commission (N.S.W.) Working Paper on Sale of Goods: Warranties, Remedies, Frustration and other Matters (1975) para. 3.21.

[8] For example, *Behn v. Burness* (1863) 3 B. & S. 751 (statement in a charterparty that ship 'now in the port of A'); *Bowes v. Chaleyer* (1923) 32 C.L.R. 159; *cf.* Fletcher Moulton L.J. in *Wallis, Son and Wells v. Pratt & Haynes* [1910] 2 K.B. 1003, 1012 who defines conditions apparently exhaustively as terms which are so essential that their non-performance may fairly be considered as a substantial failure to perform the contract at all.

[9] *Per* Edmund Davies L.J., 199 and Megaw L.J., 206.

[10] *Per* Megaw L.J., 205.

[11] This word is used by Lord Selborne in *The Mersey Steel & Iron Co. v. Naylor, Benzon & Co.* (1884) 9 App. Cas. 434, 439 and by *Anson's Law of Contract* (25th ed. 1979) 527. It seems preferable, since less ambiguous, to use 'repudiation' which is favoured by *Halsbury's Laws of England* (4th ed. 1974) Vol. 9, 375 and *Cheshire & Fifoot's Law of Contract* (9th ed. 1976) 568.

[12] *Tramways Advertising Pty Ltd v. Luna Park (N.S.W.) Ltd* (1938) 38 S.R. (N.S.W.) 632, 646 *per* Jordan C.J.; *Associated Newspapers Ltd v. Bancks* (1951) 83 C.L.R. 322, 339; *Rainbow Spray Sales Pty Ltd v. Sanders* [1964-5] N.S.W.R. 422, 425 *per* Herron C.J.

[13] *Quadling v. Robinson* (1976) 137 C.L.R. 192, 197-8 *per* Barwick C.J.; *Stevter Holdings Ltd v. Katra Constructions Pty Ltd* [1975] 1 N.S.W.L.R. 459, 464-5; *Van Reesema v. Giameos (No. 1)* (1977) 17 S.A.S.R. 353, 374-5, 383-4; *Poort v. Development Underwriting (Victoria) Pty Ltd* (No. 2) [1977] V.R. 454, 458; *Loughridge v. Lavery* [1969] V.R. 912, 924; *Burnside v. Melbourne Fire Office Ltd* [1920] V.L.R. 56, 64; *Smyth v. Smykowsky* (1957) S.R. (N.S.W.) 306, 310; for English cases see *Halsbury's Laws of England* (4th ed. 1974) Vol. 9, Contracts para. 547 n. 1 and para. 550 n. 5, and Treitel G. H., *The Law of Contract* (5th ed. 1979) 646.

collateral matter so that no possible breach of it could give rise to an event which would deprive the innocent party of substantially the whole benefit which he was intended to receive under the contract.[14] Even if this is not the case, a term will be a warranty if the parties have expressly or impliedly denied any right to terminate for its breach. A term will, in the absence of an indication of a contrary intention, be a condition if it can be said that every breach of it must give rise to an event which will deprive the party not in default of substantially the whole benefit of the contract.[15] In any event a term will be a condition if this was the intention of the parties, express or implied.[16] If their intention is not revealed expressly it is likely that the courts will continue to make use of the traditional tests and metaphors[17] for discovering their intention. Thus it has been said repeatedly that a term is a condition if it goes to the root of the contract,[18] if it affects the substance and foundation of the adventure which the contract is intended to carry out,[19] if it goes so directly to the substance of the contract, or is so essential to its very nature that its non-performance may fairly be considered as a substantial failure to perform the contract at all[20] or if failure to perform the term would render the performance of the rest of the contract a thing different in substance from that for which the innocent party stipulated.[21] In Australia an authoritative test of essentiality is

[14] *Hongkong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd* [1962] 2 Q.B. 26, 69-70 *per* Diplock L.J.

[15] *Ibid.*

[16] 'Parties may think some matter, apparently of very little importance, essential; and if they sufficiently express an intention to make the literal fulfilment of such a thing a condition precedent, it will be one': *Bettini v. Gye* (1876) 1 Q.B.D. 183, 187 *per* Blackburn J.; *Hoad v. Swan* (1920) 28 C.L.R. 258, 263.

[17] Though Diplock L.J. thought that all these metaphors amount to the same thing, namely whether the occurrence of the event deprives the party, who has further undertakings to perform, of substantially the whole benefit which it was the intention of the parties that he should obtain as the consideration for performing those undertakings: *Hongkong Fir Shipping* case [1962] 2 Q.B. 26, 66. This is not obvious however if one looks at some of the situations in which the application of these tests resulted in a finding that termination was justified. It is hard to say there was substantial deprivation of the whole benefit of the contract in: *Poussard v. Spiers & Pond* (1876) 1 Q.B.D. 410; *Associated Newspapers Ltd v. Bancks* (1951) 83 C.L.R. 322; *Bentsen v. Taylor, Sons & Co. (No. 2)* (1893) 2 Q.B.D. 274.

[18] *Davidson v. Gwynne* (1810) 12 East 381, 389 *per* Lord Ellenborough C.J.; *Decro-Wall International S.A. v. Practitioners in Marketing Ltd* [1971] 2 All E.R. 216, 227 *per* Sachs L.J.; *White v. Australian and New Zealand Theatres Ltd* (1943) 67 C.L.R. 266, 271-2 *per* Latham C.J., 275 *per* Starke J. and 282 *per* Williams J.

[19] *Bentsen v. Taylor, Sons & Co. (No. 2)* [1893] 2 Q.B. 274, 281 *per* Bowen L.J.; *Francis v. Lyon* (1907) 4 C.L.R. 1023, 1034 *per* Griffith C.J.; *Bowes v. Chaleyer* (1923) 32 C.L.R. 159, 179 *per* Isaacs and Rich JJ.; *Associated Newspapers Ltd v. Bancks* (1951) 83 C.L.R. 322, 336; *Luna Park (N.S.W.) Ltd v. Tramways Advertising Pty Ltd* (1938) 61 C.L.R. 286, 303 *per* Latham C.J.; Lord Devlin considers this the most useful test, 'The Treatment of Breach of Contract' [1966] *Cambridge Law Journal* 192, 200.

[20] *Wallis, Son & Wells v. Pratt & Haynes* [1910] 2 K.B. 1003, 1012 *per* Fletcher Moulton L.J.; *Bowes v. Chaleyer* (1923) 32 C.L.R. 159, 178 *per* Isaacs and Rich JJ.; *Luna Park (N.S.W.) Ltd v. Tramways Advertising Pty Ltd* (1938) 61 C.L.R. 286, 302 *per* Latham C.J.

[21] *Bettini v. Gye* (1876) 1 Q.B.D. 183, 188; *Associated Newspapers Ltd v. Bancks* (1951) 83 C.L.R. 322, 336; *Fullers' Theatres Ltd v. Musgrove* (1923) 31 C.L.R. 524, 537 *per* Isaacs and Rich JJ.

'whether it appears from the general nature of the contract considered as a whole, or from some particular term or terms, that the promise is of such importance to the promisee that he would not have entered into the contract unless he had been assured of a strict or a substantial performance of the promise, as the case may be, and that this ought to have been apparent to the promisor'.[22]

However, increasingly, it is being recognized that many contractual terms cannot be classified as conditions or warranties[23] and that the effect of their breach on the rights of the parties depends on the gravity of the situation resulting from the breach. Such terms have been called 'innominate'[24] or 'intermediate'[25] terms to distinguish them from conditions and warranties. If the effect of breach of such a term is to deprive the party not in default of substantially the whole benefit which it was intended he should obtain from the contract,[26] or, in other words, if it goes so much to the root of the contract that it makes further commercial performance of the contract impossible,[27] then the injured party can rescind.

These then are the rules, or at any rate one version of them, for determining whether a right to elect to terminate for breach of contract arises. It seems clear that an election by the party not in default is normally

[22] *Tramways Advertising Pty Ltd v. Luna Park (N.S.W.) Ltd* (1938) 38 S.R. (N.S.W.) 632, 641 *per* Jordan C.J.; applied in *Associated Newspapers Ltd v. Bancks* (1951) 83 C.L.R. 322, 337; *D.T.R. Nominees Pty Ltd v. Mona Homes Pty Ltd* (1977-78) 138 C.L.R. 423, 431 *per* Stephen, Mason and Jacobs JJ., *cf.* 436 *per* Murphy J.; *Southern Cross Assurance Co. Ltd v. Australian Provincial Assurance Association Ltd* (1939) 39 S.R. (N.S.W.) 174, 187 *per* Jordan C.J. and Nicholas J.

[23] *Hongkong Fir Shipping Co. Ltd v. Kawasaki Kisen Kaisha Ltd* [1962] 2 Q.B. 26; *F.L. Schuler A.G. v. Wickman Machine Tool Sales Ltd* [1974] A.C. 235; *Cehave N.V. v. Bremer Handelsgesellschaft m.b.H. The Hansa Nord* [1976] 1 Q.B. 44 (criticized by Carter J. W. and Hodgekiss C., 'Conditions and Warranties: Forebears and Descendants' (1976-79) 8 *Sydney Law Review* 31); *Reardon Smith Line Ltd v. Hansen-Tangen* (H.L. (E.)) [1976] 1 W.L.R. 989; *Harbutt's "Plasticine" Ltd v. Wayne Tank & Pump Co. Ltd* [1970] 1 Q.B. 447; *Bremer Handelsgesellschaft Schaft M.B.H. v. Vanden Avenne-Izegem P.V.B.A.* [1978] 2 Lloyd's Rep. 109; *Federal Commerce & Navigation Co. Ltd v. Molena Alpha Inc.* [1979] A.C. 757; *Direct Acceptance Finance Ltd v. Cumberland Furnishing Pty Ltd* [1965] N.S.W.R. 1504, 1511; *Daulatram Rameshwarlall v. European Grain & Shipping Ltd* [1971] 1 Lloyd's Rep. 368. For cases decided before the *Hongkong Fir Shipping* case in which a similar approach was taken, see *Aerial Advertising Co. v. Batchelors Peas, Ltd (Manchester)* [1938] 2 All E.R. 788; *Mathieson v. Sunshine Wrappings Pty Ltd* (1964) 80 W.N. (N.S.W.) 1412; *Torr v. Harpur* (1940) 40 S.R. (N.S.W.) 585; *Attorney-General v. Australian Iron & Steel Ltd* (1936) 36 S.R. (N.S.W.) 172.

[24] Terminology used in *F.L. Schuler A.G. v. Wickman Machine Tool Sales Ltd* [1974] A.C. 235, 264 *per* Lord Simon; *Bremer Handelsgesellschaft Schaft M.B.H. v. Vanden Avenne-Izegem P.V.B.A.* [1978] 2 Lloyd's Rep. 109, 113 *per* Lord Wilberforce; *Anson's Law of Contract* (25th ed., 1979) 130 and *Halsbury's Laws of England* (4th ed. 1974) Vol. 9, Contracts, para. 544.

[25] Terminology of Lord Denning M.R. in *The Hansa Nord* [1976] 1 Q.B. 44, 60; *cf.* the approach of Ormrod L.J. (at 84) who doubts whether a third category of stipulations exists; similarly *per* Upjohn L.J. in *Hongkong Fir Shipping Co. Ltd v. Kawasaki Kisen Kaisha Ltd* [1962] 2 Q.B. 26.

[26] *Hongkong Fir Shipping Co. Ltd v. Kawasaki Kisen Kaisha Ltd* [1962] 2 Q.B. 26, 70 *per* Diplock L.J.

[27] *Ibid.* 64 *per* Upjohn L.J.

necessary[28] though it may be that the contract is discharged automatically if the results of the breach are so serious that the innocent party has no choice but to treat the breach as bringing the contract to an end.[29] Moreover it now seems to be accepted in English law that rescission for breach operates to terminate the contract *de futuro* and not *ab initio*.[30] This has long been established doctrine in Australia.[31] Thus rescission for breach is no bar to an action for damages,[32] and accrued rights remain enforceable by either party,[33] at any rate in the sense that there is substituted for primary contractual obligations, secondary obligations to pay damages for failure to perform accrued obligations.[34]

All these principles may be reasonably simply stated although the difficulty of applying them to the infinite variety of contractual provisions and factual situations which may eventuate cannot be overemphasized. Nor, admittedly, do they afford any sort of precision, the terminology being so loose and vague;[35] but at least the scheme set out above provides a

[28] *Heyman v. Darwins Ltd* [1942] A.C. 356; *Decro-Wall International S.A. v. Practitioners in Marketing Ltd* [1971] 1 W.L.R. 361; *Automatic Fire Sprinklers Pty Ltd v. Watson* (1946) 72 C.L.R. 435, 450 *per* Latham C.J.; *O'Connor v. S.P. Bray Ltd* (1936) 36 S.R. (N.S.W.) 248, 260 ff. *per* Jordan C.J.; *Associated Newspapers Ltd v. Bancks* (1951) 83 C.L.R. 322, 336; *Tramways Advertising Pty Ltd v. Luna Park (N.S.W.) Ltd* (1938) 38 S.R. (N.S.W.) 632, 643 *per* Jordan C.J.; *Gunton v. Richmond-Upon-Thames London Borough Council* [1980] 3 W.L.R. 714; *cf.* Thomson J.M., 'The Effect of a Repudiatory Breach' (1978) 41 *Modern Law Review* 137 who argues that termination is automatic unless the innocent party affirms.

[29] *Harbutt's "Plasticine" Ltd v. Wayne Tank and Pump Co. Ltd* [1970] 1 Q.B. 447; criticized by Treitel G. H., *The Law of Contract* (5th ed. 1979) 639, but approved by Coote B., 'The Effect of Discharge by Breach on Exception Clauses' [1970] *Cambridge Law Journal* 221, 225.

[30] *Heyman v. Darwins Ltd* [1942] A.C. 356, 399 *per* Lord Porter; *Johnson v. Agnew* [1980] A.C. 367, 392-8 *per* Lord Wilberforce; *Photo Production Ltd v. Securicor Transport Ltd* [1980] 2 W.L.R. 283, 294-5 *per* Lord Diplock; *Hyundai Heavy Industries Co. Ltd v. Papadopoulos* [1980] 1 W.L.R. 1129; Albery M. 'Mr Cyprian Williams' Great Heresy' (1975) 91 *Law Quarterly Review* 337; *cf.* Shea A. M., 'Discharge from Performance of Contracts by Failure of Condition' (1979) 42 *Modern Law Review* 623 who argues that the contract does not come to an end at all when a party is discharged by breach.

[31] *McDonald v. Dennys Lascelles Ltd* (1933) 48 C.L.R. 457, 476-7 *per* Dixon J.; *Holland v. Wiltshire* (1954) 90 C.L.R. 409; *F.J. Bloemen Pty Ltd v. The Council of the City of Gold Coast* (1972) 46 A.L.J.R. 366; *Vandyke v. Vandyke* (1976) 12 A.L.R. 621, 634 *per* Hutley J. A.; McGarvie R. E., 'The Common Law Discharge of Contracts upon Breach' (1963) 4 *M.U.L.R.* 254 and 305, 308-24; Gummow W. (1976) 92 *Law Quarterly Review* 5; *cf. Fullers' Theatres Ltd v. Musgrove* (1923) 31 C.L.R. 524, 541 *per* Isaacs and Rich JJ.

[32] *Johnson v. Agnew* [1980] A.C. 367; *Holland v. Wiltshire* (1954) 90 C.L.R. 409; *Ogle v. Comboyuro Investments Pty Ltd* (1976) 136 C.L.R. 444; Hetherington M., 'He Who Comes to Common Law Must Come with Clean Hands' (1980) 9 *Sydney Law Review* 71; *cf. Horsler v. Zorro* [1975] 1 Ch. 302.

[33] *Hyundai Heavy Industries Co. Ltd v. Papadopoulos* [1980] 1 W.L.R. 1129; *McDonald v. Dennys Lascelles Ltd* (1933) 48 C.L.R. 457, 476-7 *per* Dixon J.; *Ettridge v. Vermin Board of the District of Murat Bay* [1928] S.A.S.R. 124; *McLachlan v. Nourse* [1928] S.A.S.R. 230.

[34] *Photo Production Ltd v. Securicor Transport Ltd* [1980] 2 W.L.R. 283, 294-5 *per* Lord Diplock; *Moschi v. Lep Air Services Ltd* [1973] A.C. 331, 345-6 *per* Lord Reid, 350-1 *per* Lord Diplock, 355 *per* Lord Simon.

[35] Though this is not necessarily to be regarded as a disadvantage since it gives scope to the courts to classify a breach with an eye on the consequences and thereby

uniform approach to the problem of determining when a party is entitled to terminate for breach. It is suggested that the courts should seek to utilize these rules, to the exclusion of any others, when the question before them is one involving discharge for breach.

Unfortunately there are still available to the courts a multiplicity of different approaches, employing disparate terminology, for dealing with the self-same question. The main problem, it is suggested, which bedevils this branch of the law, is the fact that the same issue has been tackled by the courts, at different stages of history, from a variety of different angles. The very great difficulty of stating the law[36] with respect to the effect of non-performance or defective performance by one party on the contractual obligations of the other is largely the result of the existence in the common law of overlapping categories, supported by case law which is still authoritative because of the doctrine of precedent, even though it may be obsolete. This has resulted in immense confusion both in terminology and in substance.

The editors of the fourth edition of *Halsbury's Laws of England* have this to say:

> 539. Defective performance in general. In every case of breach of contract a question may arise as to whether the breach is of such a nature that the party not in default has the choice of treating the contract as discharged. Not every breach of contract has this effect but no single test has been devised for distinguishing breaches which do lead to a right to rescind from those which do not. All the following formulae continue to have some authority, though there is a considerable degree of overlap among them: failure of condition precedent, failure of consideration, whether there is a breach of a condition or of a warranty, effect of the breach and fundamental breach.[37]

To this list may be added: failure substantially to perform an entire contract and failure to perform a dependent covenant. Some of these formulae may now be examined in order to point out areas of overlap, ambiguity and confusion, with the object of drawing attention to the need for simplification of the law and standardization of terminology.

(a) *Dependent and independent covenants*

At an earlier stage in the development of the law[38] the question whether one contracting party, A, was free from liability for failure to perform a contractual obligation because of the other party, B's, non-performance, was customarily approached by asking whether A's promise was dependent on (or as it is sometimes put, interdependent with), independent of or

perhaps achieve a more just result: see Treitel G. H., *The Law of Contract* (5th ed. 1979) 585-93; Treitel G. H., 'Some Problems of Breach of Contract' (1967) 30 *Modern Law Review* 139.

[36] Acknowledged by Treitel G. H., *The Law of Contract* (5th ed. 1979) 622.

[37] Vol. 9, Contracts; see also Coote B., 'The Effect of Discharge by Breach on Exception Clauses' [1970] *Cambridge Law Journal* 221, 223-4.

[38] Though the terminology was used as recently as *Green v. Sommerville* (1979) 54 A.L.J.R. 50, 55-6 *per* Mason J.

concurrent with, performance of his obligation by B.[39] A would be discharged and thus not in breach by failing to perform if B's covenant was dependent and B had not performed, or if the parties' promises were concurrent and B had not tendered performance. B's promise would be described as independent if the parties intended that A's obligation to perform would arise irrespective of whether B had performed or not. B's promise would be described as dependent[40] if A's obligation was intended only to arise on performance by B. Promises would be described as concurrent if each party bound himself to be ready and willing to perform his promise on tender of performance by the other party.[41] It is a question of construction of the contract whether the promises of the parties are dependent, independent or concurrent. Where the covenants are not in terms connected, it has been said that, to raise an implication of dependency, the ordinary conditions justifying the introduction of an implied term into a contract must be fulfilled. The implication must be one which is so obviously necessary to carry into effect the intention of the parties, treating them as reasonable men, that they must have agreed to its insertion as a matter of course had the point occurred to them.[42]

It is suggested that where the question is whether A is entitled to treat himself as discharged from the *whole* of his contractual obligations because of B's *breach*[43] the doctrine of dependency and independency of covenants

[39] *Pordage v. Cole* (1669) 1 Wms. Saund. 319; for the history of the doctrine of dependency and independency see Stoljar S. J., 'Dependent and Independent Promises' (1957) 2 *Sydney Law Review* 217 who considers that 'all the theories underlying the adjustment of broken contracts, are, historically, intimately connected with, and are the products of, the dependent-independent doctrine' (219 n. 13); see also Stoljar S. J., *A History of Contract at Common Law* (1975) Ch. 12 and Lord Denning M.R. in *The Hansa Nord* [1976] 1 Q.B. 44, 57-8.

[40] Often the promises of the parties are described as mutually dependent or interdependent which means that neither is obliged to perform if the other has not.

[41] *Pordage v. Cole* (1669) 1 Wms. Saund. 319, n. 5, 321; *Canning v. Temby* (1905) 3 C.L.R. 419; *Coulson v. City Mutual Life Assurance Co. Ltd* (1907) 7 S.R. (N.S.W.) 782; *Frankcombe v. Foster Investments Pty Ltd* [1978] 2 N.S.W.L.R. 41; *City Motors (1933) Pty Ltd v. Southern Aerial Super Service Pty Ltd* (1961) 106 C.L.R. 477; *Henry Dean and Sons (Sydney) Ltd v. P. O'Day Pty Ltd* (1927) 39 C.L.R. 330; *Berger v. Boyles* [1971] V.R. 321, 328; Sale of Goods Act 1893 (U.K.) s. 28 and Australian equivalents. But if one party has wrongly refused to accept performance, the other is discharged from his obligation to be ready and willing to perform his own promise, see *British and Beningtons, Ltd v. North Western Cachar Tea Co., Ltd* [1923] A.C. 48; *cf.* Lloyd M. G., 'Ready and Willing to Perform: The Problem of Prospective Inability in the Law of Contract' (1974) 37 *Modern Law Review* 121.

[42] *Per* Jordan C.J. in *Newcombe v. Newcombe* (1934) 34 S.R. (N.S.W.) 446, 450 (applied by Davidson J. in *Attorney-General v. Australian Iron & Steel Ltd* (1936) 36 S.R. (N.S.W.) 172, 181). His Honour proceeds however to cite passages in *Huntoon Co. v. Kolynos (Incorporated)* [1930] 1 Ch. 528 where the test for a dependent covenant is stated in the same terms as for a condition or essential term; *cf.* Lord Denning M.R. in *Wickman Machine Tool Sales Ltd v. L. Schuler A.G.* [1972] 2 All E.R. 1173 at 1180-1 who draws a distinction between dependent covenants and conditions.

[43] *E.g. Newcombe v. Newcombe* (1934) 34 S.R. (N.S.W.) 446; *Fearon v. The Earl of Aylesford* (1884) 14 Q.B.D. 792; *Graves v. Legg* (1854) 9 Ex. 709; *General Billposting Co., Ltd v. Atkinson* [1909] A.C. 118; *Green v. Sommerville* (1979) 54 A.L.J.R. 50; *Ellen v. Topp* (1851) 6 Ex. 424 which could all equally well be decided

is obsolete and redundant.[44] The proper approach should not involve concentrating on the relationship between the specific term broken by B and the specific obligation placed on A. In such a situation, the inquiry should be whether the term broken is a condition, warranty or intermediate term according to the tests set out above. The appropriate place for the application of the rules about dependence or independence of covenants would be in situations *other* than those where the innocent party was seeking to treat himself as discharged from the entirety of his obligations because of the guilty party's breach. These would be: (1) Where B's failure to perform is not a breach, the question is simply whether A's obligation to perform has arisen, in view of B's non-performance. B's non-performance may not constitute a breach, either because of the doctrine of frustration,[45] or because of a wrongful repudiation by A,[46] or because non-performance is due to an excepted peril in the contract[47] or is excused by law,[48] or because the time for performance has not expired.[49] One respect in particular in which this situation differs from the situation in which B's non-performance is a breach, is that no question of whether A has *elected* to terminate should need to be considered. (2) The other situation where the doctrine of dependence and independence ought to be invoked is where A is not claiming to be discharged from the entirety of his obligations under the contract, but only from a single undertaking, the obligation to perform which is said to be dependent on or concurrent with

on the basis of the condition/warranty/innominate term distinction without reference to the doctrine of dependency/independency.

[44] 'Probably little harm would be done if the old learning about dependency and independency were swept into the limbo of futile and embarrassing anachronisms': Cheshire G. C. and Fifoot C. H. S., *The Law of Contract* (4th ed. 1956) 490.

[45] Here the question will be whether A's obligation has accrued before the contract was discharged for frustration, *e.g., Cutter v. Powell* (1795) 6 T.R. 320; *Appleby v. Myers* (1867) L.R. 2 C.P. 651.

[46] *E.g. Automatic Fire Sprinklers Pty Ltd v. Watson* (1946) 72 C.L.R. 435 where the High Court considered whether, after wrongful dismissal, an employee could recover wages for services proffered but not performed, or whether he must be content with unliquidated damages; *Peter Turnbull and Co. Pty Ltd v. Mundus Trading Co. (Australasia) Pty Ltd* (1953-54) 90 C.L.R. 235; *Gunton v. Richmond-Upon-Thames London Borough Council* [1980] 3 W.L.R. 714, 730 *per* Buckley L.J., 736 *per* Brightman L.J.

[47] *E.g. Jackson v. The Union Marine Insurance Company* (1874) L.R. 10 C.P. 125 where the Court held that the parties to a charterparty had impliedly agreed that if the ship did not arrive at the port of loading in time for the voyage the charterer would be released, even though the delay might be due to an excepted peril; *The Kathleen* (1874) L.R. 4 A. & E. 269; *cf. The Angelia* [1973] 1 W.L.R. 210.

[48] *E.g.* In the case of illness of an employee: *Bettini v. Gye* (1876) 1 Q.B.D. 183; *Poussard v. Spiers and Pond* (1876) 1 Q.B.D. 410, or where the promise is void as being contrary to public policy: *Brooks v. Burns Philp Trustee Co. Ltd* (1968-69) 121 C.L.R. 432, 443 *per* Taylor J., 463-5 *per* Windeyer J.

[49] Tender of performance which is not in accordance with the contract is not a breach if it is still possible to make a proper tender within the time limited by the contract: Lord Devlin, 'The Treatment of Breach of Contract' [1966] *Cambridge Law Journal* 192, 194.

B's having performed or tendered performance.[50] The question involved here will often be that of the order of performance required by the contract. Unlike the situation on discharge for breach,[51] it is not argued that the contract is terminated, rescinded or brought to an end by the non-performance.

(b) *Entire contracts and substantial performance*

Though it is a well established doctrine, it is hard to see the need for the concept of entire contracts. A contract is said to be 'entire' when, on its proper construction, no consideration is to pass from one party unless and until the whole of the obligations of the other have been performed or, in other words, where complete performance is a condition precedent to recovery on the contract.[52] By contrast a contract is said to be 'divisible' if, on its proper construction, the right to demand performance of the other party's obligations (for example, payment) arises as each part of the

[50] *E.g. In re de Garis & Rowe's Lease* [1924] V.L.R. 38; *Roberts v. Ghulam Nabie* (1911) 13 W.A.R. 156; *Taylor v. Webb* [1937] 2 K.B. 283; *Huntoon Co. v. Kolynos (Incorporated)* [1930] 1 Ch. 528; *Healing (Sales) Pty Ltd v. Inglis Electrix Pty Ltd* (1968) 121 C.L.R. 584; *Direct Acceptance Finance Ltd v. Cumberland Furnishing Pty Ltd* [1965] N.S.W.R. 1504. The last case is a good example of the distinction sought to be drawn since it was held that 'fundamental' breach could not be argued as the defendant was not seeking to treat himself as discharged from the whole agreement (1511, *per* Walsh J.). He was thus confined to the argument that the relevant covenants were dependent; see also *Total Oil Great Britain Ltd v. Thompson Garages (Biggin Hill) Ltd* [1972] 1 Q.B. 318. Note the argument of Dawson F., 'Fundamental Breach of Contract' (1975) 91 *Law Quarterly Review* 380 that the doctrine of fundamental breach as expounded in *Harbutt's "Plasticine" Ltd v. Wayne Tank & Pump Co. Ltd* [1970] 1 Q.B. 447 (now overruled by *Photo Production Ltd v. Securicor Transport Ltd* [1980] 2 W.L.R. 283) may be explicable on the basis that the obligation of one party not to commit fundamental breach is a dependent covenant with an exception clause agreed to by the other.

[51] *Cf.* Shea A. M., 'Discharge from Performance of Contracts by Failure of Condition' (1979) 42 *Modern Law Review* 623 who disputes whether a contract terminates where one party is discharged entirely from further performance by reason of the other party's breach. He argues that the reason a promisee is discharged for breach is because, in theory, he made performance of his obligations dependent on performance of his obligations by the promisor. He is relieved of his obligation to perform, not because the contract is at an end, but because the condition of performance by the promisor has not been fulfilled.

[52] Williams G. L., 'Partial Performance of Entire Contracts' (1941) 57 *Law Quarterly Review* 373, 490; for the meaning of condition precedent see section (c) *infra*. Examples of entire contracts are found in *Phillips v. Ellinson Bros Pty Ltd* (1941) 65 C.L.R. 221; *Hunter v. Council of Municipality of West Maitland* (1923) 23 S.R. (N.S.W.) 420; *Ex parte Cameron* (1890) 11 N.S.W.R. (L.) 422; *Smith v. Jones* (1924) 24 S.R. (N.S.W.) 444 (*cf. Parkinson v. Grazcos Co-operative Ltd* (1958) 1 F.L.R. 90); *McLachlan v. Nourse* [1928] S.A.S.R. 230; *Lucas v. The Borough of Drummoyne* (1895) 16 N.S.W.R. (L.) 55; *McDonald v. Jane* [1960] V.R. 184; *Peters v. C.W. McFarling Floor Surfacing Ltd* [1959] S.A.S.R. 261; *Sinclair v. Bowles* (1829) 9 B. & C. 92; *Forman & Co. Pty Ltd v. The Ship "Liddesdale"* [1900] A.C. 190; *Vigers v. Cook* [1919] 2 K.B. 475; *Sumpter v. Hedges* [1898] 1 Q.B. 673. It has been said that there is 'always a presumption in favour of entirety': *Cheshire & Fifoot's Law of Contract* (9th ed. 1976) 525. On the other hand it is also said that entire contracts are 'the exception rather than the rule': *Anson's Law of Contract* (25th ed. 1979) 537 and that where a party agrees to do work under a contract the courts are reluctant to construe it so as to require complete performance before any payment becomes due: Treitel G. H., *The Law of Contract* (5th ed. 1979) 598; *Hoenig v. Isaacs* [1952] 2 All E.R. 176, 180-1 *per* Denning L.J.

contract is performed; thus where there has been partial performance a proportionate part of the other party's performance may be demanded.[53] Such a contract is said to impose 'severable' obligations. Typically, an entire contract is one in which the parties have agreed that payment for work or services will be made in a lump sum, that the sum will be payable on completion of the work or services and that nothing will be payable for partial performance.[54] The doctrine of entire contracts is generally[55] said to be qualified by the doctrine of substantial performance[56] which allows recovery where the parties are taken to have intended that substantial, though not precise and exact, performance will entitle a contractor to payment. Thus defects of a minor character will not discharge the obligation to pay the contract price though there will be a deduction[57] to compensate the defendant for the deficiency in performance.

Failure to perform or complete the work or services under an entire contract may or may not be a breach of contract. If it is a breach then the situation is simply one in which the parties have agreed that complete or substantial performance is a condition of the contract, for breach of which the other party can elect to terminate.[58] This is made particularly clear by one of the most authoritative definitions of a condition, that of Jordan C.J.

[53] *E.g. Markham & Andrews v. Bernales* (1906) 8 W.A.R. 208; *Roberts v. Havelock* (1832) 3 B. & Ad. 404.

[54] Whether or not failure to complete performance is breach it is generally considered unjust that a party who partly performs an entire contract can recover nothing despite having conferred a benefit on the other party: Williams G. L., 'Partial Performance of Entire Contracts' (1941) 57 *Law Quarterly Review* 373, 490; Stoljar S. J., 'Substantial Performance in Building and Work Contracts' (1954-56) 3 *Western Australia University Annual Law Review* 293, 307; Lord Devlin, 'The Treatment of Breach of Contract' [1966] *Cambridge Law Journal* 192, 201; *Cheshire & Fifoot's Law of Contract* (9th ed. 1976) 523-4; Treitel G. H., *The Law of Contract* (5th ed. 1979) 622; Goff R. and Jones G., *The Law of Restitution* (2nd ed. 1978) 390-1; The Law Commission (U.K.), Working Paper No. 65, Law of Contract, Pecuniary Restitution on Breach of Contract, 1975; *Simpson Steel Structures v. Spencer* [1964] W.A.R. 101, 105; *cf. Munro v. Butt* (1858) 8 El & Bl. 738, 754 *per* Lord Campbell C.J.

[55] *Cf.* Beck A., 'The Doctrine of Substantial Performance: Conditions and Conditions Precedent' (1975) 38 *Modern Law Review* 413; Treitel G. H., *The Law of Contract* (5th ed. 1979) 599-600.

[56] For cases where performance was substantial see *Hoenig v. Isaacs* [1952] 2 All E.R. 176; *H. Dakin & Co. Ltd v. Lee* [1916] 1 K.B. 566; *Mondel v. Steel* (1841) 8 M. & W. 858; *Dakin v. Oxley* (1864) 15 C.B. (N.S.) 646; *Williamson v. Murdoch* (1912) 14 W.A.R. 54; *Lemura v. Coppola* [1960] Qd. R. 308; for cases where performance was not substantial see *Corio Guarantee Corporation Ltd v. McCallum* [1956] V.L.R. 755; *Simpson Steel Structures v. Spencer* [1964] W.A.R. 101; *Connor v. Stainton* (1924) 27 W.A.R. 72; *Bolton v. Mahadeva* [1972] 2 All E.R. 1322.

[57] Whether this is strictly a set-off, counterclaim or true defence varies with the nature of the claim: *Halsbury's Laws of England* (4th ed. 1974) Vol. 9, Contracts para. 475 n. 2.

[58] This is acknowledged in *Hoenig v. Isaacs* [1952] 2 All E.R. 176; see also terminology used in *Vigers v. Cook* [1919] 2 Q.B. 475, 481 *per* Bankes L.J.; *Corio Guarantee Corporation Ltd v. McCallum* [1956] V.L.R. 755, 760; *Lemura v. Coppola* [1960] Qd. R. 308; *McDonald v. Jane* [1960] V.R. 184, 188; *Hunter v. Council of Municipality of West Maitland* (1923) 23 S.R. (N.S.W.) 420, 425-6; *Steele v. Tardiani* (1946) 72 C.L.R. 386, 401 *per* Dixon J.

in *Tramways Advertising Pty Ltd v. Luna Park (N.S.W.) Ltd*[59] who said that the 'test of essentiality is whether it appears from the general nature of the contract considered as a whole, or from some particular term or terms, that the promise is of such importance to the promisee that he would not have entered into the contract unless he had been assured of a strict or a substantial performance of the promise, as the case may be, and that this ought to have been apparent to the promisor'.[60] Thus to say that the plaintiff fails to recover anything for part performance because the contract is entire amounts to the same thing as saying that the obligation to pay is discharged for breach of condition.[61] On discharge for breach, accrued rights are enforceable even by the guilty party;[62] but no right to payment of any kind would yet have accrued. To say that a plaintiff is entitled to recover because he has substantially performed an entire contract is equivalent to saying the plaintiff is guilty only of a breach of warranty since the parties have implicitly agreed that a breach of this type will not justify termination.[63]

If failure to perform an entire contract is not a breach then the reason that there is no obligation to pay for partial performance is that the promise to perform or substantially perform the work or services is a covenant dependent on the promise to pay. The obligation to pay does not arise until there has been performance or substantial performance of the obligation to supply work or services. The usual situation in which failure to perform does not constitute a breach is where the contract is frustrated.[64] The common law rule[65] is that, on frustration, the contract is discharged automatically *de futuro*, the loss lies where it falls with respect to part performance[66] and only rights which have already accrued before frustration are enforceable. Hence there is no claim to payment for part performance because the dependent covenant requiring complete or at any rate substantial performance by the plaintiff was not performed before the frustrating event.

[59] (1938) 38 S.R. (N.S.W.) 632.

[60] *Ibid.* 641.

[61] The doctrines of election and waiver apply in the same way as with breach of condition: *Hoenig v. Isaacs* [1952] 2 All E.R. 176, 179-80 *per* Somerwell L.J., 181 *per* Denning L.J., 183 *per* Romer L.J.

[62] *Ettridge v. Vermin Board of the District of Murat Bay* [1928] S.A.S.R. 124; *McLachlan v. Nourse* [1928] 28 S.R. (N.S.W.) 230.

[63] This is acknowledged in *Cheshire & Fifoot's Law of Contract* (9th ed. 1976) 529.

[64] *Cutter v. Powell* (1795) 6 T.R. 320; *Appleby v. Myers* (1867) L.R. 2 C.P. 651; *The Madras* [1898] P. 90. Another situation where failure to perform would not be a breach is where a shipowner is prevented from performing his obligation to carry goods to their destination by one of the excepted perils. He is not entitled to any payment for part performance of the voyage unless there is something to justify the conclusion that there has been a fresh contract to pay freight *pro rata: The Kathleen* (1874) L.R. 4 A. & E. 269; *Appleby v. Myers* (1867) L.R. 2 C.P. 651, 660.

[65] Now modified by such legislation as the Law Reform (Frustrated Contracts) Act 1943 (U.K.); Frustrated Contracts Act 1959 (Vic.); Frustrated Contracts Act 1979 (N.S.W.).

[66] Except that money paid is recoverable if there was a total failure of consideration: *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd* [1943] A.C. 32.

Thus the category of entire contracts seems redundant. In any event, entire contracts in a strict sense, where performance of *every* obligation by one party is a prerequisite to the other party's obligations arising, are rare.[67] Most contracts contain both entire and divisible obligations.[68] Even the leading authority, *Cutter v. Powell*,[69] has been said probably to have involved only an entire obligation to complete the whole voyage and not necessarily an entire obligation to perform the services competently. It has been suggested that if the sailor had completed the voyage but had been guilty, during it, of occasional breaches of duty, he would probably have been able to recover payment, subject to a reduction for the breaches of duty.[70] Similarly with respect to contracts for carriage of goods by sea where the freight is payable on delivery. These may be described as 'entire' in the sense that nothing is payable if the goods are delivered short of their destination.[71] Yet if the goods are delivered slightly damaged payment must be made subject to a cross-action for damages.[72] When it is recognized that strictly speaking it is usually obligations in contracts rather than the contracts themselves which are 'entire' or 'divisible', retention of this terminology to describe what are indistinguishable from conditions and warranties and dependent and independent covenants is unnecessary and misleading.

(c) *Failure of condition precedent*

A contract or an obligation under a contract may be discharged because of the occurrence, or failure to occur, of a contingency on which the operation of the contract, in whole or in part, is made to depend.[73] Contracts are often entered into 'subject to' obtaining such things as planning approval, import licenses, approval of the court, Ministerial consent, a satisfactory survey, finance or acceptance of a tenant by a landlord. Such contingent conditions may be conditions precedent,[74] where an obligation or right is suspended until the happening of the stated event, or conditions subsequent when liability is made to cease on the happening of the contingency. The significant features of 'contingent' conditions are, first, that

[67] Treitel G. H., *The Law of Contract* (5th ed. 1979) 597 maintains that what are entire or severable are not contracts but particular obligations arising under contracts.

[68] *E.g. Steele v. Tardiani* (1946) 72 C.L.R. 386, 401 *per* Dixon J.; *McLachlan v. Nourse* [1928] S.A.S.R. 230; *Smith v. Jones* (1924) 24 S.R. (N.S.W.) 444.

[69] (1795) 6 T.R. 320.

[70] *Hoenig v. Isaacs* (1952) 2 All E.R. 176, 178 *per* Somervell L.J.

[71] *St Enoch Shipping Co. Ltd v. Phosphate Mining Co.* [1916] 2 K.B. 624.

[72] *Dakin v. Oxley* (1864) 15 C.B. (N.S.) 646, *Hoenig v. Isaacs* (1952) 2 All E.R. 176, 178 *per* Somervell L.J.

[73] See *Halsbury's Laws of England* (4th ed. 1974) Vol. 9, Contracts, paras. 264 and 511; *Chitty on Contracts* (24th ed. 1977) Vol. 1, para. 691.

[74] Conditions precedent to the formation of the contract are distinguishable from conditions precedent to the further operation of the contract or the operation of some provision of the contract: see *Cheshire & Fifoot's Law of Contract* (9th ed. 1976) 136-7; the distinction is clearly drawn by Starke J. in *George v. Greater Adelaide Land Development Co. Ltd* (1929) 43 C.L.R. 91, 103.

the condition is an event which may or may not happen, that is to say that it is not a certain event; and, secondly, that neither party is promising that the event will occur. Hence non-fulfilment of the contingency in itself gives no right of action for breach, though frequently there will be some promise, express or implied, such as that a party will use his best endeavours to bring about the occurrence,[75] or refrain from actions to impede the happening of the occurrence.[76] There may be a breach of a term of this kind giving rise to damages, but if the contingency fails to occur the contract or obligation would be discharged for this reason and not because of breach.

It is suggested that the term 'condition precedent' should be limited in its use to contingent conditions and that the expression should be avoided where reference is made to a promissory condition or essential term, that is to say, a condition in the sense in which that expression is used in the Sale of Goods Acts. Unfortunately, largely because of obsolete pleading rules,[77] the term 'condition precedent' is constantly used, even in recent cases, synonymously with essential term,[78] dependent covenant,[79] entire obligation[80] or substantial performance of an entire obligation.[81] This can only cause confusion since the question whether a contract is discharged for failure of a contingent condition is determined by different criteria

[75] *Butts v. O'Dwyer* (1952) 87 C.L.R. 267; *Gray v. Allen* [1977] V.R. 413; *Hargreaves Transport Ltd v. Lynch* [1969] 1 W.L.R. 215; *Zieme v. Gregory* [1963] V.R. 214; *Barber v. Crickett* [1958] N.Z.L.R. 1057, 1059; *Waldron v. Tsimiklis* (1975) 12 S.A.S.R. 481.

[76] *Duncan v. Mell* (1914) 14 S.R. (N.S.W.) 333; *Egan v. Ross* (1928) 29 S.R. (N.S.W.) 382.

[77] To enforce the defendant's promise the plaintiff had to aver performance or readiness and willingness to perform obligations of his own which were either inter-dependent or concurrent with the defendant's promise; that is, performance or proffered performance by the plaintiff was a 'condition precedent' to the defendant's liability; see the materials in n. 39 *supra* and *Hongkong Fir Shipping Co. Ltd v. Kawasaki Kisen Kaisha Ltd* [1962] 2 Q.B. 26, 63 *per* Upjohn L.J., 67 *per* Diplock L.J., Carter J. W. and Hodgekiss C., 'Conditions and Warranties: Forebears and Descendants' (1976-79) 8 *Sydney Law Review* 31, 32-6; Lloyd M. G., 'Ready and Willing to Perform: The Problem of Prospective Inability in the Law of Contract' (1974) 37 *Modern Law Review* 121.

[78] *Hongkong Fir Shipping Co. Ltd v. Kawasaki Kisen Kaisha Ltd* [1962] 2 Q.B. 26; *Bowes v. Chaleyer* (1923) 32 C.L.R. 159; *Bentsen v. Taylor, Sons & Co. (No. 2)* (1893) 2 Q.B.D. 274, 281 *per* Bowen L.J.; *Trans Trust S.P.R.L. v. Danubian Trading Co. Ltd* [1952] 2 Q.B. 297, 304 *per* Denning L.J.; *Rainbow Spray Sales Pty Ltd v. Sanders* [1964-65] N.S.W.R. 422, 427 *per* Herron C.J.; *Halsbury's Laws of England* (4th ed. 1974) Vol. 9, Contracts, paras. 511-19 uses the term 'condition precedent' to refer both to promissory and contingent conditions.

[79] *Boone v. Eyre* (1779) 1 Hy. Bl. 273 n.; *Behn v. Burness* (1863) 1 B. & S. 877, 888; *Bettini v. Gye* (1876) 1 Q.B.D. 183, 187 *per* Blackburn J. In *Fearon v. The Earl of Aylesford* (1884) 14 Q.B.D. 792, 800 *per* Brett M.R. the term 'condition subsequent' was used to refer to a dependent covenant.

[80] *Cutter v. Powell* (1795) 6 T.R. 320, 325 *per* Ashhurst J., 326 *per* Lawrence J. An 'entire contract' is described as one in which it is agreed that complete performance shall be a condition precedent to recovery on the contract in The Law Commission Working Paper No. 65, Law of Contract, Pecuniary Restitution on Breach of Contract, 3 and by Williams G. L., 'Partial Performance of Entire Contracts' (1941) 57 *Law Quarterly Review* 373, 490 at 373.

[81] *Simpson Steel Structures v. Spencer* [1964] W.A.R. 101, 103.

from the question whether a contract is effectively discharged for breach. It may not always be obvious whether the parties have made their contract subject to a contingent condition or whether one party is undertaking an obligation to bring about the occurrence of the stated event, in which case the condition would be promissory.[82] But once a provision is correctly classified as a contingent condition, then on failure of the contingency the contract may be avoided without any further inquiry into the importance of the term or the gravity of the event resulting from failure of the condition.[83] This contrasts with the position on breach of a promissory term where it is essential to proceed to classify the term as a condition, warranty or intermediate term, according to the tests stated above, in order to decide whether a right to avoid the contract arises. This is not to say however that questions of election and waiver may not still be relevant in the case of failure of a contingent condition, since it seems that failure of the contingency may often be construed as making the contract voidable rather than void,[84] and that if a condition is for the benefit of one party it may be waived by him.[85]

Were it not for the fact that the Sale of Goods Acts entrenched the use of the term 'condition' to mean essential term, breach of which justifies rescission, it would be desirable to avoid its use entirely in this context in favour of other terminology such as 'essential' or even 'fundamental' term. Though use of 'condition' is sanctified, courts could at least avoid use of the term 'condition precedent' except where reference is to a 'true' condition, that is, a contingent condition.[86] Regrettably, they do not seem inclined to do so.

(d) *Failure of consideration*

Sometimes it is said that a party is discharged from his contractual obligation because the consideration for which his promise was made has failed; that is, the other party's failure to perform deprives him of or goes

[82] Cases where it was unclear include *Brien v. Dwyer* (1979) 53 A.L.J.R. 123; *United Dominions Trust (Commercial) Ltd v. Eagle Aircraft Services Ltd* [1968] 1 W.L.R. 74; *Dwyer v. Jerram* [1956] V.L.R. 279.

[83] In *Howard F. Hudson Pty Ltd v. Ronayne* (1972) 126 C.L.R. 449 a conditional promise was discharged for failure of the condition even though the condition was void as being in unreasonable restraint of trade.

[84] *Suttor v. Gundowda Pty Ltd* (1950) 81 C.L.R. 418; *Gange v. Sullivan* (1966) 116 C.L.R. 418; *Charles Lodge Pty Ltd v. Menahem* [1966] V.R. 161; *Zieme v. Gregory* [1963] V.R. 214.

[85] *Dwyer v. Jerram* [1956] V.L.R. 279; *The South Australian Railways Commissioner v. Egar* (1973) 47 A.L.J.R. 140; *Gange v. Sullivan* (1966) 116 C.L.R. 418; *Wood Preservation Ltd v. Prior* [1969] 1 All E.R. 364; Report on Waiver of Conditions Precedent in Contracts, Law Reform Commission of British Columbia, L.R.C. 31, 1977.

[86] *Attorney-General v. Australian Iron & Steel Ltd* (1936) 36 S.R. (N.S.W.) 172, 182 *per* Davidson J.; Reynolds F. M. B., 'Warranty, Condition and Fundamental Term' (1963) 79 *Law Quarterly Review* 534, 536.

to the root of the consideration for which his promise was given.[87] This terminology derives from *Boone v. Eyre*[88] where Lord Mansfield said that 'where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent'.[89]

However, it soon became apparent that, though lip service may have been paid to the requirement that the failure of consideration should be *total* to justify rescission, lesser degrees of failure were in fact acknowledged to suffice.[90] Thus in practice non-performance which 'goes to the whole of the consideration' (in Lord Mansfield's terminology) came to signify a breach of condition or essential term; whereas a breach which resulted only in a partial failure of consideration would be a breach of warranty or inessential term.[91] But it was sought to accommodate *all* cases where the law allows or denies rescission within the dichotomy of total or partial failure of consideration including those cases where quite clearly there was not even a substantial failure of consideration and yet rescission was available. The attempt became ludicrous when it was said of entire contracts that, the consideration being one and indivisible, by failing in part, it failed altogether.[92] Thus there could be held to be a total failure of consideration in the case of an entire contract despite the fact that one party may have conferred a considerable benefit on the other. This is a fictitious use of language.

Employing the terminology of failure of consideration, total or partial, to refer to circumstances which do, or do not, justify rescission is objectionable, if only because it gives the misleading impression that to justify rescission by one party it must be shown that the other party is in default with respect to the entirety of his contractual obligations. But its use is the

[87] *Francis v. Lyon* (1907) 4 C.L.R. 1023, 1035 *per* Griffith C.J.; *The Hansa Nord* [1976] 1 Q.B. 44, 57-8 *per* Lord Denning M.R., 83 *per* Ormrod L.J.; *Huntoon Company v. Kolynos (Incorporated)* [1930] 1 Ch. 528, 558 *per* Lawrence L.J.; *Lion White Lead Ltd v. Rogers* (1918) 25 C.L.R. 533, 550 *per* Isaacs and Rich JJ.; *Liverpool Holdings Ltd v. Gordon Lynton Car Sales Pty Ltd* [1978] Qd. R. 279, 282; *King v. Patrick's Day (Minhamite) Pty Ltd* [1971] V.R. 777, 783; *Fullers' Theatres Ltd v. Musgrove* (1923) 31 C.L.R. 524, 537 *per* Isaacs and Rich JJ.; *Poussard v. Spiers & Pond* (1876) 1 Q.B.D. 410; *Heyman v. Darwins Ltd* [1942] A.C. 356, 399 *per* Lord Porter; *Bolton v. Mahadeva* [1972] 1 W.L.R. 1009; *Davidson v. Gwynne* (1810) 12 East 381, 389 *per* Lord Ellenborough C.J.; *Graves v. Legg* (1854) 9 Exch. 709, 716; Shea A. M., 'Discharge from Performance of Contracts by Failure of Condition' (1979) 42 *Modern Law Review* 623, 632.

[88] (1779) 1 Hy. Bl. 273 n.

[89] *Ibid.* see also *Pordage v. Cole* (1669) 1 Wms. Saund. 319; Stoljar S. J., 'Dependent and Independent Promises' (1957) 2 *Sydney Law Review* 217, 245-52.

[90] *The Duke of St Alban's v. Shore* (1789) 1 Hy. Bl. 270; *Ellen v. Topp* (1851) 6 Exch. 424; Williams G. L., 'Partial Performance of Entire Contracts' (1941) 57 *Law Quarterly Review* 373, 490, 490 ff.

[91] *Van Reesema v. Giameos (No. 1)* (1977) 17 S.A.S.R. 353, 374 *per* Bray C.J.

[92] *Pordage v. Cole* (1669) 1 Wms. Saund. 319, 320; *Chanter v. Leese* (1840) 5 M. & W. 698; *Ellen v. Topp* (1851) 6 Exch. 424.

more inappropriate, and misconceptions are more likely to occur, in view of the fact that in breach of another area of the law, the law of quasi-contract, the phrase 'total failure of consideration' means more nearly, if not precisely, what it says. Money paid under a contract is recoverable from the payee in quasi-contract if the payer has received no part of the consideration for which payment was made.[93] Use of the same terminology, but in a looser or even fictitious sense, in the law relating to discharge of contracts for non-performance can only cause confusion and should be avoided.

(e) *Fundamental breach*

The expressions 'fundamental breach' and 'breach of a fundamental term' are frequently used simply to refer to a repudiatory breach; that is, a breach which is of such a nature that the innocent party is justified in electing to rescind. In many cases which do not involve exception clauses in any way, this terminology is used in this sense.[94] Such use can be misleading since, in the field of exception clauses, the so-called 'doctrine of fundamental breach', on one view at any rate, gives a narrower meaning to the same terminology. Thus the expressions are ambiguous and this can cause confusion where the courts do not make clear the sense in which the terms are being employed.

At one time authority in England,[95] though not in Australia,[96] supported the existence of a rule of law precluding reliance on an exception clause by a party who committed a breach of a fundamental term or a fundamental breach. Such a breach, according to this rule, was more serious or radical than a repudiatory breach. To be fundamental it must have resulted in performance becoming something totally different from that which the

[93] *Hudson v. Robinson* (1816) 4 M. & S. 475; *Rowland v. Divall* [1923] 2 K.B. 500; *Fehlberg v. Stanton* [1960] A.L.R. 299; Stoljar S. J., 'The Doctrine of Failure of Consideration' (1959) 75 *Law Quarterly Review* 53; Goff R. and Jones G., *The Law of Restitution* (2nd ed. 1978) 371-7.

[94] *Brien v. Dwyer* (1979) 53 A.L.J.R. 123; *George Hudson Holdings Ltd v. Rudder* (1973) 128 C.L.R. 387, 397 *per* Menzies J.; *Direct Acceptance Finance Ltd v. Cumberland Furnishing Pty Ltd* [1965] N.S.W.R. 1504; *Berger v. Boyles* [1971] V.R. 321; *Moschi v. Lep Air Services Ltd* [1973] A.C. 331; *Photo Production Ltd v. Securicor Transport Ltd* [1980] 2 W.L.R. 283, 294 *per* Lord Diplock; *Farrant v. Leburn* [1970] W.A.R. 179, 182; *Baker Perkins Ltd v. Thompson* [1960] N.S.W.R. 488; *Cheshire & Fifoot's Law of Contract* (9th ed. 1976) 571 (*cf.* 3rd Australian edition, 1974, 710 which avoids this terminology).

[95] *Karsales (Harrow) Ltd v. Wallis* [1956] 2 All E.R. 866; *J. Spurling Ltd v. Bradshaw* [1956] 2 All E.R. 121; *Yeoman Credit Ltd v. Apps* [1962] 2 Q.B. 508; *Charterhouse Credit Co. Ltd v. Tolly* [1963] 2 Q.B. 683.

[96] *Council of the City of Sydney v. West* (1965) 114 C.L.R. 481; *Thomas National Transport (Melbourne) Pty Ltd v. May & Baker (Australia) Pty Ltd* (1966) 115 C.L.R. 353 *per* Windeyer J.; *H. & E. Van der Sterren v. Cibernetics (Holdings) Pty Ltd* (1970) 44 A.L.J.R. 157; *V.L. Boots Pty Ltd v. Booth (E.R.F.) Pty Ltd* [1968] 3 N.S.W.R. 519; *Port Jackson Stevedoring Pty Ltd v. Salmond & Spraggon (Australia) Pty Ltd* (1980) 54 A.L.J.R. 552; *cf. World Travel Service Pty Ltd v. McNiven* [1964-65] N.S.W.R. 731; *Penny v. Grand Central Car Park Pty Ltd* [1965] V.R. 323.

contract contemplated.[97] The House of Lords in the *Suisse Atlantique* case[98] and the *Photo Production* case[99] has now made it clear beyond doubt that no such rule of law exists, but only a rule of construction to the effect that an exclusion clause will not normally be construed as intended to cover fundamental breach. However the House of Lords has not clarified the meaning of the terms 'fundamental breach' and 'breach of a fundamental term' where used in relation to this rule of construction.[1] Some judges in the *Suisse Atlantique* case clearly thought that a fundamental breach is just a repudiatory breach;[2] others considered that, so far as this rule of construction is concerned, the phrase fundamental breach is still used in the narrower sense.[3] It is not, perhaps, of great significance in the law relating to exception clauses, which is the correct view. This is because the rule of construction may simply be expressed as a presumption,[4] the strength of which increases, the more radical the breach.[5]

However in relation to the law of discharge of contracts for breach it is important to know whether, in a given case, a court used the term fundamental breach in a wide or narrow sense, since previous decisions give guidance for the future with respect to the sorts of circumstances which justify rescission. The so-called doctrine of fundamental breach was at one time closely tied up with the rules of discharge for breach. This was because the deviation cases,[6] on which the doctrine was largely based, were explained by the House of Lords in *Hain Steamship Co. Ltd v. Tate & Lyle Ltd*[7] as involving application of the general law of contract on discharge by breach. This thinking induced the erroneous view, taken by the English Court of Appeal both before[8] and after[9] the *Suisse Atlantique* case, that exception

[97] *Smeaton Hanscomb & Co. Ltd. v. Sassoon I. Setty Son & Co.* [1953] 2 All E.R. 1471, 1473 *per* Devlin J.; *Yeoman Credit Ltd v. Apps* [1962] 2 Q.B. 508, 520 *per* Holroyd Pearce L.J.; *World Travel Service Pty Ltd v. McNiven* [1964-65] N.S.W.R. 731.

[98] *Suisse Atlantique Société d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361.

[99] *Photo Production Ltd v. Securicor Transport Ltd* [1980] 2 W.L.R. 283.

[1] *Cf. Chitty on Contracts* (24th ed. 1977) Vol. 1 paras. 687 and 1506 where the view is taken that English law does not recognise any category of 'fundamental terms' distinct from conditions and that the expression 'fundamental breach' signifies only breach which frustrates the commercial purpose of the contract and justifies rescission.

[2] [1967] 1 A.C. 361, 397, 421-2 *per* Lords Reid and Upjohn.

[3] *Ibid.* 393, 431 *per* Viscount Dilhorne and Lord Wilberforce; the fact that the earlier cases which proceeded on the basis of a rule of law rather than construction were not overruled but reinterpreted means that those of them in which fundamental breach was used in the narrower sense are still authoritative on this point; see also *Kenyon, Son & Craven Ltd v. Baxter Hoare & Co. Ltd* [1971] 2 All E.R. 708.

[4] '. . . there is a strong, though rebuttable, presumption that in inserting a clause of exclusion or limitation in their contract the parties are not contemplating breaches of fundamental terms . . .': [1967] 1 A.C. 361, 427 *per* Lord Upjohn.

[5] *Ibid.* 432 *per* Lord Wilberforce; *Levison v. Patent Steam Carpet Cleaning Co. Ltd* [1978] Q.B. 69, 84 *per* Sir David Cairns.

[6] *E.g. Joseph Thorley Ltd v. Orchis Steamship Co. Ltd* [1907] 1 K.B. 660; *James Morrison & Co. Ltd v. Shaw, Savill & Albion Co. Ltd* [1916] 2 K.B. 783.

[7] (1936) 41 Com. Cas. 350.

[8] See cases n. 95 *supra.*

[9] *Harbutt's "Plasticine" Ltd v. Wayne Tank & Pump Co. Ltd* [1970] 1 Q.B. 447;

clauses ceased, as a matter of law, to apply on fundamental breach, at any rate if the contract was disaffirmed.[10] The House of Lords in the *Photo Production* case has now declared the deviation cases to be *sui generis*[11] and decisively rejected the supposition that disaffirmance automatically precludes reliance on an exception clause.[12]

The position therefore is that the rules for discharge for breach and the rules regarding the application of exception clauses are now distinct. Discharge for breach does not involve any special consequences so far as these terms are concerned. Whether the clause applies depends on the construction of the contract. The contract is construed with the assistance of various rules of construction, among them the doctrine of fundamental breach. Thus it is unfortunate that in the law of discharge by breach the same terminology should be used in a sense which is wider, on one view of the authorities, than the sense in which it is used in relation to a special rule of construction which applies to exception clauses.

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The confusion in the case law which results from the existence of these various methods of approach employing different terminology, to deal with basically the same problem, is compounded by the fact that more often than not a combination of the various formulae is used in the one case and the terminology runs together.[13] The leading texts, by devoting separate sections to the five different bodies of law discussed above, may well give the impression, quite unjustified by the case law, that they are distinct from each other and from the law of conditions, warranties and intermediate terms. On closer examination the interrelationships are, of

Farnworth Finance Facilities Ltd v. Attryde [1970] 2 All E.R. 774; *Wathes (Western) Ltd v. Austins (Menswear) Ltd* [1976] 1 Lloyd's Rep. 14; *Levison v. Patent Steam Carpet Cleaning Co. Ltd* [1978] Q.B. 69; these cases were never applied in Australia.

[10] *Cf. Wathes (Western) Ltd v. Austins (Menswear) Ltd* [1976] 1 Lloyd's Rep. 14 where even this limitation was not acknowledged.

[11] [1980] 2 W.L.R. 291 *per* Lord Wilberforce.

[12] *Ibid.* expressly overruling *Harbutt's "Plasticine" Ltd v. Wayne Tank & Pump Co. Ltd* [1970] 1 Q.B. 447 and *Wathes (Western) Ltd v. Austins (Menswear) Ltd* [1976] 1 Lloyd's Rep. 14.

[13] A good example is the judgment of Davidson J. in *Attorney-General v. Australian Iron & Steel Ltd* (1936) 36 S.R. (N.S.W.) 172 who said '. . . the substantial questions which arise for determination are: (1) Whether the provisions of clause 6 . . . constitute a condition precedent or a vital and essential term going to the root of the contract, or amount merely to an independent covenant the breach of which could be met by payment of damages. . . . If the covenant or agreement which is being considered goes to part only of the real consideration of both sides and may be compensated by damages upon breach it is an independent contract (sic) and not vital to the whole contract . . .' (178) and: 'In support of the proposition that the contract might be read as divisible and that the defendant's obligation and the time for completion of the railway by the Government were dependent upon each other, reliance was placed on . . .' (180-1); see also *Huntoon Co. v. Kolynos (Incorporated)* [1930] 1 Ch. 528, 557-8; *Hoenig v. Isaacs* [1952] 2 All E.R. 176; *Corio Guarantee Corporation Ltd v. McCallum* [1956] V.L.R. 755 at 760-1.

course, acknowledged by the text writers.[14] But to anyone seeking a statement of the modern law relating to discharge of contractual obligations for breach, who does not have a good grasp of the history of the law in the area,[15] the present-day position must seem inexplicably and unnecessarily complicated.[16] It is puzzling to say the least to find that the right to terminate for breach is usually determined by asking whether the term broken is a condition, warranty or intermediate term, but alternatively the question may sometimes be approached by asking if the parties' covenants are dependent, whether a condition precedent has been fulfilled, whether the contract is entire, whether consideration has failed or whether the breach or the term broken is fundamental. A study of centuries of legal history should not be a pre-requisite to comprehension of current common law rules.

It is suggested that the law would be greatly improved and simplified if the rules relating to discharge of contracts for breach were separated from other areas with which they are now connected. It should be acknowledged that the rules regarding rescission of contracts for breach are distinct from the law regarding discharge of contracts for non-performance which is not breach, discharge of particular obligations under contracts rather than contracts themselves for breach, discharge for failure of contingent conditions, recovery of money on a total failure of consideration and the rules regarding the application of exception clauses.

What is needed in this branch of the law is standardization of terminology[17] and elimination of redundant or overlapping categories and distinctions without differences. These objectives can probably only be achieved however by statutory codification of the law, should this ever occur.[18] The

[14] *E.g. Halsbury's Laws of England* (4th ed. 1974) Vol. 9, Contracts, deals with dependency and independency of covenants in a quite separate section from conditions and warranties, yet gives as the test of dependency, one of the often-cited definitions of a condition (para. 516); see *Chitty on Contracts* (24th ed. 1977) Vol. 1, para. 1502 where the same test is given as a definition of a condition.

[15] Well summarized by Lord Denning M.R. in *The Hansa Nord* [1976] 1 Q.B. 44, 57-8.

[16] Treitel G. H., *The Law of Contract* (5th ed. 1979) 622 acknowledges that: 'The Law relating to the effects of failure to perform is hard to state; and parts of it are still harder to justify'.

[17] In *Photo Production Ltd v. Securicor Transport Ltd* [1980] 2 W.L.R. 283, 293 Lord Diplock said: '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'.

[18] The English Law Commission has a reference on codification of the law of contract but has suspended its work for the time being with the intention, in the meantime, of producing a series of Working Papers containing provisional proposals relating to particular aspects of the law of contract which might be in need of reform. In New Zealand the Contractual Remedies Act 1979 codifies the law relating to discharge for breach and misrepresentation. Starke J. G., 'A Restatement of the Australian Law of Contract as a First Step Towards an Australian Uniform Contract Code' (1975) 49 *Australian Law Journal* 234, argues that, as a necessary step paving the way towards codification, a restatement of the Australian law of contract should be prepared, representing a preliminary feasibility study of the problems that would

problem of settling on terminology seems intractable[19] since no single expression of preference about usage by any judge, or even an entire appeal court, can be considered authoritative in the same way as a statutory definition. So irretrievably ambiguous are some terms, such as 'repudiation',[20] 'rescission',[21] 'condition precedent',[22] 'condition',[23] 'fundamental breach'[24] and 'waiver',[25] that it would be desirable to avoid their use entirely in any statutory code in favour of newly-minted terminology. Streamlining the law by abolishing or narrowing down categories to avoid overlap and redundancy is also unlikely to be achieved except by statutory codification since obsolete cases employing outdated reasoning and terminology are nevertheless, unless overruled, still embedded in the fabric of the common law and hence remain authoritative. Judges are bound to disagree, in many instances, about the value of particular precedents. The problem is well illustrated by Lord Devlin's extra-judicial remarks about Diplock L.J.'s statement in the *Hong Kong Fir Shipping* case[26] that:

confront the legislature when it proceeds to pass a codifying statute; 50 *Australian Law Journal* 208.

[19] 'To plead for complete uniformity may be to cry for the moon': *per* Lord Wilberforce in *Photo Production Ltd v. Securicor Transport Ltd* [1980] 2 W.L.R. 283, 290.

[20] On the ambiguity of the term see *Heyman v. Darwins, Ltd* [1942] A.C. 356, 378-9 *per* Lord Wright; *The Hansa Nord* [1976] 1 Q.B. 44, 59 *per* Lord Denning M.R.; the most common usages are to refer to (1) a breach which justifies termination: *Anson's Law of Contract* (25th ed. 1979) 526-7; Sale of Goods Act 1923 (N.S.W.) ss. 5, 16(2); *Moschi v. Lep Air Services Ltd* [1973] A.C. 331, 350 *per* Lord Diplock, (2) an intimation of an intention to abandon the contract before the date for performance; *Cheshire & Fifoot's Law of Contract* (9th ed. 1976) 568; McGarvie R. E., 'The Common Law Discharge of Contracts upon Breach' (1963) 4 *M.U.L.R.* 254, 258; McRae D. M., 'Repudiation of Contracts in Canadian Law' (1978) 56 *Canadian Bar Review* 233, 234; *Stevter Holdings Ltd v. Katra Constructions Pty Ltd* [1975] 1 N.S.W.L.R. 459, 464; *D.T.R. Nominees Pty Ltd v. Mona Homes Pty Ltd* (1977-78) 138 C.L.R. 423, (3) the act of a party who refuses to perform for the other party's breach: Jenkins D., 'The Essence of the Contract' [1969] *Cambridge Law Journal* 251, 252, (4) termination for any cause in pursuance of an inherent legal right, *e.g.* for breach, mistake, misrepresentation: Gordon D. M., 'Election to Repudiate a Contract' (1960) 38 *Canadian Bar Review* 509.

[21] On the ambiguity of the term see *Halsbury's Laws of England* (4th ed. 1974) Vol. 9, Contracts, para. 535; Lord Wilberforce in *Photo Production Ltd v. Securicor Transport Ltd* [1980] 2 W.L.R. 283, 290. It is often said that in its primary and more correct sense it signifies setting aside of the contract *ab initio* for some vitiating factor affecting formation, *e.g.* misrepresentation, mistake or undue influence: *Cheshire & Fifoot's Law of Contract* (9th ed. 1976) 579; McGarvie R. E., 'The Common Law Discharge of Contracts upon Breach' (1963) 4 *M.U.L.R.* 254, 255-7; Shea A. M., 'Discharge from Performance of Contracts by Failure of Condition' (1979) 42 *Modern Law Review* 623, 627.

[22] *Cheshire & Fifoot's Law of Contract* (9th ed. 1976) 136-8; *Trans Trust S.P.R.L. v. Danubian Trading Co. Ltd* [1952] 2 Q.B. 297, 304 *per* Denning L.J.

[23] *Wickman Machine Tool Sales Ltd v. L. Schuler A.G.* [1972] 2 All E.R. 1173, 1180-1 *per* Lord Denning M.R.; *L. Schuler A.G. v. Wickman Machine Tool Sales Ltd* [1974] A.C. 235, 250-1 *per* Lord Reid, 264-5 *per* Lord Simon.

[24] See section (e) *supra*.

[25] On the various senses in which the term is used see Treitel G. H., *The Law of Contract* (5th ed. 1979) 81; *Halsbury's Laws of England* (4th ed. 1974) Vol. 9, Contracts para. 571.

[26] *Hongkong Fir Shipping Co. Ltd v. Kawasaki Kisen Kaisha Ltd* [1962] 2 Q.B. 26.

> The common law evolves not merely by breeding new principles but also, when they are fully grown, by burying their progenitors.[27]

While agreeing in principle, Lord Devlin added:

> But the decencies of legal decomposition must be observed and we must be careful, if the continuity of the common law is to be maintained, not to order the summary execution of progenitors that are still alive and kicking.[28]

In a system like ours which encourages individualism on the part of judges it is unlikely that a consensus about which progenitors are ripe for burial will be reached judicially.

[27] *Ibid.* 71.
[28] 'The Treatment of Breach of Contract' [1966] *Cambridge Law Journal* 192, 200.