this test in earlier High Court decisions and the Court's failure to acknowledge the other view held on the matter make this not unlikely. Their refusal, however, to enter deeply into the dispute could indicate an open approach which would enable the test to be explained and varied in differing factual situations. Indeed the common law rules on the subject are referred to as 'well understood but variously explained'.[24] Considering the great variety of factual situations in which the question is raised, such an approach may be as necessary here as it is in reference to the nature, applicability and content of the *Audi alteram partem* rule.

VALERIA McAULIFFE

UNITED DOMINIONS TRUST (COMMERCIAL) LTD. v. EAGLE SERVICES LTD.[1]

I

United Dominions Trust (Commercial) Ltd. v. Eagle Services Ltd.[1] raises some interesting points of both a practical and a theoretical nature.

The case concerned recourse agreements in two hire-purchase transactions of the familiar pattern, the two actions being consolidated. The defendant ("Eagle") had sold an aircraft to the plaintiffs ("U.D.T."), who had in turn let it out on hire-purchase to Orion Airways, Ltd. ("Orion"). The recourse agreement between plaintiff and defendant took the form of a "repurchase" agreement: Eagle agreed, in the event of termination of the hire-purchase contract to purchase the aircraft from U.D.T. 'at a price equal to the balance outstanding [of the hire-purchase price]'[2]. This obligation was subject to four provisos. Proviso (a) in effect subrogated Eagle to any rights of U.D.T. against Orion, proviso (b) was not relevant, and proviso (c) required U.D.T. to keep the aircraft insured at all times prior to re-purchase. Proviso (d) was:

> That you will (whether or not you call upon us to repurchase the said aircraft) notify us within seven days of each and every default made by Orion Airways, Ltd. in payment of hire-rentals.

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24 (1969) 43 A.L.J.R. 150, 152.
1 [1968] 1 All E.R. 104.
2 Ibid. at 105.

After using the aircraft for some time, Orion made default in payment but Eagle were not informed until some months later, whereupon they purported to repudiate their obligation to repurchase. This was not accepted by U.D.T. Thereafter U.D.T. terminated their contract with Orion and took steps to recover possession of the aircraft, but it was only five months after termination that they called on Eagle to repurchase.

Widgery J. gave judgment for the plaintiffs, apparently on the grounds:

(1) that failure to comply with proviso (d) was not so serious a breach as to discharge the contract (applying the *Hong Kong Fir Shipping Case*).[3]

(2) that, though there was to be implied a term that notice to repurchase should be given within a reasonable time of termination of the hire-purchase agreement, nevertheless time was not of the essence, and Eagle should have given notice to U.D.T. to make it so.

The Court of Appeal (Denning M.R., Diplock and Edmund Davies L.JJ.) took the view that Eagle's obligation was "conditional"[4] on U.D.T. giving notice within a reasonable time—as they had not done so, no obligation ever came into existence. No unanimous opinion was expressed as to whether Eagle's obligation was likewise "conditional" on strict compliance with proviso (d), the view of Denning M.R. and Edmund Davies L.J. differing from that of Diplock L.J.

II

The decision indicates a hardening attitude towards recourse agreements cast in the form of repurchase contracts. English and Australian[5] hire-purchase financiers have been experimenting with this form in order to avoid the special rules relating to guarantees *stricto sensu,* while at the same time preserving the effect of such contracts (as witness proviso (a) of this particular contract). The question of whether a particular agreement is a guarantee *stricto sensu* requires

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3 Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd. [1962] 2 Q.B. 26.

4 a 'condition precedent': per Denning M.R. and Edmund Davies L.J. [1968] 1 All E.R. 104, 107; the 'event giving rise to Eagle's unilateral obligation to buy': per Diplock L.J. ibid. at 111.

5 See Crothers v. Hire Finance Ltd. (1959) 76 W.N. (N.S.W.) 469; Direct Acceptance Finance Ltd. v. Cumberland Furnishing Pty. Ltd. [1965] N.S.W.R. 1504; Daly & Another v. Roth (1956) 73 W.N. (N.S.W.) 270.

the court to 'have regard to its essential nature'.[6] If it is classified as such, the court may give the guarantor 'the benefit of all the laws in favour of those who undertake suretyship for another'.[7] If not, it must take effect strictly according to the terms of the agreement. Where the recourse agreement provides for repurchase of the goods, or at all events for payment of a sum equal to the balance outstanding of the total hire-purchase price (whether or not the dealer can thereupon call for transfer to himself of title to the goods) it is submitted that the agreement cannot be treated as a guarantee. The reasoning of Walsh J. in *Direct Acceptance Finance Ltd. v. Cumberland Furnishing Pty. Ltd.*,[8] criticising *Unity Finance Ltd. v. Woodcock*[9] is convincing: there can be no guarantee where the "guarantor" is called upon to pay an amount exceeding that for which the principal debtor is liable, and in Australia, at least, the hirer can never be compelled to pay the full balance outstanding (having regard to the rebate provisions and the requirement that the owner give credit for the value of goods returned).[10]

But though a "repurchase" agreement may escape classification as a guarantee, the U.D.T. case suggests that such an agreement will be enforced only if the owner has complied strictly with its terms. Ignoring for a moment the theoretical considerations leading them to this conclusion,[11] Lord Denning M.R. and Edmund Davies L.J. both considered that strict compliance with proviso (d) was necessary before U.D.T. could call on Eagle to repurchase.[12] Neither, however, based his decision on this ground. Diplock L.J. because of his particular analysis of the situation,[13] inclined to the opposite view.[14] The

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6 Per Holroyd Pearce L.J. in Yeoman Credit Ltd. v. Latter & Another [1961] 2 All E.R. 294 at 296; and see Richmond J. in Cameo Motors Ltd. v. Portland Holdings Ltd. [1965] N.Z.L.R. 109 at 113.

7 Per Lord Denning M.R. in Unity Finance Ltd. v. Woodcock [1963] 2 All E.R. 270: e.g. Midland Counties Motor Finance Co. Ltd., v. Slade [1951] 1 K.B. 346 (discharge by giving time to pay); Midland Motor Showrooms Ltd. Newman [1929] 2 K.B. 256, Unity Finance Ltd. v. Woodcock [1963] 2 All E.R. 270 (discharge by cesser of principal debtor's obligation).

8 [1965] N.S.W.R. 1504 at 1509.

9 [1963] 2 All E.R. 270.

10 On this point, see Cameo Motors Ltd. v. Portland Holdings Ltd. [1965] N.S.W.R. 109 at 113 per Richmond J.

11 For the theoretical considerations involved, see Part III of this note, infra p.

12 [1968] 1 All E.R. 104 at 107 per Lord Denning M.R.; at 112 per Edmund Davies L.J.

13 Infra, p.

14 [1968] 1 All E.R. 104, 110.

majority opinion on the point is certainly more easily applied, the approach of Diplock L.J. depending (as we shall see) on an initial classification of terms as either "unilateral" or "synallagmatic" in nature.

The actual ground of decision, that U.D.T. were required to give Eagle notice to re-purchase within a reasonable time of termination of the hire-purchase contract,[15] raises other considerations.

Where the agreement has been to "repurchase", the courts have implied a further term that the financier should be ready to give actual delivery.[16] (This result can be avoided by careful wording.)[17] In the U.D.T. case, after termination of the hire-purchase contract, U.D.T. had to spend some time in locating the aircraft. It was eventually found in the hands of repairers, who claimed a lien. Further time was lost in negotiating a discharge of this. While it is clear that 'a reasonable time has always got to be considered in regard to the actual circumstances'[18] it would appear that a "reasonable time" might well expire before the goods can be located. The term is implied for commercial convenience: 'It is commercially inconceivable that they should have bound themselves until the Greek Kalends to buy at a fixed price an obsolescent chattel whose value would diminish with the passage of time.'[19]

In view of these difficulties, stemming basically from the "sale" aspect of this particular type of recourse agreement, it may be advisable for hire-purchase financiers to heed the words of Scott L.J. in the *Watling Trust case*:[20] 'It would be very much better for the parties that the reality of the transaction should appear in the documents.' If an indemnity is required, this can be given without the pretence that the contract is really one of sale.

III

The fact that the recourse arrangement was in form an agreement to sell also gives rise to the theoretical interest of the decision. In

15 This approach was foreshadowed in the judgment of Lord Denning M.R. in Unity Finance Ltd. v. Woodcock [1963] 2 All E.R. 271 at 273.

16 Watling Trust Ltd. v. Briffault Range Co. Ltd. [1938] 1 All E.R. 525. Though not cited, presumably section 28 of the Sale of Goods Act 1895 (W.A.) requires this: likewise section 12 should apply in relation to title, quiet possession and freedom from encumbrances.

17 As in Yeoman Credit Ltd. v. Latter & Another [1961] 2 All E.R. 294, 297. But the nature of the recourse agreement will be changed.

18 [1968] 1 All E.R. 104, at 108 per Lord Denning M.R.

19 Ibid. at 111, per Diplock L.J.

20 Watling Trust Ltd. v. Briffault Range Co. Ltd. [1938] 1 All E.R. 525 at 529.

previous cases dealing with similar arrangements, the legal situation was not subjected to careful analysis. This became necessary in the U.D.T. case. It will be remembered that there were two grounds on which Eagle claimed to be relieved of their obligation to repurchase—

(1) non-compliance with proviso (d);
(2) failure to call for repurchase within a reasonable time of termination.

Widgery J. treated these two requirements as promissory parts of a single bilateral[21] contract. The question for him was, therefore, whether non-compliance was sufficiently serious to constitute repudiatory breach. Adopting the now familiar test of the *Hong Kong case*,[22] he concluded that non-compliance with proviso (d) did not operate as a discharge. By use of the concept of time being not "of the essence", the notice requirement was likewise reduced to the status of a "warranty" (using pre-*Hong Kong* terminology).

The Court of Appeal took an entirely different track. All three members regarded the promise to repurchase as a "unilateral" obligation. At least some of the various provisos and implied terms were merely 'descriptive of the event on the occurrence of which Eagle's unilateral obligation to buy the aircraft arises'.[23] U.D.T. did not promise to comply with these. But if there was no compliance, then Eagle's obligation to re-purchase never came into being.[24] On this analysis, there was no room for an enquiry as to "substantial" or "trivial" breach. The concept of "breach" itself is relevant only to promissory terms. The emphasis was thus shifted from rules governing performance of obligations to those governing formation or creation of obligations.[25] The difference in result achieved by the Court of Appeal is accounted for by the stricter requirements of the latter group of rules. The Court found authority for their approach in a line of cases[26] dealing with options to continue leases, the power to exercise

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21 Diplock L.J. preferred the term "synallagmatic" and stoutly defended his use of it (in the Hong Kong case) against aspersions of 'gratuitous philological exhibitionism'—see [1968] 1 All E.R. 104 at 108.

22 [1962] 2 Q.B. 26.

23 [1968] 1 All E.R. 104 at 111 per Diplock L.J.

24 'There is no obligation; there can be no breach. The action must fail': ibid. at 111 per Diplock L.J.

25 'In order to be turned into a binding contract, the offer must be accepted in exact compliance with its terms. The acceptance must correspond with the offer': ibid. at 107 per Lord Denning M.R.

26 Weston v. Collins (1865) 12 L.T. 4; Finch v. Underwood (1876) 2 Ch. D. 310; Hare v. Nicholl [1966] 2 Q.B. 130; West Country Cleaners (Falmouth), Ltd. v. Saly [1966] 3 All E.R. 210.

the option being conditional on precise observance of all the terms of the main lease.

Though all three members of the Court adopted the same basic approach, Diplock L.J. was alone in attempting a further analysis of the various clauses of the recourse agreement. On closer inspection, some clauses were found to be "synallagmatic", others merely "unilateral" (in the sense that they qualified the acceptance of Eagle's "unilateral" obligation to repurchase), and the rules relating to performance therefore differed according to the category in which a particular clause was placed. Diplock L.J. regarded proviso (c) (the insurance provision) as synallagmatic, and tentatively made the same classification for proviso (d). He therefore tended to agree with Widgery J. that the breaches of proviso (d) which had occurred did not discharge Eagle.[27] On the point of actual decision, he agreed with his brethren that the notice requirement was "unilateral".

Where a particular contract is a complex of "unilateral" and "bilateral" undertakings, it appears necessary to enter into the sort of analysis performed by Diplock L.J., for the rules applicable will depend on the class involved. Diplock L.J. gives no guide as to how to disentangle "synallagmatic" from "unilateral" clauses. Until more precise tests are evolved, future courts may find this sort of classification a useful device for achieving one result rather than another.

In view of this, a final question may be raised, as to the validity of the approach adopted by the Court of Appeal.

The traditional view of a "unilateral" obligation is that it is an offer in return for an act, the performance of the act being at once the acceptance of the offer, and the consideration for it. The Court of Appeal concentrated on one aspect only—the acceptance factor—and ignored the consideration factor. Though this might well have been justified on existing authority,[28] it is submitted that in problems of this nature the consideration factor should prevail. Where "performance" is in issue, the strict approach typified by *Cutter v. Powell*[29] has given way to the less stringent doctrine of "substantial performance", and it is submitted that the consideration provided by performance of an act (in response to a "unilateral" offer) should be accorded the same treatment. With respect, it is somewhat legalistic to

27 See [1968] 1 All E.R. 104 at 110. The other two members of the Court tended to the opposite view: ibid. at 107, 112.

28 In Australia e.g. by R. v. Clarke (1927) 40 C.L.R. 227, where the consideration factor (the information was given) was outweighed by the acceptance aspect.

29 (1795) 6 Term. Rep. 320.

distinguish the two situations on the ground that in the one case performance is promised, while there is no promise in the other.[30]

It is recognised that in this particular case, it requires some stretch of the imagination to regard the performance of the various provisos which hedged Eagle's offer to repurchase, as the consideration for the synallagmatic repurchase contract. The agreement might be summarised as follows: 'If you give notice of defaults within seven days (and if you call on us to repurchase within a reasonable time of repossession), we will repurchase.' The performance of the "if" clauses[31] could technically be regarded as consideration, and it is submitted that they should be so treated. If this is done, the "substantial performance" doctrine can be brought into play. Though there may be a slight air of unreality, this is outweighed by the resulting consistency of approach.

L. L. PROKSCH

OLSSON v. DYSON[1]

(Assignment of choses in action: contract—rights and liabilities of third parties.)

The technical rubric of voluntary assignment of legal choses in action sometimes tends to obscure the fact that most cases subsumed under it are concerned, simply, with the legal requirements for making an effective gift of a debt. Nor is it surprising that such cases have given rise to conceptual difficulties: they necessarily involve three parties—creditor/donor, debtor and donee—and they thereby fall neatly across the established categories of contract and gift. Where effective, a gift of a debt gives rise to a *jus tertii* not by way of contract but nevertheless, in a very real sense, because of it.

Before the Judicature Act 1873 no means existed at common law by which a direct gift of a debt enforceable at law could be made. True, much the same result could be achieved at law by means of novation; and in equity by an assignment in which the Court of Chancery would order the assignor (creditor) to permit the assignee to sue in his name in an action at law against the debtor. But these

30 The position of the Court in support of the distinction is most powerfully presented by Diplock L.J.: [1968] 1 All E.R. 104 at 109-110.

31 See [1968] 1 All E.R. 104, at 109, 110 per Diplock L.J.

1 (1969) 43 A.L.J.R. 77.