TERMINATION FOR BREACH OF CONTRACT

John E Stannard
Senior Lecturer in Law, Queen's University Belfast

David Capper
Reader in Law, Queen's University Belfast

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THE NATURE OF TERMINATION

Behind the concept of termination for breach[1] there lies a very simple notion which can be summed up in three propositions: (1) I have made a deal with you; (2) you have failed to keep your side of the bargain; (3) I should therefore no longer be obliged to keep mine either. Whether or not this applies in any given case depends on the question identified by Tettenborn: to what extent are one person's obligations under a contract dependent on what the other party does—or indeed fails to do?[2] **1.01**

[1] It has recently been argued that termination is best seen not as a response to breach as such but as an aspect of the law of unjust enrichment: C Langley and R Loveridge, 'Termination as a Response to Unjust Enrichment' [2012] LMCLQ 65. If this is right, this entire book is based on a misconception. The authors argue that their preferred analysis would better deal with a number of situations where the orthodox analysis causes difficulties, most notably termination for excused non-performance (para 1.28), concurrent rights of termination at common law and under the contract (Ch 8, paras 8.18–8.28), and the recovery of loss of bargain damages (Ch 10, paras 10.07–10.17). Whilst these issues certainly pose problems of analysis, abandoning the entire notion of termination for breach does seem a rather drastic solution to those problems; in any event, it is surely now too well engrained into the collective legal consciousness to be displaced by anything less than a complete statutory reformulation.

[2] AM Tettenborn, *An Introduction to the Law of Obligations* (Butterworths, 1984) p 141.

Simple though the basic notion may be, the law to which it gives rise has always been particularly difficult; as long ago as 1837 it was said that few questions were of so frequent occurrence or of so much practical importance, yet so difficult to solve, as those relating to discharge for breach.[3] As McKendrick points out, this is a topic that is complex in both a factual and a legal sense.[4] It is factually complex because it is often difficult to determine whether a breach of contract has occurred, and if so by whom.[5] It is legally complex because the rules are by no means clear, and the consequences of getting them wrong can be catastrophic.[6] In this opening chapter we shall clear the ground by defining the scope of our inquiry before going on to consider some of the problems of analysis to which it gives rise.

A. Defining the Question

1.02 The key question here is the one posed by Diplock LJ (as he then was) in *The Hongkong Fir*:[7] 'Every synallagmatic contract contains in it the seeds of the problem: in what event will a party be relieved of his undertaking to do that which he has agreed to do but has not done?' When the event relied on in this context is a breach by the other party, we have a case of termination for breach of contract, or as Carter says, 'exercise of a right to terminate the performance of the contract for breach or repudiation of obligation by the promisor'.[8] Though Diplock LJ refers to synallagmatic[9] or bilateral contracts in this connection, the same question can arise in relation to unilateral contracts where the promisor argues that the condition to which his or her promise is subject has not been fulfilled;[10] indeed, the rules governing these cases mirror very closely those governing termination for breach in bilateral contracts, and they derive from the same historical root.[11] While Diplock

[3] *Smith's Leading Cases* (A Maxwell, 1837) Vol 2, 1, quoted in F Dawson and DW McLauchlan, *The Contractual Remedies Act 1979* (Sweet & Maxwell, 1981) pp 2–3.

[4] E McKendrick, *Contract Law, Text, Cases and Materials* (5th edn, OUP, 2012) p 936.

[5] McKendrick, p 936 (n 4). Thus, for instance, a party who terminates performance in good faith after a breach by the other party may be found to have wrongfully repudiated the contract if the termination is found to have been unwarranted, as in *Federal Commerce and Navigation Co Ltd v Molena Alpha Ltd (The Nanfri)* [1979] AC 757 (HL): see Ch 7, para 7.35.

[6] McKendrick, p 936 (n 4).

[7] *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd (The Hongkong Fir)* [1962] 2 QB 26 (CA) 65.

[8] JW Carter, *Carter's Breach of Contract* (Hart, 2012) para 3-39.

[9] A synallagmatic contract has been defined as a 'reciprocal contract. . . characterised by mutual duties and rights': LB Curzon, *Dictionary of Law* (6th edn, Longman, 2002). In *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd* [1968] 1 WLR 74 (CA) 82 Diplock LJ admitted that the use of this term had left him open to the charge of 'gratuitous philological exhibitionism', but said that he preferred the term to 'bilateral' on the ground that there might be more than two parties to the contract.

[10] As in *United Dominions Trust v Eagle Aircraft Services* (n 9) itself: see para 1.29.

[11] See Ch 2, paras 2.06–2.12.

LJ is broadly correct in declaring that such a contract 'contains in it' the seeds of the problem we are considering, this does not mean that the problem is purely one of contractual construction;[12] on the contrary, as the *Hongkong Fir* case itself demonstrates, the answer to the question may very well depend on the effect of the breach in the given case.[13] While questions of termination for breach do indeed involve the question whether the promisor is relieved of his or her 'undertaking to do that which he [or she] has agreed to do but has not yet done', the two questions are not the same. For one thing, a party to a contract may claim to be relieved from such an undertaking by a wide range of factors, including not only breach but also frustration, failure of condition, misrepresentation, undue influence, and even mistake; while some of these are closely related to termination for breach, others raise very different issues.[14] As well as this, termination for breach may involve not only the discharge of contractual undertakings but a variety of other consequences too.[15]

1.03 The classic account of termination is that given in *Moschi v Lep Air Services* by Lord Diplock.[16] Though he speaks in this context of 'rescission' rather than 'termination',[17] his words are still worth quoting at length in this context:

> It is no doubt convenient to speak of a contract as being terminated or coming to an end when a party who is not in default exercises his right to treat it as rescinded. But the law is concerned with the effect of that election upon those obligations of the parties of which the contract was the source, and this depends on the nature of the particular obligation and upon which party promised to perform it.
>
> Generally speaking, the rescission of the contract puts an end to the primary obligations of the party not in default to perform any of his contractual promises which he has not already performed by the time of the rescission. It deprives him of the right as against the other party to continue to perform them. It does not give rise to any secondary obligation in substitution for a primary obligation which has come to an end. The primary obligations of the party in default to perform any of the promises made by him and remaining unperformed likewise come to an end as does his right to continue to perform them. But for his primary obligations there is substituted by operation of law a secondary obligation to pay to the other party a sum of money to compensate him for the loss he has sustained as a result of the failure to perform the primary obligations.

[12] Such a view was broadly accepted in the first part of the 20th century, but was rejected by the Court of Appeal in the *Hongkong Fir* case: see Lord Devlin, 'The Treatment of Breach of Contract' [1966] CLJ 192. However, it has still been argued by Reynolds and others that the question ultimately depends on the intention of the parties: see for instance FMB Reynolds, 'Discharge of Contract by Breach' (1981) 97 LQR 541; SA Smith, *Contract Theory* (OUP, 2004) chs 8 and 9.

[13] See Ch 6, para 6.06.

[14] See Ch 4, paras 4.06–4.12.

[15] Thus, as Treitel says, the injured party may not only refuse to perform his or her own promise, but may also refuse to accept performance by the other party, and may even seek to 'undo' the transaction by returning the defective performance and claiming back the consideration provided for it: GH Treitel, 'Some Problems of Breach of Contract' (1967) 30 MLR 139, 140–1; E Peel, *Treitel: The Law of Contract* (13th edn, Sweet & Maxwell, 2011) para 18-001. The consequences of termination are discussed in Part IV of this work.

[16] [1973] AC 331 (HL) 350.

[17] See further Ch 4, para 4.07.

1.04 From this, we can see that the process of termination for breach generally involves certain elements. There is a breach by the party in default. There is an election by the other party to terminate in response to this. The consequences of this termination differ as between the injured party and the party in default. The consequence for the injured party is that he or she no longer has to perform any outstanding primary obligations under the contract; indeed, the innocent party loses the right to do so. The consequence for the party in default is the same, except that in this case there arises a secondary obligation to pay compensation to the injured party. All of these aspects of termination will be considered more fully in the course of the book.

B. Termination as a Process and a Remedy

1.05 Termination for breach can be seen both as a process and as a remedy. Traditionally the topic has been dealt with under the broader umbrella of 'discharge', alongside such topics as performance, frustration, and agreement.[18] This has the advantage of a certain conceptual symmetry, whereby the topics relating to the formation of a contract (offer and acceptance, consideration, intention to create legal relations, and so on) at the beginning of the book are mirrored by those relating to its discharge (agreement, performance, breach, and frustration) towards the end. Problems arise, however, when the notion of discharge is pressed too far; in particular, the idea of the contract 'coming to an end' can be a misleading one, and has given rise to various errors and misconceptions.[19] For this and other reasons more emphasis is now given to termination in the context of remedies.[20] Indeed, it has been stressed that termination (or in laymen's terms, 'cancelling the contract') can be one of the most useful weapons in the armoury for the victim of a breach of contract, not least because, unlike many other remedies, it does not require recourse to the courts.[21]

[18] This can be seen most clearly in the older editions of *Cheshire, Fifoot and Furmston's Law of Contract*, in which Part VII ('Discharge of Contract') had four chapters, one on each topic. The more recent editions are not split up into different parts, and performance and breach are now amalgamated into a single chapter. A similar scheme is followed in J Beatson, AS Burrows, and J Cartwright, *Anson's Law of Contract* (29th edn, OUP, 2010), where Part 4 ('Performance and Discharge') contains one chapter on performance and four on discharge (agreement, frustration, breach and operation of law). Older editions of Treitel, *The Law of Contract* (see n 15 for recent edition) deal with the matter under three headings, 'Performance', 'Breach' and 'Frustration'; in the most recent edition these have become 'Performance and Breach', 'Discharge by Breach' and 'Frustration'. All of these books deal with remedies at a later stage under one or more separate headings. In the same way, *Chitty* has a section devoted to discharge followed by a section devoted to remedies; see AS Burrows et al (eds), *Chitty on Contracts* (31st edn, Sweet & Maxwell, 2012).

[19] See para 1.36.

[20] The first person to do this seems to have been Hugh Beale in *Remedies for Breach of Contract* (Law Book Co, 1980), and this has been followed through in successive editions of Beale, Bishop, and Furmston (n 21) and also in McKendrick (n 4). See also FMB Reynolds, 'Discharge by Breach as a Remedy' in PD Finn (ed), *Essays on Contract* (Law Book Co, 1987) p 183.

[21] HG Beale, WD Bishop, and MP Furmston, *Contract: Cases and Materials* (5th edn OUP, 2007) p 549; JW Carter and MJ Tilbury, 'Remedial Choice and Contract Drafting' (1998) 13 JCL 5, 9.

However, this notion of termination as a remedy should not obscure the close relationship between termination and the other modes of discharge, most notably frustration. It is therefore essential to keep both aspects of the topic in view.

C. Problems of Terminology

One of the biggest problems in this area of the law is, as Lord Wilberforce has pointed out, the lack of any agreed or consistent terminology.[22] This relates not only to the process of termination itself, but also to some of the concepts surrounding it. **1.06**

(1) The name of the process

The process which we are considering has been described in a wide variety of ways: for instance, the injured party may be said to repudiate the contract,[23] or treat the contract as repudiated[24] or discharged;[25] alternatively the contract may be discharged,[26] rescinded,[27] cancelled,[28] or terminated.[29] However some of these **1.07**

[22] See para 1.38 Treitel, 'Some Problems of Breach of Contract' p 139 (n 15). This problem goes back to the century before last: see WR Anson, 'Some Notes on Terminology in Contract' (1891) 7 LQR 337, who complains that 'a fig will as well produce thistles as a puzzled brain will produce a lucid explanation' (p 337); see also JL Montrose, 'Conditions, Warranties and other Contractual Terms' (1937) 15 Can BR 309.

[23] *Behn v Burness* (1863) 3 B & S 751 (Exchequer Chamber) 755, 122 ER 281, 283 (Williams J); *J & E Kish v Charles Taylor & Sons & Co* [1912] AC 604 (HL) 617 (Lord Atkinson); *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd (The Hongkong Fir)* [1962] 2 QB 26 (QBD: Commercial Ct) 38 (Salmon J).

[24] Sale of Goods Act 1979, s 11(2), (3), and (4); *Wallis, Son and Wells v Pratt and Haynes* [1910] 2 KB 1003 (CA) 1012 (Fletcher Moulton LJ (dissenting)). The appeal was allowed, and the sentiments of Fletcher Moulton LJ were approved, by the House of Lords at [1911] AC 394 (HL). For more recent examples of this terminology see *Hallam v Avery* [2000] 1 WLR 966 (CA) 969 (Judge LJ); *Meikle v Nottinghamshire County Council* [2004] EWCA Civ 859; [2005] ICR 1, para 34 (Keene LJ); *Azimut-Benetti SpA v Healey* [2010] EWHC 2234 (Comm); [2011] 1 Lloyd's Rep 473, para 32 (Blair J).

[25] *Kingscroft Insurance Co Ltd v Nissan Fire & Marine Insurance Co Ltd (No 2)* [1999] CLC 1875 (QBD: Commercial Ct) 1915 (Moore-Bick J); *TTM v Hackney LBC* [2011] EWCA Civ 4; [2011] HRLR 14 para 87 (Toulson LJ); *Masri v Consolidated Contractors International Co SAL* [2007] EWCA Civ 688; [2007] 2 CLC 49 (CA) para 33 (Lloyd LJ).

[26] *Humphreys v Chancellor, Master and Scholars of the University of Oxford and anor* [2000] ICR 405 (CA) 423 (Moore-Bick J); *ST Microelectronics NV v Condor Insurance Ltd* [2006] EWHC 977 (Comm); [2006] 2 Lloyd's Rep 525, para 61 (Christopher Clarke J); *ENE 1 Kos Ltd v Petroleo Brasileiro SA (The Kos)* [2010] EWCA Civ 772; [2010] 2 CLC 19, para 18 (Longmore LJ).

[27] *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 WLR 574 (HL) 598 (Lord Lloyd of Berwick); *Hanson v South West Electricity Board* [2001] EWCA Civ 1377; [2002] 1 P & CR 35; *Eminence Property Developments Ltd v Heaney* [2010] EWCA Civ 1168; [2010] 3 EGLR 165, para 23 (Etherton LJ).

[28] This is the terminology used throughout the New Zealand Contractual Remedies Act 1979; Dawson and McLauchlan, *The Contractual Remedies Act*, chs 5 and 6 (n 3).

[29] *ERG Raffinerie Mediterranee SpA v Chevron USA Inc (t/a Chevron Texaco Global Trading)* [2007] EWCA Civ 494; [2007] 1 CLC 807, 810 (Longmore LJ); *Dadourian Group International v Simms* [2009] EWCA Civ 169; [2009] 1 Lloyd's Rep 601, para 9 (Arden LJ); *Parkwood Leisure Ltd v Alemo-Herron* [2011] UKSC 26; [2011] IRLR 696, para 12 (Lord Hope).

labels are more helpful than others. In particular, the notion of repudiation is also used in a more precise way to indicate a wrongful refusal to perform, or at the very least a total inability to perform,[30] and is now therefore best not used to describe a situation where the refusal to perform is justified, or where there is no question of refusal or inability at all. In the same way, rescission is now best used to describe the situation where a contract is avoided *ab initio*,[31] in contrast to that where the defaulting party still remains under what is termed a 'secondary obligation' to pay damages for the breach.[32] 'Discharge' is a useful term, but this is better used in a broader sense to cover cases of agreement and frustration as well as those of breach.[33] For this reason the present work will follow Cheshire, Fifoot, and Furmston and others in calling the process 'termination',[34] though of course it is not the contract itself that is terminated, but rather the obligation of the injured party to perform his or her obligations under that contract.[35]

(2) Performance and breach

1.08 One problem with the topic of termination for breach is that it is not necessarily discussed under a separate heading in the textbooks.[36] Rather, much of the material tends to be found under the broad headings of 'performance' and 'breach',[37] or alternatively 'discharge by performance' and 'discharge by breach'.[38] On the face of it this should cause no difficulty; a contract is performed when the promisor does what has been agreed, and breached when he or she fails to do so without lawful excuse. Unfortunately the classification adopted by the textbooks sometimes obscures this. In particular, much of the law relating to the topic presently under discussion has sometimes been set out not, as one would expect, under the heading of 'breach', but under the heading of 'performance'.[39] Of course, as Cheshire,

[30] *Universal Cargo Carriers Corp v Citati* [1957] 2 QB 401 (QBD: Commercial Ct) 426 (Devlin J); see Ch 7, para 7.32.

[31] *Johnson v Agnew* [1980] AC 367 (HL) 392–3 (Lord Wilberforce); *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 (HL) 844 (Lord Wilberforce); see Ch 4, para 4.07.

[32] *Moschi v Lep Air Services* [1973] AC 332 (HL) 350 (Lord Diplock); see para 1.03.

[33] As in MP Furmston, CHS Fifoot, and AWB Simpson, *Cheshire, Fifoot, and Furmston's Law of Contract* (16th edn, OUP, 2012) chs 18–20; Beatson, Burrows, and Cartwright, *Anson's Law of Contract*, chs 13–16 (n 18).

[34] Furmston, Fifoot, and Simpson, *Cheshire, Fifoot, and Furmston's Law of Contract*, ch 18 (n 33); Carter, *Carter's Breach of Contract*, para 3-39 (n 8).

[35] *Heyman v Darwins* [1942] AC 356 (HL) 373 (Lord Macmillan); *Moschi v Lep Air Services*, 350 (n 32).

[36] FMB Reynolds, 'Warranty, Condition and Fundamental Term' (1963) 79 LQR 534, 550–1; Treitel, 'Some Problems of Breach of Contract', p 139 (n 15).

[37] As in Furmston, Fifoot, and Simpson, *Cheshire, Fifoot and Furmston's Law of Contract* (n 33) and the older editions of Treitel (*The Law of Contract* (n 15)).

[38] As in older editions of *Cheshire, Fifoot and Furmston's Law of Contract* (n 33). Beatson, Burrows, and Cartwright, *Anson's Law of Contract* (n 18) and the more recent editions of Treitel (*The Law of Contract* (n 15)) use a mixture of the two approaches.

[39] This was particularly marked in previous editions of Treitel (*The Law of Contract* (n 15)).

Fifoot, and Furmston point out, performance and breach are in many ways two sides of the same coin, and cannot easily be separated out.[40] Nevertheless, for the purposes of this book, the term 'performance' will be reserved for the situation where the party in question carries out the relevant obligation. 'Discharge by performance' will be used to denote the situation where a party is discharged from the relevant obligation by performing it, as opposed to that where the discharge comes about as a result of a failure in performance by the other party. In the same way, the term 'breach' will be used to denote a failure without lawful excuse to perform an obligation under the contract, and 'discharge by breach' will indicate the situation where the other party is discharged from one or more of his or her own obligations as a result of such failure.

(3) Conditions, warranties, and innominate terms

1.09 One key factor in determining whether a party has a right to terminate for breach is whether the term broken is a 'condition' or a 'warranty'.[41] This classification goes back to section 11(1)(b) of the Sale of Goods Act 1893, where a condition is described as a term 'the breach of which may give rise to a right to treat the contract as repudiated' and a warranty as a term 'the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated'. Though this relates to the sale of goods, the same is true of contracts generally; breach of condition gives rise to the right to terminate, but not breach of warranty.[42] However, neither of these terms is free from ambiguity. The word 'condition' is used in many different ways in the law of contract,[43] and in the present context it can be used to mean not only an important term of the contract but also some agreed contingency that must occur before a particular obligation becomes due for performance.[44] In the same way, the word 'warranty' has been used to denote not only a minor term of the contract, but also: (1) a term of the contract

[40] Furmston, Fifoot, and Simpson, *Cheshire, Fifoot, and Furmston's Law of Contract*, p 665 (n 33).

[41] See Ch 2, paras 2.06–2.12.

[42] *Wallis, Son and Wells v Pratt and Haynes* [1910] 2 KB 1003 (CA) 1012 (Fletcher Moulton LJ (dissenting)). The appeal was allowed, and the sentiments of Fletcher Moulton LJ were approved, by the House of Lords at [1911] AC 394 (HL).

[43] A 'chameleon-like word that takes on its meaning from its surroundings': *Skips A/S Nordheim and ors v Syrian Petroleum Co Ltd and anor (The Varenna)* [1984] QB 599 (CA) 618 (Donaldson MR); SJ Stoljar, 'The Contractual Concept of Condition' (1953) 69 LQR 485.

[44] Or, in the words of Burchell, 'an external fact on which the existence of the obligation depends': EM Burchell, '"Condition" and "Warranty"' (1954) 71 SALJ 333. This confusion between a condition as a contingency and a condition as a promise is perhaps one of the least satisfactory aspects of the present law, and has been repeatedly discussed in the literature: see for instance Montrose, 'Conditions, Warranties and other Contractual Terms' (n 22); Stoljar, 'The Contractual Concept of Condition' (n 43); A Beck, 'The Doctrine of Substantial Performance: Conditions and Conditions Precedent' (1975) 38 MLR 413; GH Treitel, '"Conditions" and "Conditions Precedent"' (1990) 106 LQR 185; JW Carter, 'Conditions and Conditions Precedent' (1990–91) 4 JCL 90. The use of the word to denote a contingency is particularly associated with the old cases prior to the Sale of Goods Act 1893, and is still significant in relation to unilateral contracts and options: see paras 1.29–1.30.

as opposed to a 'mere representation';[45] (2) a guarantee of goods or services;[46] (3) a fundamental term in an insurance contract;[47] and even (4) a fundamental term generally.[48] In the present work, unless the contrary is stated, the words 'condition' and 'warranty' will be used as in the Sale of Goods Act, and the phrase 'condition precedent' used for an agreed contingency of the type described previously.[49]

1.10 The courts have also recognized a third class of term in this connection. In the *Hongkong Fir* case[50] it was said by Diplock LJ that not all contractual terms could be classified as 'conditions' or 'warranties', and that there were some terms of which the breach might or might not give rise to a right to terminate, depending on the gravity of the consequences.[51] This type of term has been classed as an 'innominate' or 'intermediate' term.[52] On this analysis there are three classes of term: (1) conditions (where a breach *always* gives rise to a right to terminate); (2) warranties (where a breach *never* (or at any rate, hardly ever)[53] gives rise to a right to terminate); and (3) innominate or intermediate terms (where a breach *sometimes* gives rise to a right to terminate). Given that the right to terminate for serious breaches can arise quite independently of the construction of the contract,[54] it can be argued that this three-fold analysis is over-subtle, and that it would be better simply to speak of: (1) conditions (where breach always gives rise to a right to terminate); and (2) warranties (where this can only be done if the consequences of the breach are sufficiently serious).[55] However, given the widespread acceptance by the courts of the concept of the innominate term,[56] it is probably too late to dispense with it now.[57]

[45] *Hopkins v Tanqueray* (1854) 15 CB 130 (Common Pleas) 142, 139 ER 369, 374 (Crowder J); *Oscar Chess Ltd v Williams* [1957] 1 WLR 370 (CA) 377 (Hodson LJ); *Dick Bentley Productions Ltd and anor v Harold Smith (Motors) Ltd* [1965] 1 WLR 623 (CA) 627 (Lord Denning MR).

[46] *Bernstein v Pamson's Motors (Golders Green) Ltd* [1987] RTR 384 (QBD) 393 (Rougier J); *Dandara Holdings Ltd v Co-operative Retail Services Ltd* [2004] EWHC 1476 (Ch); [2004] 2 EGLR 163, para 70 (Lloyd J); *National House Building Council v Revenue and Customs Commissioners* [2010] UKFTT 226 (TC); [2010] STI 2655, para 62 (Sir Stephen Oliver QC).

[47] Marine Insurance Act 1906, s 33(3); *De Maurier (Jewels) Ltd v Bastion Insurance Co* [1967] 2 Lloyd's Rep 550 (QBD: Commercial Ct) 560 (Donaldson J); *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)* [1992] 1 AC 233 (HL) 262 (Lord Goff); *Global Process Systems Inc v Syarikat Takaful Malaysia Bhd (The Cendor Mopu)* [2011] UKSC 5; [2011] 1 Lloyd's Rep 560, para 56 (Lord Mance).

[48] As in *Behn v Burness* (1863) 3 B & S 751 (Exchequer Chamber) 755 (Williams J).

[49] As in Peel, *Treitel*, para 17-015 (n 15); Carter, *Carter's Breach of Contract*, para 1-17 (n 8).

[50] *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd (The Hongkong Fir)* [1962] 2 QB 26 (CA).

[51] *The Hongkong Fir*, 70 (n 50).

[52] The two seem to be interchangeable: *Cehave NV v Bremer Handelsgesellschaft MBH (The Hansa Nord)* [1976] QB 44 (CA) 82 (Ormrod LJ); *Bunge Corp v Tradax Export SA* [1981] 1 WLR 711 (HL) 714 (Lord Wilberforce); *Dominion Corporate Trustees Ltd v Debenhams Properties Ltd* [2010] EWHC 1193 (Ch); [2010] 23 EG 106 (CS) para 22 (Kitchin J).

[53] See Ch 6, para 6.12.

[54] See Ch 6, para 6.06; see, however, Reynolds, 'Discharge of Contract by Breach' (n 12).

[55] See further Ch 6, para 6.13.

[56] JW Carter, 'Classification of Contractual Terms: the New Orthodoxy' [1981] CLJ 219; see further Ch 6, para 6.13, fn 42.

[57] Carter 'Classification of Contractual Terms' (n 56).

(4) Fundamental breach

1.11 According to *The Hongkong Fir*,[58] the right to terminate may be exercised not only for breaches of condition but for other serious breaches too. Such breaches are described in various ways; for instance 'fundamental' breaches,[59] 'frustrating' breaches,[60] 'repudiatory' breaches,[61] or breaches that go to 'the root of the contract'.[62] Unfortunately none of these terms is without difficulty. The concept of 'fundamental breach' has been used in the past in a totally different connection, that is to say a breach of such gravity as to bar the party responsible from relying on an exemption clause in the contract,[63] and though that doctrine has long since been discredited,[64] there is still debate as to whether breaches of condition are also necessarily 'fundamental' in the present context.[65] To talk of a 'frustrating' breach creates the risk of confusion with the modern doctrine of frustration;[66] and it may not be appropriate to describe all breaches of this sort as 'repudiatory'.[67] The notion of a breach going to the 'root of the contract' has a long and respectable pedigree,[68] and for this and other reasons has been preferred by some judges,[69] but it has been

[58] *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd (The Hongkong Fir)* [1962] 2 QB 26 (CA).

[59] *Antaios Compania Naviera SA v Salen Rederiena AB (The Antaios)* [1983] 1 WLR 1362 (CA) 1375 (Fox LJ); *Hurst v Bryk and ors* [1999] Ch 1 (CA) 9 (Peter Gibson LJ); *Great Peace Shipping Ltd v Tsavrilis Salvage International Ltd (The Great Peace)* [2002] EWCA Civ 1407; [2003] QB 679, para 82 (Lord Phillips).

[60] *The Hongkong Fir*, 35 (Salmon J) (n 58); *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 (HL) 436 (Lord Wilberforce); *Trade and Transport Inc v Iino Kaiun Kaisha (The Angelia)* [1973] 1 WLR 210 (QBD) 221 (Kerr J).

[61] *Miles v Wakefield Metropolitan District Council* [1987] AC 359 (HL) 562 (Lord Templeman); *Esanda Finance Corp Ltd v Plessnig* (1989) 63 ALJR 338 (HCA) 242 (Brennan J); *Esso Petroleum Co Ltd v Milton* [1997] CLC 634 (CA) 637 (Simon Brown LJ); *Associated British Ports v Ferryways* NV [2008] EWHC 1265 (Comm); [2008] 2 Lloyd's Rep 35, para 55 (Field J).

[62] *London Transport Executive v Clarke* [1981] ICR 355 (CA) 362 (Lord Denning MR); *Millers Wharf Partnership Ltd v Corinthian Column Ltd* (1991) 61 P & CR 461 (Ch D) 478 (Knox J); *ACG Acquisition XX LLC v Olympic Airlines SA* [2010] EWHC 923 (Comm); [2010] 1 CLC 581, para 35 (Hamblen J).

[63] *Karsales (Harrow) Ltd v Wallis* [1956] 1 WLR 936 (CA); *Charterhouse Credit Co v Tolly* [1963] 2 QB 683 (CA); *Harbutt's Plasticine Ltd v Wayne Tank & Pump Co Ltd* [1970] 1 QB 447 (CA).

[64] *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 (HL); *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 (HL).

[65] Reynolds, 'Warranty, Condition and Fundamental Term', pp 540–50 (n 36); JL Montrose, 'Some Problems about Fundamental Terms' [1964] CLJ 60; see Ch 5, para 5.06.

[66] Though the two concepts derive from a common root, they have now diverged to a considerable extent: see Ch 2.

[67] Thus repudiation suggests an unwillingness or inability to perform in the future, whereas an injured party may terminate purely on the basis of the consequences of the breach that have already occurred. For this and other reasons it is argued by Carter (*Carter's Breach of Contract*, paras 6-43–6-45 (n 8)) that the doctrine in *The Hongkong Fir* operates independently from that of repudiation.

[68] Furmston, Fifoot, and Simpson, *Cheshire, Fifoot, and Furmston's Law of Contract*, p 679 (n 33) describes it as 'the favourite of the judges for at least 150 years'.

[69] *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 WLR 361 (CA) 374 (Sachs LJ); Furmston, Fifoot, and Simpson, *Cheshire, Fifoot, and Furmston's Law of Contract*, p 679 (n 33).

described as a misleading metaphor,[70] besides which it is rather too unwieldy to be used as a technical term. Given that there is now no longer any risk of confusion with the law of exemption clauses, it is probably best to use the term 'fundamental breach' for a breach of this sort, whilst leaving open for the present the question whether it necessarily includes a breach of condition.[71]

(5) Repudiation and renunciation

1.12 The word 'repudiation' can be used in several different senses;[72] in particular, it can be used in a wide sense to describe any 'fundamental' breach of the sort mentioned earlier,[73] or in a narrower sense to mean a refusal by a party to perform his or her obligations under the contract.[74] In some cases the term is used to describe any such refusal, whether justified or unjustified,[75] but since the Sale of Goods Act 1893 it has generally carried the implication of a *wrongful* refusal to perform,[76] and this is the way in which it will be used in the present work. Though a repudiation in this sense will normally[77] amount to a fundamental breach, not every fundamental breach will be a repudiation, the distinction being that whereas the emphasis in fundamental breach is on what the defaulting party has done (or rather, not done) *in the past*, the emphasis in repudiation is on what he or she is likely to do (or rather, not do) *in the future*.[78] The essence of repudiation is that the party concerned demonstrates that he or she is not ready, willing, and able to perform.[79] Where the

[70] *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435 (HL) 459 (Lord Sumner); Furmston, Fifoot, and Simpson, *Cheshire, Fifoot, and Furmston's Law of Contract*, p 679 (n 33).

[71] See further Ch 5, para 5.06.

[72] *Heyman v Darwins Ltd* [1942] AC 356 (HL) 378 (Lord Wright); Carter, *Carter's Breach of Contract*, paras 7-03–7-04 (n 8).

[73] See para 1.11; Carter, *Carter's Breach of Contract*, para 7-04 (n 8); *UCB Leasing Ltd v Holtom (t/a David Holtom & Co)* [1987] RTR 362 (CA) 369 (Lloyd LJ); *Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce* [1997] CLC 1274 (CA) 1281 (Evans LJ); *Gisda Cyf v Barratt* [2010] UKSC 41; [2010] ICR 1475, para 24 (Lord Kerr of Tonaghmore).

[74] Carter, *Carter's Breach of Contract*, para 7-03 (n 8); Furmston, Fifoot, and Simpson, *Cheshire, Fifoot, and Furmston's Law of Contract*, p 673 (n 33); *Shearson Lehman Bros Inc v Maclaine, Watson & Co Ltd* (*Damages: Interim Payments*) [1987] 1 WLR 480 (CA) 488 (Lloyd LJ); *Ali Shipping Corp v Shipyard Trogir* [1998] CLC 566 (CA) 581 (Potter LJ); *Pittack v Naviede* [2010] EWHC 1509 (Ch); [2011] 1 WLR 1666, para 24 (Mark Herbert QC).

[75] *Behn v Burness* (1863) 3 B & S 751 (Exchequer Chamber) 755, 122 ER 281, 283 (Williams J); *Goodman v Winchester & Alton Rly plc* [1985] 1 WLR 141 (CA) 144 (Lawton LJ); *Lancaster v Bird* (2000) 2 TCLR 136 (CA) 141 (Chadwick LJ).

[76] Sale of Goods Act 1893, s 11(1)(b); Sale of Goods Act 1979, s 11(3); *Chancery Lane Developments Ltd v Wades Departmental Stores Ltd* (1987) 53 P & CR 306 (CA) 310 (Slade LJ); *Credit Suisse Asset Management Ltd v Armstrong and ors* [1996] ICR 882 (CA) 891 (Neill LJ); *Golden Ocean Group Ltd v Salgaocar Mining Industries Pvt Ltd* [2011] EWHC 56 (Comm); [2011] 1 CLC 125, 128 (Christopher Clarke J).

[77] Though a refusal to perform a condition of the contract may perhaps also amount to repudiation: see further Ch 10, paras 10.15–10.16.

[78] The distinction is not an easy one to draw, as in many cases the injured party will be relying on a combination of *both* the past effects of the breach *and* the effects that it is likely to have in the future; see Ch 6, para 6.31.

[79] Carter, *Carter's Breach of Contract*, para 7-03 (n 8).

repudiation consists of an express or implied refusal to perform by the party concerned, it is generally termed a 'renunciation',[80] and most cases of repudiation fall into this category;[81] but repudiation can also be demonstrated by showing that the party concerned, though not unwilling to perform, was in fact unable to do so,[82] and this will be termed 'factual inability'.[83]

D. Common Law and Equity

1.13 One of the more tricky problems in this area of the law is the different way in which common law and equity have approached the question. At first sight this might seem surprising; after all, the courts have had to administer both sets of principles since the Judicature Act of 1873, and one might have expected the relationship between the two to have been worked out by now. Nevertheless, the orthodox view is that whilst there has been a fusion of jurisdictions,[84] equity and common law still continue to exist as separate bodies of doctrine;[85] in the famous words of Walter Ashburner,[86] whilst the two streams now run in a common channel, the waters are not yet merged.[87] As far as termination for breach is concerned, there are three main areas where the principles of the common law and equity appear to diverge, and though efforts have been made to reconcile the two sets of rules, these have not been met with universal approval by equity lawyers.

(1) Time stipulations in equity

1.14 The most obvious area of tension, at least from an historical perspective, has been the different approach of common law and equity to time stipulations. According to the traditional approach, the courts of common law were more ready to allow termination for breach of a time stipulation than those of equity, or as it was said,

[80] Beatson, Burrows, and Cartwright, *Anson's Law of Contract*, pp 512–16 (n 18); Peel, *Treitel*, para 17-074 (n 15); *Universal Cargo Carriers v Citati* [1957] 2 QB 401 (QBD: Commercial Ct) 436 (Devlin J); *Hurst v Bryk and ors* [1999] Ch 1 (CA) 18 (Hobhouse LJ); *Alan Auld Associates Ltd v Rick Pollard Associates and anor* [2008] EWCA Civ 655; [2008] BLR 419, para 13 (Tuckey LJ).

[81] See Ch 7, para 7.31.

[82] Carter, *Carter's Breach of Contract*, para 9-01 (n 8); see Ch 7, para 7.32.

[83] See *Carter*, para 9-13 (n 8).

[84] J McGhee (ed), *Snell's Equity* (32nd edn, Sweet & Maxwell, 2010) para 1.016; JE Martin, *Hanbury and Martin: Modern Equity* (19th edn, Sweet & Maxwell, 2012) paras 1-020–1-023.

[85] McGhee, *Snell's Equity*, para 1.019 (n 84).

[86] D Browne, *Ashburner's Principles of Equity* (2nd edn, Butterworth, 1933) p 18; Martin, *Hanbury and Martin: Modern Equity*, para 1-020 (n 84).

[87] In *United Scientific Holdings v Burnley Borough Council* [1978] AC 904 (HL) 925 Lord Diplock declared that this metaphor was no longer helpful, but the extent to which a fusion of principles has taken place continues to be a matter of hot dispute among equity lawyers: see PV Baker, 'The Future of Equity' (1977) 93 LQR 529; RP Meagher, JD Heydon, and MJ Leeming, *Meagher, Gummow and Lehane's Equity, Doctrines & Remedies* (4th edn, Butterworths LexisNexis, 2002) paras 2-100–2-320; A Burrows, 'We do this at Common Law but that in Equity' (2002) 22 OJLS 1.

time was generally of the essence at common law, but not in equity. This is well expressed by Maitland in his famous lecture on specific performance:[88]

> As a general rule a man cannot sue upon a contract at law if he himself has broken that contract, though of course as you know there are many exceptions to this statement. Now in contracts for the sale of land it very frequently happens that a breach of the terms of the contract has been committed by the person who wishes to enforce it. Such a contract will be full of stipulations that certain acts are to be done within certain times… Well you know that equity held as a general rule that these stipulations as to time were not of the essence of the contract—that for example a purchaser might sue for specific performance although he had not in all respects kept the days assigned to him by the contract of sale for his various acts. This was the general rule—these stipulations as to time were not essential unless the parties declared them to be so.[89]

This passage is noteworthy for three reasons. The first is that it shows the close connection between the equitable rules as to time and the doctrine of specific performance. The common law approach is to ask whether the innocent party can *terminate*, the general rule being that this can only be done if the breach *is* a sufficiently serious one. Equity, on the other hand, looks at the problem as it were from the other end, by asking whether the defaulting party can *enforce the contract*, the general rule being that this can be done provided that the breach is *not* too serious. Secondly, in declaring that someone 'cannot sue upon a contract at law if he himself has broken that contract', it assumes that the common law regarded termination as the norm in cases of breach rather than as the exception.[90] Thirdly, it shows that the whole point of the equitable rule in this regard was to enforce contracts which could be validly terminated at law; indeed, for this reason the equitable grant of specific performance in these cases was often accompanied by what was called a 'common injunction' to prevent the injured party taking proceedings at law on that basis.[91]

1.15 The status of these rules following the Judicature Act of 1873 has long been a matter of controversy. Section 25(7) of the Act provided that stipulations in contracts, as to time or otherwise, which would not prior to the passing of the Act have been deemed to be or to have become of the essence, should henceforth receive in all courts the same construction and effect that they would have had in equity. However, according to the House of Lords in *Stickney v Keeble*,[92] this did not

[88] FW Maitland, *Equity: a Course of Lectures* (2nd edn, revised by John Brunyate, CUP, 1947) ch 12.

[89] Maitland, *Equity*, p 307 (n 88).

[90] Whether this was so even in contracts for the sale of land is a moot point: see *Lang v Gale* (1813) 1 M & S 111 (KB) 105 ER 42, *Stowell v Robinson* (1837) 3 Bing NC 928 (Common Pleas), 132 ER 668 and *Sansom v Rhodes* (1840) 6 Bing NC 261 (Common Pleas), 133 ER 103.

[91] As in *Hearne v Tenant* (1807) 13 Ves J 287 (High Ct of Chancery), 33 ER 301 (action for ejection); *Levy v Lindo* (1817) 3 Mer 84 (High Ct of Chancery), 36 ER 32 (action for return of deposit).

[92] [1915] AC 386.

change the substantive law; in particular, the defaulting party would not be given relief in any case where formerly a decree of specific performance would not have been granted.[93] The effect of this was to preserve the equitable jurisdiction in a kind of bubble, insulated from the rest of the law. However, in 1978 an attempt was made by Lord Simon, in *United Scientific Holdings v Burnley Borough Council*,[94] to reformulate the equitable doctrine in common law terms. In the words of Lord Simon:[95]

> The law may well come to inquire whether a contractual stipulation as to time is (a) so fundamental to the efficacy of the contract that any breach discharges the other party from his contractual obligations ('essence'), or (b) such that a serious breach discharges the other party, a less serious breach giving rise to damages (if any) (or interest), or (c) such that no breach does more than give a right to damages (if any) (or interest) ('non-essential'). If this sort of analysis falls to be made, I see no reason why any type of contract should, because of its nature, be excluded.
>
> To put it another way, to say that time is of the essence would be another way of saying that timely performance is a 'condition'. To say that it is not of the essence would mean that it is a 'warranty'. There is also the possibility that it is an 'intermediate' or 'innominate' term, though this possibility is not reflected in the equitable classification.

1.16 Attractive though this analysis may be at first sight, there are a number of problems with it. In particular, while it works reasonably well for cases where time is of the essence, it falls down in cases where it is not. One can agree that where time is of the essence, untimely performance will be a breach of condition, and specific performance will not be available to the party in default. However, to equate a non-essential time stipulation with one 'such that no breach does more than give a right to damages' does violence to the historical roots of the doctrine, which was grounded on the assumption that that the breach *did* give a greater right at common law, namely the right to terminate.[96] Furthermore, the whole point of the doctrine was that where time was not of the essence, a decree of specific performance would be granted.[97] But even though it may now be true to say that a party whose untimely performance amounts to a breach of warranty may obtain specific performance in *some* cases, such a remedy is by no means available in *all*.[98] All in all, though Lord Simon may be right in saying that it may *eventually* be possible to express the law in these terms, that time has probably not yet come.

[93] *Stickney v Keeble*, 417 (Lord Parker) (n 92).
[94] [1978] AC 904 (HL).
[95] *United Scientific Holdings v Burnley BC*, 945 (n 94).
[96] See para 1.14.
[97] See para 1.14.
[98] On the contrary, specific performance will only be available in a minority of cases: McGhee, *Snell's Equity*, ch 17 (n 84); Martin, *Hanbury and Martin: Modern Equity*, ch 24 (n 84); see further Ch 12, paras 12.35–12.61.

(2) The notice procedure

1.17 Equity also allows for time to be made of the essence by notice.[99] This can happen in two cases, one being where the other party is in breach of a non-essential time stipulation,[100] and the other being when time was originally of the essence but the right to timely performance has been waived.[101] The issue of such a notice is subject to a number of conditions which need not be discussed at this point,[102] but its effect is to set a deadline for performance by the defaulting party; if this is not forthcoming, the right to specific performance is lost and the other party may terminate.

1.18 As in the case where time is originally of the essence, attempts have been made to reformulate the equitable doctrine in common law terms. However, it is not possible here to make use of the notion of a condition, as the law does not allow a term to be reclassified as a condition if it was not one to begin with.[103] However, in *United Scientific Holdings Ltd v Burnley Borough Council*[104] Lord Simon got round this problem by making use of the notion of repudiation, saying:[105]

> The notice operates as evidence that the promisee considers that a reasonable time for performance has elapsed by the date of the notice and as evidence of the date by which the promisee now considers it reasonable for the contractual obligation to be performed. The promisor is put on notice of these matters. It is only in this sense that time is made of the essence of a contract in which it was previously non-essential. The promisee is really saying, 'Unless you perform by such-and-such a date, I shall treat your failure as a repudiation of the contract.'

1.19 Once again, this is an attractive approach, and has the particular advantage of covering both types of case in which the procedure operates (that is to say cases where time was not of the essence to start with, and cases where an essential time stipulation has been waived).[106] This is of particular significance given that the use

[99] McGhee, *Snell's Equity*, para 17-042 (n 84); JE Stannard, *Delay in the Performance of Contractual Obligations* (OUP, 2007) ch 8.

[100] *Taylor v Brown* (1839) 2 Beav 180 (Rolls Court) 183, 48 ER 1149, 1150 (Lord Langdale MR); *Green v Sevin* (1879) 13 Ch D 589 (High Ct); *Compton v Bagley* [1892] 1 Ch 313 (High Ct); *Re Barr's Contract* [1956] Ch 551 (High Ct); *Behzadi v Shaftesbury Hotels* (CA) [1992] Ch 1.

[101] As in *Charles Rickards Ltd v Oppenhaim* [1950] 1 KB 616 (CA).

[102] See Ch 7, paras 7.35–7.40; Stannard, *Delay in the Performance of Contractual Obligations*, paras 8.07–8.32 (n 99).

[103] *Green v Sevin* (1879) 13 Ch D 589, 599 (Fry J); *Raineri v Miles* [1981] AC 1050 (HL) 1085–6 (Lord Edmund-Davies); *Behzadi v Shaftesbury Hotels* [1992] Ch 1 (CA) 12 (Nourse LJ) and 24 (Purchas LJ); *Re Olympia & York Canary Wharf Ltd (No 2)* [1993] BCC 159 (Ch D: Companies Ct), 171–3 (Morritt J); *Morris v Robert Jones Investments Ltd* [1994] NZLR 275 (CA NZ) 280 (Hardie Boys J).

[104] *United Scientific Holdings Ltd v Burnley BC* [1978] AC 904 (HL).

[105] *United Scientific Holdings v Burnley BC*, 906 (n 104); see also *Taylor v Raglan Developments Pty Ltd* [1981] 2 NSWLR 117 (SC NSW Equity Division) 131 (Powell J); *Louinder v Leis* (1982) 149 CLR 509 (HCA) 526 (Mason J); *Laurinda Pty Ltd v Capalba Park Shopping Centre Pty Ltd* (1989) 166 CLR 623 (HCA) 644–5 (Brennan J); *Morris v Robert Jones Investments Ltd* [1994] 2 NZLR 275 (CA NZ) 281 (Hardie Boys J).

[106] See para 1.17.

of the notice procedure in the latter situation is clearly not confined to cases where a decree of specific performance may be granted.[107] However, once again the fit between the notice procedure and the doctrine of repudiation is not an exact one; in particular, whereas failure by a party in default to comply with a properly served notice allows the other party to terminate more or less as a matter of course,[108] such failure, as Lord Simon concedes, can at best be *evidence* of repudiation.[109] Once again, therefore, it is probably still too early to dispense with the distinction between the doctrines of common law and equity in the present context.

(3) Relief against forfeiture

1.20 Another knotty problem in this context is the extent to which the right to terminate for breach of contract can be restricted by the equitable jurisdiction for relief against forfeiture.[110] This jurisdiction has a long and venerable history,[111] the classic situation being where a lessor seeks to forfeit the lease for non-payment of rent and it can be shown either that the right of forfeiture was inserted purely by way of security, or that the lessee's breach was occasioned by fraud, accident, mistake, or surprise.[112] However, in 1973 the House of Lords put forward a wider principle, it being said that the courts had a general equitable jurisdiction to relieve against forfeiture for breach of covenant or condition where the primary object of the bargain was to secure a stated result which could effectively be attained when the matter came before the court, and when the forfeiture provision was added by way of security for the production of that result.[113]

1.21 The extent to which this affects the right to terminate for breach of contract in English law is a moot point.[114] There is no doubt that this can be done as a matter of principle; the only debate is as to when, and under what conditions. The question is discussed more fully in Chapter 4,[115] but the equitable jurisdiction in this context seems to be subject to three clear limitations. The first and most important is that it

[107] *Hartley v Hymans* [1920] 3 KB 475 (KBD) (sale of goods); *Charles Rickards Ltd v Oppenhaim* [1950] 1 KB 616 (CA) (work and labour). Whether the procedure is confined to such cases in the former situation is not entirely clear, but the better view is that it is available as a general remedy: see Stannard, *Delay in the Performance of Contractual Obligations*, ch 8 (n 99).

[108] See Ch 7, para 7.40.

[109] See para 1.18; *Eshun v Moorgate Mercantile Credit Co* [1971] 1 WLR 722 (CA) 726 (Lord Denning MR); *Morris v Robert Jones Investments Ltd* [1994] NZLR 275 (CA NZ) 281 (Hardie Boys J).

[110] McGhee, *Snell's Equity*, paras 13-015–13-018 (n 84).

[111] M Pawlowski, *The Forfeiture of Leases* (Sweet & Maxwell, 1993) chs 9 and 10.

[112] *Hill v Barclay* (1811) 18 Ves J 56, 34 ER 238; *Re Lord de Clifford's Estate* [1900] 2 Ch 707 (Ch D).

[113] *Shiloh Spinners v Harding* [1973] AC 691, 723 (Lord Wilberforce) and 726 (Lord Simon); cf the general jurisdiction given in this context by the New Zealand Contractual Remedies Act 1979, s 9: Dawson and McLauchlan, *The Contractual Remedies Act 1979*, pp 140–66 (n 3).

[114] Stannard, *Delay in the Performance of Contractual Obligations*, paras 11.51–11.66 (n 99).

[115] See Ch 4, paras 4.77–4.81.

only applies to contracts involving the transfer of proprietary or possessory rights;[116] thus, for instance, it will not apply to a time charterparty, which gives the charterer no interest in the vessel itself but is in essence no more than a contract for services.[117] Secondly, the courts will be very slow to use the jurisdiction in the commercial context, where contracts are drafted for the purpose of trade between parties acting at arm's length.[118] Thirdly, the forfeiture against which relief is sought must be more than that of the defaulting party's expectation of performance;[119] rather there must be something in the case to make it unconscionable for the innocent party to rely on his or her legal rights, such as an element of unjust enrichment.[120]

E. Discharge and Damages

1.22 There are also problems concerning the relationship between discharge and damages. One is the extent to which the two overlap. Obviously the right to damages can exist without there being any question of discharge; this will be the case where there has been a breach of contract, but the term broken is not a condition and there is no evidence of repudiation or fundamental breach. A party to a contract may also be discharged from the obligation to perform without having any right to damages. This is well illustrated by *Jackson v Union Marine Insurance Co Ltd*,[121] where a charterparty provided that the ship was to proceed with all possible dispatch (dangers and accidents of navigation excepted) from Liverpool to Newport, and there load a cargo of iron rails for San Francisco. Soon after leaving Liverpool the ship went aground and was severely damaged, by which time the charterer had thrown up the charter and chartered another ship. A claim was subsequently brought by the shipowner on a policy of insurance on the chartered freight, and in this context the question arose whether the charterer had been bound to load the ship. It was found as a fact that the delay caused by the accident was sufficient to put an end, in a commercial sense, to the commercial speculation entered upon by the parties to the contract, but the insurers sought to argue that the owner was

[116] *BICC plc v Burndy Corp* [1985] Ch 232 (CA) 252 (Dillon LJ); *Celestial Aviation Trading 71 Ltd v Paramount Airways Pte Ltd* [2010] EWHC 185 (Comm); [2011] 1 Lloyd's Rep 9; McGhee, *Snell's Equity*, para 13-015 (n 84).

[117] *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana (The Scaptrade)* [1983] AC 694 (HL) 702 (Lord Diplock). However, the jurisdiction is not confined to the transfer of interests in land: *Barton Thompson & Co Ltd v Stapling Machines Co* [1966] Ch 499; *BICC plc v Burndy Corp* [1985] Ch 232 (CA); *More Og Romsdal Fylkesbatar AS v Demise Charterers of the Ship 'Jotunheim'* [2004] EWHC 671 (Comm); [2005] 1 Lloyd's Rep 181.

[118] *The Scaptrade* [1983] 1 Lloyd's Rep 146 (CA) 153 (Robert Goff LJ), affd [1983] AC 694 (HL); *Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514 (JCPC–Hong Kong) 519 (Lord Hoffmann).

[119] *Union Eagle v Golden Achievement*, 520 (Lord Hoffmann) (n 118).

[120] As in *Re Dagenham (Thames) Dock Co, ex p Hulse* (1872–73) LR 8 Ch App 1022 (land built on by purchaser); *Starside Properties Ltd v Mustapha* [1974] 1 WLR 816 (CA) (forfeiture of instalments of purchase price).

[121] (1874–75) LR 10 CP 125 (Exchequer Chamber).

protected by the exception relating to perils of the seas. However, this was held not to affect the matter. The clause had the effect of excusing the shipowner, but gave him no right.[122] In the words of Bramwell B:[123]

> The exception is an excuse for him who is to do the act, and operates to save him from an action and make his non-performance not a breach of contract, but does not operate to take away the right the other party would have had, if the non-performance had been a breach of contract, to retire from the engagement: and if one party may, so may the other.

To put it another way, the fact that the charterer had no right to damages did not deprive him of the right to throw up the charter.[124]

1.23 This brings out an important point; though termination is an important remedy for breach of contract,[125] the discharge of contractual obligations is by no means confined to that situation.[126] On the contrary, there are at least three situations where discharge may take place in the absence of a breach. The first is where the contract is discharged by frustration, or by excused non-performance falling short of frustration.[127] Another is where the promisor in a unilateral contract argues that he or she is discharged from the obligation to perform by the failure of the event on which that obligation was conditioned.[128] A third case is where a party exercises a contractual right of termination predicated on events that may but need not necessarily include breaches by the other party.[129] All of this goes to show that the relationship between breach and discharge is much less close than that between breach and damages; while there can be no *damages* without breach in the contractual context, there can often be *discharge* without breach.

1.24 Another problem is that the quantum of damages recoverable may vary depending on the basis upon which termination took place. Where the termination has been occasioned by repudiation or fundamental breach, the law allows the injured party to recover damages not only for the particular breach but for loss of the expected benefit of the contract as a whole.[130] The same principle has been held to apply to breaches of condition, on the ground that these are deemed to amount

[122] *Jackson v Union Marine Insurance Co Ltd*, 144 (n 121).
[123] *Jackson v Union Marine Insurance Co Ltd*, 144 (n 121).
[124] The case is now generally treated as one of frustration, which means that the charterer had no choice; both parties were discharged automatically from their primary obligations; see further Ch 6, para 6.20.
[125] See para 1.03.
[126] This has led some to argue that termination is best not seen as a consequence of breach at all: see Langley and Loveridge, 'Termination as a Response to Unjust Enrichment' (n 1).
[127] See Ch 6, para 6.20.
[128] As in *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd* [1968] 1 WLR 74 (CA); see para 1.29.
[129] As in *Financings v Baldock* [1963] QB 104 (CA); *Shevill and anor v Builders' Licensing Board* (1982) 149 CLR 620 (HC Australia); see Ch 8.
[130] *Yeoman Credit Ltd v Waragowski* [1961] 1 WLR 1124 (CA); *Overstone Ltd v Shipway* [1962] 1 WLR 117 (CA).

to a repudiation of the contract.[131] But where the termination takes place under an express clause giving the right to do so, damages can only be recovered for the breach that has actually occurred.[132] The distinction between these different cases can be an exceedingly fine one, and can lead to seemingly arbitrary results.[133] For this reason it has been suggested that the law would be better if the two issues were separated; in particular, that the fact that termination is available should not necessarily carry with it a right to damages either at a particular level[134] or indeed at all.[135]

F. Withholding Performance and Termination

1.25 One of the most important aspects of the right to terminate is the right to refuse performance;[136] in the words of Lord Diplock, termination puts an end to the 'primary obligations' of the party not in default in so far as they have not already been performed at the time of the termination.[137] However, a party who is entitled to refuse performance is not necessarily entitled to terminate.[138] Thus an employer is normally entitled to withhold the payment of wages in certain circumstances,[139] but this does not mean that the contract is terminated; for this, the employee would have to be properly dismissed. Again, if a seller tenders goods that are not in conformity with the contract, the buyer may reject them, but this does not mean that the contract is terminated, as the seller may still have time to produce other goods that do meet that specification.[140] The buyer may only refuse a fresh tender of performance if it is made

[131] *Lombard North Central plc v Butterworth* [1987] QB 527 (CA); *Wallis, Son and Wells v Pratt and Haynes* [1910] 2 KB 1003 (CA), 1012 (Fletcher Moulton LJ).

[132] *Financings v Baldock* [1963] QB 104 (CA); *Shevill and anor v Builders' Licensing Board* (1982) 149 CLR 620 (HC Australia).

[133] See Ch 10, paras 10.07–10.17.

[134] JE Stannard, 'Delay, Damages and the Doctrine of Constructive Repudiation' (2013) 29 JCL 178.

[135] This is particularly a problem in the area of anticipatory breach: M Mustill, 'The Golden Victory–Some Reflections' (2008) 124 LQR 569, 572–3; see further Ch 7, para 7.33.

[136] Peel, *Treitel*, para 18-001 (n 15).

[137] *Moschi v Lep Air Services Ltd* [1973] AC 331 (HL) 350. In this context Lord Diplock speaks of 'rescission', but he is referring to the process which in the present work is called 'termination': see para 1.03.

[138] Beale, *Remedies for Breach of Contract*, p 91 (n 20).

[139] Thus an employee will normally have to work for a certain period before wages become due, and wages may also be withheld for non-performance in certain cases without the contract being terminated: see G Mead, 'Employer's Right to Withhold Wages' (1990) 106 LQR 192.

[140] *Borrowman, Phillips & Co v Free & Hollis* (1878) 4 QBD 500 (CA); *Agricultores Federados Argentinos Sociedad Co-operativa Lda v Ampro SA Commerciale, Industrielle et Financiere* [1965] 2 Lloyd's Rep 157 (QBD: Widgery J); *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep 391 (HL). This can cause problems where the seller seeks to repair and re-tender defective goods after they have been rejected by the buyer: see *J & H Ritchie v Lloyd Ltd* [2007] UKHL 9; KFK Low, 'Repair, Rejection and Rescission: an Uneasy Resolution' (2007) 123 LQR 536. See generally A Apps, 'The Right to Cure Defective Performance' [1994] LMCLQ 525; V Mak, 'The Seller's Right to Cure Defective Performance—a Reappraisal' [2007] LMCLQ 409.

too late,[141] or alternatively if the original tender was so bad as to amount to a repudiation of the contract.[142]

1.26 These principles are easy to state, but can be difficult to apply. The reason for this is that the right to withhold performance may often crystallize into a right to terminate once the time for the other party's performance has passed, or in other cases where it is clear that he or she will not be able to perform.[143] This is well illustrated by the famous case of *Cutter v Powell*,[144] where a seaman agreed to serve on board ship for a voyage from Jamaica to Liverpool. The contract provided that his wages were to be paid ten days after arrival, provided that he had performed all his duties on the voyage. The seaman having died during the course of the voyage, it was held that his widow could recover nothing. In this case what was originally merely a right to withhold performance (until ten days after the arrival of the ship at Liverpool) was effectively converted by the seaman's death into a right to terminate. This case also illustrates another reason for the difficulty, which is historical. Prior to the beginning of the nineteenth century, questions of discharge were often couched in terms of whether a party to a contract had performed all the necessary 'conditions precedent' required to earn the right to demand performance from the other side.[145] Thus in *Cutter v Powell* the key finding of the court was that performance of the complete voyage was intended as a condition precedent to the right to recover wages.[146] Nevertheless, it is important that the two rights in question are not confused. The right to withhold performance is essentially a temporary one,[147] and depends basically on the agreed order of performance; if the contract provides that A should not have to perform until B has performed, then party A is entitled to withhold performance until this has happened.[148] The right to terminate, on the other hand, assuming that it is not waived by the injured party,[149] is fixed and final in nature, and depends not only on the intention of the parties but also on the nature and consequences of the other party's breach.[150]

[141] As in *Kwei Tek Chao v British Traders and Shippers Ltd* [1954] 2 QB 459 (QBD: Devlin J).

[142] As in *Texaco Ltd v Eurogulf Shipping Co Ltd (The Texaco)* [1987] 2 Lloyd's Rep 541 (QBD: Commercial Ct); Beale, *Remedies for Breach of Contract* (n 20); Peel, *Treitel*, para 17-004 (n 15).

[143] See further Ch 4, para 4.08.

[144] *Cutter v Powell* (1795) 6 TR 320, 101 ER 573 (KB).

[145] See Ch 2, para 2.04. The use of the term 'condition' in this context is also a further source of ambiguity: see para 1.09.

[146] (1795) 6 TR 320, 325, 101 ER 573, 576 (Ashhurst J).

[147] Apps, 'The Right to Cure Defective Performance', p 528 (n 140).

[148] Beale, *Remedies for Breach of Contract*, p 20 (n 20). The same rule applies to unilateral contracts and options: see para 1.29.

[149] See Ch 4, paras 4.54–4.68.

[150] See Ch 6, para 6.06, though see Reynolds, 'Discharge of Contract by Breach' (n 12).

G. Termination, Frustration, and Excused Non-performance

1.27 The cases demonstrate a close relationship between the doctrines of termination for breach and discharge by frustration. In particular, the concepts of fundamental breach, repudiation, and frustration all stem from the same historical root,[151] and cases which give rise to any one of these doctrines can, with a slight alteration of the facts, fall under the purview of another. In *Jackson v Union Marine Insurance Co Ltd* the charterparty was frustrated because of delay caused by the grounding of the ship;[152] the fact that this came within the scope of the excepted perils clause made it a case of frustration, but if the clause had not applied it would have been a case of discharge by breach. Both doctrines involve the extinction of the primary obligations of the parties concerned, and it has been said that the degree of failure in performance needed to trigger the doctrine of frustration is the same as that needed to trigger the right to terminate for fundamental breach.[153] Nevertheless, the doctrines in question differ in a number of key respects.[154] One is that whereas termination for breach by its very nature requires a breach of some sort,[155] frustration operates only where neither party is in default.[156] Another is that whereas termination for breach operates only by way of election on the part of the injured party,[157] frustration is automatic.[158] Moreover, whereas termination for breach gives rise to a secondary obligation to pay damages for the party in default,[159] frustration gives rise to no such obligation; both parties are discharged entirely from their obligations under the contract.[160]

[151] See Ch 2; *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha (The Hongkong Fir)* [1962] 2 QB 26 (CA) 66–9 (Diplock LJ).

[152] (1874–75) LR 10 CP 125 (Exchequer Chamber); see para 1.22.

[153] *The Hongkong Fir*, 69 (Diplock LJ) (n 151); *Chilean Nitrate Sales Corp v Marine Transportation Co Ltd (The Hermosa)* [1982] 1 Lloyd's Rep 638 (QBD: Commercial Ct) 649 (Mustill J); *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2002] EWCA Civ 1407; [2003] QB 697, para 82 (Lord Phillips MR); see, however, GH Treitel, *Frustration and Force Majeure* (2nd edn, Sweet & Maxwell, 2004) para 5-060.

[154] Peel, *Treitel*, para 15-005 (n 15).

[155] See Ch 3.

[156] *Bank Line Ltd v Arthur Capel and Co* [1919] AC 435 (HL) 452 (Lord Sumner); *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] AC 524 (JCPC–Canada) 530 (Lord Wright); *Davis Contractors Ltd v Fareham UDC* [1956] AC 696 (HL) 729 (Lord Radcliffe); *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal (The Hannah Blumenthal)* [1983] AC 854 (HL) 909 (Lord Brandon); *J Lauritzen A/S v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep 1 (CA) 8 (Bingham LJ); Treitel, *Frustration and Force Majeure*, ch 14 (n 153).

[157] See Ch 4, para 4.13.

[158] *Hirji Mulji v Cheong Yue SS Co* [1926] AC 497 (JCPC–Hong Kong) 505 (Lord Sumner); *Denny, Mott & Dickson Ltd v James B Fraser & Co Ltd* [1944] AC 265 (HL(Sc)) 274 (Lord Wright); *The Super Servant Two*, 8 (Bingham LJ) (n 156); Treitel, *Frustration and Force Majeure*, para 15-002 (n 153).

[159] See para 1.03; see also Ch 10.

[160] *Taylor v Caldwell* (1863) 3 B & S 826, 840, 122 ER 309, 314 (Blackburn J); *Joseph Constantine SS Line v Imperial Smelting Corp* [1942] AC 154 (HL) 188 (Lord Wright); *The Super Servant Two*, 8 (Bingham LJ) (n 156); Treitel, *Frustration and Force Majeure*, para 15-010 (n 153).

1.28 Matters are further complicated by the existence of a third category of cases involving excused non-performance falling short of frustration.[161] Thus an employee will not be liable for breach of contract by failing to turn up for work while he or she is ill,[162] or prevented by some other factor for which he or she is not to blame.[163] The point is that though performance is excused,[164] the contract will not be frustrated unless the employee's absence is of such nature or duration as to render performance of the contract radically different from that which was contemplated by the parties.[165] Such cases are relatively uncontroversial, but a fourth class of case has been mooted in which excused non-performance by one party allows the other to terminate even in the absence of either breach or frustration.[166] The case cited in this connection is *Poussard v Spiers & Pond*,[167] in which the plaintiff was engaged for a period of three months to sing in the defendants' opera. Shortly before the opening night the plaintiff fell ill, and the defendants engaged a substitute. The defendants then refused to take the plaintiff back when she recovered, and it was held that they were entitled to do so; the effect of the plaintiff's absence was serious enough to justify them dispensing with her services. This case has been cited as one of frustration,[168] but it has been argued that the illness of the plaintiff was not serious enough to bring this doctrine into operation, and that the defendants could have insisted on retaining her services had they wished to do so.[169] There is not the space in the present context to look at this argument in any detail;[170] suffice it to say at present that there is no bright line between termination for breach and frustration, and that some of the cases are not easy to classify.

[161] Peel, *Treitel*, para 17-051 (n 15); Treitel, *Frustration and Force Majeure*, paras 5-057–5-058 (n 153).

[162] *Jackson v Union Marine Insurance Co Ltd* (1874–75) LR 10 CP 125 (Exchequer Chamber) 145; *Poussard v Spiers & Pond* (1876) 1 QBD 410 (DC) 414; Treitel, *Frustration and Force Majeure*, para 5-058 (n 153).

[163] *Sim v Rotherham Metropolitan BC* [1987] Ch 216 (Ch D: Scott J) 254 (teacher locked in lavatory).

[164] ie the performance of the employee, in so far as he or she is prevented from carrying out the duties in question: *Marshall v Alexander Sloan & Co Ltd* [1981] IRLR 264 (EAT); J Stanner, *Tolley's Employment Law* (Tolley, 1994) para S5025.

[165] *Morgan v Manser* [1948] 1 KB 184 (KBD: Streatfeild J); *Condor v Barron Knights Ltd* [1966] 1 WLR 87 (Bedford Assizes: Thompson J); *Marshall v Harland and Wolff Ltd* [1972] ICR 101 (NIRC); *FC Shepherd & Co Ltd v Jerrom* [1986] ICR 802 (CA).

[166] Treitel, *Frustration and Force Majeure*, para 5-060 (n 153).

[167] (1876) 1 QBD 410 (DC).

[168] *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435 (HL) 461 (Lord Sumner); *Robert H Dahl v Nelson Donkin* (1881) 6 App Cas 38 (HL) 52 (Lord Blackburn); *Tamplin SS Co Ltd v Anglo-Mexican Petroleum Co Ltd* [1916] 2 AC 397 (HL) 421 (Lord Atkinson); Treitel, *Frustration and Force Majeure*, para 5-060 (n 153).

[169] Treitel, *Frustration and Force Majeure*, para 5-060 (n 153).

[170] See further Ch 4, para 4.10.

H. The Problem of Options

1.29 By its very nature, the concept of termination for breach in the full sense can only apply to bilateral or 'synallagmatic' contracts, where the parties are subject to reciprocal obligations;[171] it cannot apply in relation to a unilateral contract or option where one party is not under any obligation at all. However, similar principles can apply, as is demonstrated by *Hare v Nicoll*,[172] where a contract for the sale of shares provided that the buyer could call on the seller to repurchase the shares provided that the price was paid before a particular day. The buyer sought to exercise the option, but failed to pay the price in time. It was held by the Court of Appeal that the option had not been validly exercised; options of this sort were in essence a privilege for the benefit of the party on whom they were conferred, and it was for that party to comply strictly with the conditions stipulated for the exercise of the option.[173] This is not a case of termination for breach, as the buyer had committed no breach; he was not obliged to call on the seller to repurchase at all, let alone within any particular time frame. The point was that if he wanted to do so, he had to do so on the terms agreed. In a bilateral contract, termination for breach can only occur if the breach is a sufficiently serious one, but in the case of a unilateral obligation or option there is no room for manoeuvre; either the conditions for the exercise of the option have been met, or they have not,[174] and if they have not, that is the end of the matter; a miss, as the saying is as good as a mile.

1.30 Efforts made by the courts to mitigate the harsh effects of this rule have led to some uncertainty in the law. Particular problems have been caused by rent review clauses; to what extent does the late service of 'trigger notices' deprive the landlord of the right to have the rent reviewed under a long lease?[175] The courts initially took the view that these notices were essentially options, and that they therefore could not be exercised at all unless the agreed time limits were strictly followed.[176] Needless to say, the effect of this at a time of rapid inflation was potentially catastrophic, and the courts had to modify their stance to some degree. In *United Scientific Holdings Ltd v Burnley Borough Council*[177] the House of Lords drew a distinction in this context between 'true options', which involved the creation of a new contract, and other

[171] See para 1.02.
[172] [1966] 2 QB 130 (CA).
[173] *Hare v Nicoll*, 141 (Willmer LJ) and 148 (Winn LJ) (n 172).
[174] *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd* [1968] 1 WLR 74 (CA) 84 (Diplock LJ); PS Atiyah (1968) 31 MLR 332.
[175] JE Stannard, *Delay in the Performance of Contractual Obligations*, paras 11.33–11.37 (n 99). Similar issues have been raised in relation to notification clauses in insurance contracts: see *Alfred McAlpine plc v BAI (Run-Off) Ltd* [2000] 1 Lloyd's Rep 437 (CA); *Friends Provident Life & Pensions Ltd v Sirius International Insurance* [2005] EWCA Civ 601, [2005] 2 Lloyd's Rep 517; J Lowry and P Rawlings, 'Innominate Terms in Insurance Contracts' [2006] LMCLQ 135.
[176] *Samuel Properties (Developments) Ltd v Hayek* [1972] 1 WLR 1064 (CA).
[177] [1978] AC 904 (HL).

provisions equivalent to options which merely led to the variation of obligations under an existing contract.[178] Provisions of the latter type, which may conveniently be termed 'quasi-options', are not subject to the strict rules for compliance governing true options, and in many ways are more akin to bilateral obligations of the usual sort; thus, for instance, both parties may take steps to have the provision invoked,[179] and a notice may even be served in some cases making time of the essence.[180] The relationship between quasi-options of this sort and true options is not at all clear, and as in the case of frustration and termination for breach no bright line can be drawn.

I. Liquidated Damages, Penalties, Options, and Deposits

1.31 One important consequence of termination is the right of the injured party to recover damages, not only for the actual breach in question, but for the loss of the entire bargain.[181] In many cases, however, the contract will contain an agreed damages clause, and the court may then be faced with the question whether the clause in question should be struck down as a 'penalty'.[182] The principles for deciding whether this is so are complex,[183] but generally speaking an agreed damages clause will be regarded as penal if it is designed not as a fair pre-estimate of the loss but as a measure to deter the other party for failing to perform the contract;[184] in particular, where the sum specified is out of all proportion to any possible loss sustained.[185]

1.32 The jurisdiction of the court to strike down penalties is relatively circumscribed; in particular, it only applies in relation to agreed *damages* clauses, that is to say sums payable in the event of a breach. A sum that is payable on the occurrence of some other event cannot be penal.[186] This leads to a strange paradox in relation to agreed sums payable on voluntary termination. Contracts of hire purchase and the like frequently contain provisions which allow the hirer to terminate on payment of an agreed sum. Even if this sum may be set at a level grossly in excess of any loss to the

[178] *United Scientific Holdings v Burnley BC*, 928–30 (Lord Diplock), 945–6 (Lord Simon), 951 (Lord Salmon), and 961–2 (Lord Fraser) (n 177).

[179] *Touche Ross & Co v Secretary of State for the Environment* (1983) 46 P & CR 187 (CA); *Metrolands Investments Ltd v JH Dewhurst Ltd* [1986] 3 All ER 659 (CA).

[180] *London and Manchester Assurance Co v Dunn* (1982) 265 EG 39 (CA); *Amherst v James Walker Goldsmith and Silversmith Ltd* [1983] Ch 305.

[181] See Ch 10, para 10.04.

[182] See Ch 10, para 10.18.

[183] *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co* [1915] AC 79 (HL).

[184] *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co*, 86 (Lord Dunedin) (n 183); *Lordsvale Finance plc v Bank of Zambia* [1996] QB 752 (QBD) 762 (Colman J); *Murray v Leisureplay plc* [2005] EWCA Civ 963; [2005] IRLR 946; McGhee, *Snell's Equity*, para 13-002 (n 84).

[185] *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co*, 87 (Lord Dunedin) (n 183); *Ringrow Pty Ltd v BP Australia Pty Ltd* (2005) 224 CLR 656 (HC Australia).

[186] *Associated Distributors v Hall* [1938] 2 KB 83 (CA); *Re Apex Supply Co Ltd* [1942] Ch 108 (Ch D); *Export Credit Guarantee Department v Universal Oil Products Co* [1983] 1 WLR 399 (HL).

other party, the doctrine of penalties cannot apply, as there is no breach involved;[187] the hirer is simply exercising an option of the sort considered previously.[188] This leads to the paradox that the law gives protection to one who breaks the contract, while denying it to one who keeps it.[189] This absurd state of affairs is now mitigated to some extent by statute,[190] but the limitation of the penalty doctrine to cases of breach still holds good.

1.33 Similar problems may arise when a party who terminates seeks to forfeit a deposit paid by the other, or to retain previous instalments of the purchase price.[191] In the past the equitable jurisdiction to relieve against forfeiture in such cases was thought to be confined to contracts for the sale of land,[192] but in *Workers Trust and Merchant Bank Ltd v Dojap Investments Ltd*[193] a broader principle was asserted by the Privy Council, Lord Wilberforce suggesting that any clause requiring one party either to pay or to forfeit a sum to the other in the event of breach could be treated as a penalty unless it could be justified as a genuine pre-estimate of the loss.[194] However, the jurisdiction of the court in relation to forfeiture is more restricted than its jurisdiction in relation to penalties; whereas the courts will refuse to enforce a penalty as a matter of principle, relief against forfeiture is not automatic, and will generally only be granted to a party who is ready and willing to perform his or her contractual obligations (for instance by paying any sums outstanding).[195] It has been said that there is no doctrinal or policy reason for this distinction,[196] which like so many in this area of the law can only be explained in the light of history.[197]

J. Damages and the Action for the Price

1.34 Where a breach of contract is serious enough to give rise to the right to terminate, the other party is left with a choice; he or she can either terminate or affirm.[198] A party who affirms may also sometimes have the option of completing performance and then bringing an action for the contract price. In *White and Carter (Councils) Ltd v*

[187] *Associated Distributors v Hall* (n 186).
[188] See para 1.29.
[189] *Bridge v Campbell Discount Co Ltd* [1962] AC 600 (HL) 629 (Lord Denning).
[190] Consumer Credit Act 1974, s 100.
[191] McGhee, *Snell's Equity*, para 13-015 (n 84).
[192] Law of Property Act 1925, s 49(2).
[193] [1993] AC 573 (JCPC–Jamaica); C Harpum, 'Deposits as Penalties' [1993] CLJ 389; H Beale, 'Unreasonable Deposits' (1993) 109 LQR 524; Carter (1993) 6 JCL 266.
[194] Beale, 'Unreasonable Deposits', p 578 (n 193); McGhee, *Snell's Equity*, para 13-014 (n 84).
[195] McGhee, *Snell's Equity*, para 13-001 (n 84).
[196] McGhee, *Snell's Equity*, para 13-001 (n 84).
[197] *Jobson v Johnson* [1989] 1 WLR 1026 (CA) 1042 (Nicholls LJ); C Harpum, 'Equitable Relief: Penalties and Forfeitures' [1989] CLJ 370; DR Harris, 'Penalties and Forfeiture: Contractual Remedies Specified by the Parties' [1990] LMCLQ 158.
[198] See Ch 4, para 4.13.

McGregor[199] a firm of advertisers contracted with the defendant to display advertisements for his business on litter bins in the Clydebank area. The defendant repudiated the contract very soon afterwards, but the claimants decided to ignore the repudiation and to carry on with performance regardless; having put the advertisements in place, they then brought a successful action for the contract price. At first sight this seems to go clean against the rule that the victim of a breach of contract is obliged to mitigate his or her loss, but this rule applies as such only to damages,[200] and there is a clear difference in law between such a claim and a claim for the contract price. Thus a claim for the price is a claim by the *promisor* for a *debt* owed on the basis of *performance* by the promisor; a claim for damages is a claim by the *promisee* for *compensation* on the basis of *non-performance* by the promisor.[201] This does not mean, of course, that the policy factors underlying the mitigation principle should not also restrict the availability of a claim for the contract price,[202] but the way in which these policy factors are addressed by the courts differs substantially as between the two kinds of claim,[203] and it is therefore important not to confuse the two.

K. Conditions and Contractual Rights of Termination

1.35 Commercial and consumer contracts often contain express rights of termination, and the question then arises as to how these relate to the right to terminate for breach at common law.[204] Broadly speaking, termination for breach of contract at common law can take place in two cases, the first being where the other party has broken a condition of the contract, and the second where there has been some other breach with very serious consequences.[205] It is the first of these that gives rise to most of the problems in this connection. Since deciding whether a particular term is a condition is primarily a matter of construction,[206] the distinction between

[199] [1962] AC 413 (HL (Sc)); MP Furmston, 'The Case of the Insistent Performer' (1962) 25 MLR 364; PM Nienaber, 'The Effect of an Anticipatory Repudiation: Principle and Policy' [1962] CLJ 213; Mr Justice Priestley, 'Conduct after Breach: the Position of the Party Not in Breach (1990–91) 3 JCL 218; JW Carter, A Phang, and S-Y Phang, 'Performance Following Repudiation: Legal and Economic Interests' (1999) 15 JCL 97; see further Ch 12, paras 12.12–12.34.

[200] K Scott, 'Contract—Repudiation—Performance by Innocent Party' [1962] CLJ 12.

[201] *Re Park Air Services plc* [2000] 2 AC 172 (HL), 187; Peel, *Treitel*, para 21-001 (n 15).

[202] Beatson, Burrows, and Cartwright, *Anson's Law of Contract*, 575 (n 18); Furmston, Fifoot, and Simpson, *Cheshire, Fifoot, and Furmston's Law of Contract*, p 783 (n 33); Peel, *Treitel*, para 21-013 (n 15).

[203] See further Ch 10, para 10.31.

[204] JW Carter and Y Goh, 'Concurrent and Independent Rights to Terminate for Breach of Contract' (2009) 26 JCL 133; See Ch 8.

[205] See Part III.

[206] *Glaholm v Hays* (1841) 2 M & G 257 (Common Pleas), 133 ER 743; *Behn v Burness* (1863) 3 B & S 751 (Exchequer Chamber), 122 ER 281; *Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 (HL); *Tradax Export SA v European Grain & Shipping Co* [1983] 2 Lloyd's Rep 100 (QBD: Commercial Ct); *George Hunt Cranes Ltd v Scottish Boiler and General Insurance Co Ltd* [2001] EWCA Civ 1964; [2003] 1 CLC 1.

termination for breach of condition and termination under a contractual right can be a very difficult one to draw.[207] Nevertheless, it is a distinction which can have serious implications when it comes to deciding what rights and remedies the injured party may have in addition to the basic right to terminate. In particular, a party who terminates for breach of condition may be in a much stronger position when it comes to damages than one who merely exercises a contractual right.[208] There are other problems associated with the distinction. For instance, to what extent can a party who wrongfully refuses to perform meet a claim for wrongful repudiation by arguing that he or she had made a bona fide mistake in interpreting the scope of a right to terminate that was expressly *given* by the contract, and that therefore his or her refusal to perform should not be construed as a refusal to be *bound* by that contract?[209] Again, to what extent can contractual rights of termination be taken to exclude a concurrent right of termination under the common law?[210] Given the importance of contractual rights of this sort in the commercial context, these questions are of crucial importance, but the law has still not fully worked out a satisfactory approach to the problem.[211]

L. Bringing the Contract to an End

1.36 References can frequently be found in reported cases to a contract being brought to an end by breach,[212] repudiation,[213] or even the election of the option to

[207] See Ch 8, paras 8.02–8.04.

[208] *Financings Ltd v Baldock* [1963] 2 QB 104 (CA); *Lombard North Central plc v Butterworth* [1987] 1 QB 527 (CA).

[209] *Sweet and Maxwell Ltd v Universal News Services Ltd* [1964] 2 QB 699 (CA); *Federal Commerce and Navigation Co Ltd v Molena Alpha Inc (The Nanfri)* [1979] AC 757 (HL); *Woodar Investment Development Ltd v Wimpey Construction (UK) Ltd* [1980] 1 WLR 277 (HL).

[210] *Stocznia Gdanska SA v Latvian Shipping Co (No 2)* [2002] EWCA Civ 889; [2002] 2 Lloyd's Rep 436; *Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2009] EWCA Civ 75; [2010] QB 27; *Shell Egypt West Manzala GmbH v Dana Gas Egypt Ltd* [2010] EWHC 465 (Comm).

[211] See further Ch 8, paras 8.18–8.28.

[212] *H Dakin & Co v Lee* [1916] 1 KB 566 (CA) 578 (Cozens Hardy MR); *Emerald Construction Ltd v Lowthian and ors* (CA) [1966] 1 WLR 691, 704 (Diplock LJ); *Harbutt's 'Plasticine' Ltd v Wayne Tank and Pump Co* [1970] 1 QB 447, 464 (Denning MR); *Rasool and ors v Hepworth Pipe Co Ltd* [1980] ICR 494 (EAT) 504 (Waterhouse J); *Briggs v Oates* [1990] ICR 473 (Ch D) 483 (Scott J); *Delta Sound PA Ltd v Federal Signal Ltd* 2001 WL 1347085 (QBD: Manchester District Registry) para 127 (Nelson J); *Cooper & ors v Pure Fishing (UK) Ltd* [2004] EWCA Civ 375; [2004] 2 CLC 412, para 15 (Tuckey LJ); *Hayes (t/a) Orchard Construction) v Gallant* [2008] EWHC 2726 (TCC) para 182 (Judge Toulmin QC).

[213] *Michael v Hart & Co* [1902] 1 KB 482 (CA) 490 (Collins MR); *Melachrino and anor v Nickoll and Knight* [1920] 1 KB 693 (KBD) 697 (Bailhache J); *Denmark Productions Ltd v Boscobel Productions Ltd* [1969] 1 QB 699 (CA) 721 (Salmon LJ); *Medway Packaging Ltd v Meurer Maschinen GmbH & Co KG* [1990] ILPr 234 (QBD) 238 (Hobhouse LJ); *SCI (Sales Curve Interactive) Ltd v Titus Sarl* [2001] EWCA Civ 591; [2001] 2 All ER (Comm) 416, para 36 (Rix LJ); *Prison Service v Beart (No 2)* [2005] EWCA Civ 467; [2005] ICR 1206, para 31 (Rix LJ); *Pioneer Freight Futures Co Ltd v TMT Asia Ltd* [2011] EWHC 1888 (Comm) para 25 (Gloster J).

terminate.[214] This is no doubt a useful metaphor as far as it goes, but problems have arisen when it is pushed too far. Thus, for instance, it has been suggested on this basis that arbitration clauses[215] and exemption clauses[216] no longer apply following termination; since the contract is totally at an end, none of its provisions can be relied on by either party. However, as has been affirmed on several occasions, this is a misunderstanding of how the process of termination works. What is terminated is not the contract as a whole, but merely the obligation of the parties to perform their primary obligations under it; other provisions, in so far as they are intended to regulate the obligations of the parties following termination, are unaffected.[217] The possibility of confusion would be less if the courts were to abandon the metaphor of the contract coming to an end, but given that it is to some extent implicit in the very notions of discharge and termination, such a hope must remain a vain one; indeed, despite being aware of the problems associated with its use, the courts seem to be as fond of the metaphor as ever they were.[218]

M. The Way Forward

1.37 When considering reform of the law relating to termination, one is reminded of the old Irishman who, when asked the way to a certain destination, replied: 'If I wanted to go there, I wouldn't start from here!' Many of the anomalies and fine distinctions that pervade this area of the law can only be explained on historical grounds,[219] but have now become so ingrained into the jurisprudence of the courts that it would be impossible to get rid of them without abolishing the existing law in its entirety and starting again from scratch. Not that this is necessarily impossible; the Indian Contract Act of 1872 still forms the basis of Indian contract law to

[214] *Addis v Gramophone Co* [1909] AC 488 (HL) 501 (Lord Gorell); *Stickney v Keeble* [1915] AC 386 (HL) 415 (Lord Parker); *Martin v Stout* [1925] AC 359 (JCPC–Egypt) 364 (Lord Atkinson); *Littlejohn v LCC* [1938] 1 KB 78 (CA) 95 (Scott LJ); *Beard v Porter* [1948] 1 KB 321 (CA) 325 (Evershed LJ); *Jennings' Trustee v King* [1952] Ch 899 (Ch D) 904 (Harman J); *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH (The Mihalis Angelos)* [1971] 1 QB 164 (CA) 198 (Edmund Davies LJ); *Millichamp v Jones* [1982] 1 WLR 1422 (Ch D) 1430 (Warner J); *Vitol SA v Norelf Ltd (The Santa Clara)* [1996] AC 800 (HL) 811 (Lord Steyn); *Berkeley Community Villages Ltd v Pullen* [2007] EWHC 1330 (Ch); [2007] 3 EGLR 101, para 80 (Morgan J); *Acre 1127 (in liq) v De Montfort Fine Art Ltd* [2011] EWCA Civ 87, para 15 (Tomlinson LJ).

[215] *Heyman v Darwins Ltd* [1942] AC 356 (HL) 359; *Johannesburg Municipal Council v D Stewart & Co Ltd* 1909 SC (HL) 53, 54 (Lord Loreburn) and 56 (Lord Shaw); *Jureidini v National British and Irish Millers Insurance Co Ltd* [1915] AC 499 (HL) 505 (Viscount Haldane LC); *Hirji Mulji v Cheong Yue SS Co* [1926] AC 497 (JCPC–Hong Kong).

[216] *Harbutt's Plasticine Ltd v Wayne Tank & Pump Co Ltd* [1970] 1 QB 447 (CA) 465–7 (Denning MR); see further Ch 9, paras 9.27–9.29.

[217] *Boston Deep Sea Fishing & Ice Co v Ansell* (1889) 39 Ch D 339 (CA) 361 (Bowen LJ); *Heyman v Darwins Ltd*, 373 (Lord Macmillan) and 399 (Lord Porter) (n 215); *Moschi v Lep Air Services* [1973] AC 331 (HL) 350 (Lord Diplock); *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 (HL) 844–5 (Lord Wilberforce) and 848–50 (Lord Diplock); see further Ch 9, paras 9.19–9.34.

[218] See the cases cited at nn 212–214.

[219] See further Ch 2.

this very day,[220] similar codes can be found in New Zealand[221] and in Malaysia,[222] and there has even been discussion of a European Contract Code.[223] Indeed, it is easy to forget how much English contract law is now to be found in statutory form, especially in relation to specialized topics such as the sale of goods,[224] consumer credit,[225] and employment law.[226] Even where full scale recodification is not possible, a lot can be done by the agreement and formulation of sets of common principles, as seen in the work of the American Law Institute,[227] the International Institute for the Unification of Private Law (UNIDROIT),[228] and the Lando Commission.[229]

1.38 In the meantime, however, it is up to the courts to do their best to avoid creating unnecessary confusion. This is, of course, by no means an easy matter. Thirty years ago, commenting on the problems caused by the tortuous and now happily defunct doctrine of 'fundamental breach' as applied to exemption clauses, Lord Wilberforce claimed that a lot of the difficulties arose from the uncertain or inconsistent terminology as applied to the topic of this book; discharge, rescission, termination, the contract is at an end, or dead, or displaced; clauses cannot survive, or simply go.[230] He went on to concede that to plead for complete uniformity might be to cry for the moon, but added that the courts should not make use of these confusions to produce on purely analytical grounds doctrines that should be decided on the basis of policy.[231] Whilst it may be impossible at this stage to eliminate from the law the problems of analysis described in the present chapter, the courts can avoid some of their worst effects by ensuring that they do not distort the law by placing on matters of terminology a weight that they were not meant to bear.

[220] A Singh, *Contract and Specific Relief* (10th edn, Eastern Book Co, 2006).
[221] Contractual Remedies Act 1979; Dawson and McLauchlan, *The Contractual Remedies Act 1979* (n 3).
[222] Malaysian Contracts Act 1950; C Fong, 'The Malaysian Contracts Act 1950' (2009) 25 JCL 244.
[223] MP Furmston, 'Unification of the European Law of Obligations—an English View' in *Mélanges Offerts à Marcel Fontaine* (Larcier, 2003) p 371; Furmston, Fifoot, and Simpson, *Cheshire, Fifoot, and Furmston's Law of Contract*, pp 34–5 (n 33).
[224] Sale of Goods Act 1979; MG Bridge, *The Sale of Goods* (2nd edn, OUP, 2009).
[225] Consumer Credit Acts 1974 and 2006; F Philpott, *The Law of Consumer Credit and Hire* (OUP, 2009).
[226] Employment Rights Act 1996; I Smith and A Baker, *Smith and Wood's Employment Law* (11th edn, OUP, 2013).
[227] *Restatement of the Law Second, Contracts* (1981).
[228] *Unidroit Principles of International Commercial Contract: 2004* (2004); Furmston, Fifoot, and Simpson, *Cheshire, Fifoot, and Furmston's Law of Contract*, pp 34–5 (n 33).
[229] O Lando and H Beale, *Principles of European Contract Law* (Kluwer Law International, 2000).
[230] *Photo Productions Ltd v Securicor Transport Ltd* [1980] AC 827 (HL) 844.
[231] *Photo Productions v Securicor Transport*, 844 (n 230).