real and sensible manner,[234] the fiduciary must prefer the duty to the principal to their personal interest,[235] save where the principal has given their free and fully informed consent to enable the fiduciary to prefer their own interest. Two specific rules are founded on the no-conflict rule, namely the self-dealing and the fair-dealing rules.[236] Any contract made between the principal and the fiduciary in breach of fiduciary duty is liable to be rescinded in Equity.

2-045 The identification of a fiduciary relationship may alternatively be sufficient to establish actual or presumed undue influence.[237] The boundary between breach of fiduciary duty and undue influence is uncertain,[238] particularly because where there is a relationship of trust and confidence there will also be the potential for undue influence. So, typically both may be pleaded on the same set of facts. But although the two principles overlap, they do not coincide.[239] The doctrine of breach of fiduciary duty has two advantages over actual or presumed undue influence, namely that it is not necessary to prove that the claimant was under the influence of the defendant and neither is it necessary to establish that the resulting contract requires explanation. Once the fiduciary relationship has been identified the need for an explanation is assumed and the burden is placed on the fiduciary to show that the principal had given their fully informed consent to the transaction. The heavy burden of proving consent is borne by the fiduciary because of the potential for abuse of such relationships by the fiduciary.[240]

2-046 **Self-dealing rule** The self-dealing rule will be breached where a fiduciary deals on behalf of themself and the principal in the same transaction.[241] So, for example, a trustee, cannot sell trust property to themself[242] or obtain a lease of trust property.[243] Neither can the trustee sell their own property to the trust.[244] Breach of this rule renders the transaction voidable[245] so that the principal can rescind it without needing to prove that the transaction was unfair.[246] The self-dealing rule can be excluded by the relevant instrument which governs the fiduciary relationship.[247] The rationale behind the rule is that the risk of conflict between personal interest and duty to the principal is such that the principal can rescind the contract, regardless of the fairness of the transaction.[248]

2-047 The contract will not, however, be voidable where the fiduciary has obtained the consent of the court or the fully informed consent of the principal to the

234 *Boardman v Phipps* [1967] 2 A.C. 46 at 124 (Lord Upjohn).
235 *Swain v The Law Society* [1982] 1 W.L.R. 17 at 36 (Oliver LJ).
236 *Tito v Waddell (No.2)* [1977] Ch 106 at 241.
237 See paras 2-032 and 2-033.
238 *CICB Mortgages Plc v Pitt* [1994] 1 A.C. 200 at 209 (Lord Browne-Wilkinson).
239 *B.C.C.I. v Aboody* [1990] Q.B. 923 at 962 (Slade LJ). In *Moody v Cox and Hatt* [1917] 2 Ch 71 at 79 Lord Cozens-Hardy MR specifically held that relief in Equity was given by reason of breach of fiduciary duty and not for undue influence.
240 *B.C.C.I. v Aboody* [1990] Q.B. 923 at 963 (Slade LJ); *CICB Mortgages Plc v Pitt* [1994] 1 A.C. 200 at 209 (Lord Browne-Wilkinson).
241 *Tito v Waddell (No.2)* [1977] Ch 106 at 241 (Sir Robert Megarry VC).
242 *Ex p. Lacey* (1802) 6 Ves. 625 at 626 (Lord Eldon LC); *Ex p. James* (1803) 8 Ves. 337 at 345 (Lord Eldon LC).
243 *Re Thompson's Settlement* [1986] Ch 99.
244 *Armstrong v Jackson* [1917] 2 K.B. 822 at 824 (McCardie J).
245 *Holder v Holder* [1968] 1 Ch 353, at 398; *Caldicott v Richards* [2020] EWHC 767 (Ch).
246 *Tito v Waddell (No.2)* [1977] Ch 106 at 241 (Sir Robert Megarry VC).
247 *Sargeant v National Westminster Bank Plc* (1990) 61 P. & C.R. 518.
248 *Wright v Morgan* [1926] A.C. 788.

transaction.[249] The fairness of the transaction may be a relevant evidential factor when assessing whether the consent was fully informed. Since the principal will not have been a party to the transaction, clear evidence of consent to the transaction will need to be adduced before the court will be able to conclude that the principal had indeed consented to it. It has sometimes been recognised that the court has a discretion to uphold a contract even though it was made in breach of the self-dealing rule.[250]

2-048 **Fair-dealing rule** The fair-dealing rule will be breached where a fiduciary contracts with the principal in their own right. This will render the contract voidable,[251] save where the fiduciary can show that they took no advantage of their fiduciary position, that the transaction was fair[252] and that there had been full disclosure of everything which was or might be material to the principal's decision to enter into the transaction.[253] So, for example, if a trustee purchases a beneficiary's interest in trust property, the contract can be set aside by the beneficiary unless the trustee can establish the fairness of the transaction and that the trustee had not taken advantage of the principal.[254] Although a purchase from the beneficiary can be valid therefore, it remains a hazardous transaction because the negotiations and the final agreement must be completely above board and reasonable, with no hint of fraud, concealment or advantage of the principal taken by the fiduciary.[255] The rationale behind the rule is that any contract between the principal and fiduciary is suspect because of the conflict between the fiduciary's personal interest and duty to the principal.

2-049 **Acting for more than one principal** Fiduciaries should avoid placing themselves in a position where their duty to one principal conflicts with their duty to another principal, [256] save where both principals have given their fully informed consent to such a conflict.[257] Such consent may be given expressly or may be implied where the principal was aware that the fiduciary was acting for another principal.[258] If such fully informed consent has not been obtained, where the interests of the two principals come into conflict any contract entered into by the fiduciary on behalf of one or both of the principals will be voidable,[259] although rescission will only be possible if the other principal with whom the transaction was made knew of the

249 *Ex p. James* (1803) 8 Ves 337 at 353 (Lord Eldon LC); *Tito v Waddell (No.2)* [1977] 1 Ch 106 at 225 (Megarry VC).
250 *Holder v Holder* [1968] Ch 353 at 398 (Danckwerts LJ); *Hillsdown Holdings Plc v Pensions Ombudsman* [1997] 1 All E.R. 862 at 895 (Knox J).
251 *Re Cape Breton Co* (1885) 29 Ch D. 795 at 803 (Cotton LJ); *Burland v Earle* [1902] A.C. 83 at 99 (Lord Davey).
252 *Moody v Cox and Hatt* [1917] 2 Ch 71; *Tito v Waddell (No.2)* [1977] Ch 106 at 241 (Megarry VC).
253 *Demerara Bauxite Co Ltd v Hubbard* [1923] A.C. 673.
254 See *Thomson v Eatswood* (1877) 2 App. Cas. 215 at 236 (Lord Cairns LC). Conaglen has argued that fairness should simply be an evidential factor taken into account by the court in determining whether the principal gave his fully informed consent to the transaction: "A Reappraisal of the Fiduciary Self-dealing and Fair-dealing Rules" (2006) C.L.J. 366 at 368.
255 See *Coles v Trecothick* (1804) 9 Ves. 234 at 247 (Lord Eldon LC).
256 *Clarke Boyce v Mouat* [1994] 1 A.C. 428; *Marks and Spencer Plc v Freshfields Bruckhaus Deringer (a firm)* [2004] EWHC 1337 (Ch); [2004] 1 W.L.R. 2331.
257 *Clark Boyce v Mouat* [1994] 1 A.C. 428 at 435.
258 *Bristol and West Building Society v Mothew* [1998] Ch 1 at 19 (Millett LJ).
259 *North and South Trust Co v Berkeley* [1971] 1 W.L.R. 470 at 485 (Donaldson J).

double employment.[260] The rationale behind this recognition of a breach of duty is that the conflict of duty means that the fiduciary is unable to provide undivided loyalty to each principal. It is no defence that making full disclosure to one principal will involve breach of the duty owed to the other,[261] since the fiduciary should not put themself in a position where the duties conflict.[262] Liability for a conflict of duties owed to different principals can be avoided by an express or implied term in the contract of appointment which allows the fiduciary to act for other principals.[263]

2-050 **Bribery** Bribery is committed where a third party either makes or agrees to make a payment to a fiduciary, such as an agent, without the knowledge and consent of his principal. There is no need to prove that any of the parties were consciously aware that they were doing anything wrong for a payment to be characterised as a bribe.[264] Where a fiduciary enters into a contract with another on behalf of the principal as a result of the third party bribing the fiduciary,[265] the contract will be void because of the fiduciary's absence of authority to bind the principal.[266] Where, however, a principal is induced to enter into a contract with another party as a result of the fiduciary being bribed, either by the other party or somebody else, the contract may be voidable in Equity by virtue of breach of the no-conflict rule,[267] there being an irrebuttable presumption that the agent was influenced by the bribe.[268] The contract will only be voidable, however, if the conscience of the other party to the contract was affected in some way.[269] This will be established if the other party to the contract knew[270] that the principal was deprived of the fiduciary's disinterested advice,[271] that the principal neither knew nor consented to the payment to the fiduciary[272] and that the bribe was paid or mentioned before the contract was made.[273] If the principal was aware of the possibility of the bribe but did not give their informed consent to its receipt, the consequent contract may still be rescinded if it would be just and proportionate to do so, having regard to questions of improper intent and motive.[274] It has been recognised that the other contracting party's conscience will be affected if they had dealt with the fiduciary secretly and behind the back of the principal and dishonestly assisted the fiduciary to abuse their position to make the contract, even if the fiduciary breached their duty in some other way.[275] Consequently in *UBS AG v Depfa Bank Plc*,[276] the principal could rescind a contract where the other contracting party knew of the fiduciary's conflict of interest but did not know that the fiduciary had been bribed by a third party.[277] If the other contracting party acts honestly they will not be affected by what they do not know provided that they do not turn a blind eye to the truth.

260 *Transvaal Land Co v New Belgium (Transvaal) Land and Development Co* [1914] 2 Ch 488; *North and South Trust Co v Berkeley* [1971] 1 W.L.R. 470 at 485 (Donaldson J). M. Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Oxford: Hart Publishing, 2010), p.159. It would not be appropriate to impute the fiduciary's knowledge of the double-employment to the principal: M. Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Oxford: Hart Publishing, 2010), p.161.

261 *Moody v Cox and Hatt* [1917] 2 Ch 71.

262 *Hilton v Barker, Booth and Eastwood* [2005] UKHL 8; [2005] 1 W.L.R. 567 at [44] (Lord Walker).

263 *Kelly v Cooper* [1993] A.C. 205.

264 *Ross River Ltd v Cambridge City Football Club Ltd* [2007] EWHC 2115 (Ch); [2008] 1 All E.R. 1004 at [218] (Briggs J).

265 Or where the fiduciary has or will obtain a secret commission: *Logicrose Ltd v Southend United Football Club* [1988] 1 W.L.R. 1256 at 1260 (Millett J). This may include a "half-secret commission" where the principal is aware that a commission might be paid but is unaware of the amount: *Wood v Commercial First Business Ltd (In Liquidation)* [2019] EWHC 2205 (Ch) at [130] (Deputy Judge of the High Court James Pickering).

266 *Heinl v Jykse Bank (Gibraltar) Ltd* [1999] Lloyd's Rep. Bank 511 at 521 (Nourse LJ).

267 *Logicrose Ltd v Southend United Football Club* [1988] 1 W.L.R. 1256 at 1260 (Millett J). See also *Panama and South Pacific Telegraph Co v India Rubber, Gutta Percha, and Telegraph Works Co* (1875) L.R. 10 Ch. App. 515; *Grant v Gold Exploration and Development Syndicate Ltd* [1900] 1 Q.B. 233 at 249 (Collins LJ); *Armagas Ltd v Mundogas SA* [1986] A.C. 717 at 142 (Robert Goff LJ); *Hurstanger Ltd v Wilson* [2007] EWCA Civ 299 at [38]; [2007] 4 All E.R. 1118 at [38] (Tuckey LJ).

268 *Hovenden and Sons v Millhof* (1900) 83 L.T. 41 at 43 (Romer LJ). See also *UBS AG v Depfa Bank Plc* [2017] EWCA Civ 1567; [2017] 2 Lloyd's Rep. 621 at [155] (Lord Briggs and Hamblen LJ).

269 *UBS AG v Depfa Bank Plc* [2017] EWCA Civ 1567; [2017] 2 Lloyd's Rep. 621.

270 *Logicrose Ltd v Southend United Football Club* [1988] 1 W.L.R. 1256 at 1261 (Millett J); *Chancery Client Partners Ltd v MRC 957 Ltd* [2016] EWHC 2142 (Ch). This includes Nelsonian blindness (turning a blind eye): *Logicrose Ltd v Southend United Football Club* [1988] 1 W.L.R. 1256 at 1261 (Millett J).

271 *Logicrose Ltd v Southend United Football Club* [1988] 1 W.L.R. 1256 at 1261 (Millett J).

272 *Ross River Ltd v Cambridge City Football Club Ltd* [2007] EWHC 2115 (Ch); [2008] 1 All E.R. 1004 at [203] (Briggs J); *Hurstanger Ltd v Wilson* [2007] EWCA Civ 299; [2007] 1 W.L.R. 2351 *Medsted Associates Ltd v Canaccord Genuity Wealth (International) Ltd* [2019] EWCA Civ 83; [2019] 1 W.L.R. 4481. Where the principal is a company it is the knowledge and consent of the directors rather than the shareholders which is relevant: *Ross River Ltd v Cambridge City Football Club Ltd* [2007] EWHC 2115 (Ch); [2008] 1 All E.R. 1004, at [207] (Briggs J). Disclosure of the bribe must be made to all the directors at a properly convened broad meeting attended by a sufficient quorum: *Ross River Ltd v Cambridge City Football Club Ltd* [2007] EWHC 2115 (Ch); [2008] 1 All E.R. 1004 at [214].

273 *Ross River Ltd v Cambridge City Football Club Ltd* [2007] EWHC 2115 (Ch); [2008] 1 All E.R. 1004 at [228] (Briggs J). Cf. *Panama and South Pacific Telegraph Co v India Rubber, Gutta Percha, and Telegraph Works Co* (1875) L.R. 10 Ch. App. 515 at 527 (James LJ) and 332 where Mellish LJ assumed the case involved termination for a repudiatory breach of contract.

274 See *Johnson v EBS Pensioner Trustees Ltd* [2002] Lloyds Rep. P.N. 309; *Hurstanger Ltd v Wilson* [2007] EWCA Civ 299; [2007] 4 All E.R. 1118 at [50] (Tuckey LJ).

275 *UBS AG v Depfa Bank Plc* [2017] EWCA Civ 1567; [2017] 2 Lloyd's Rep. 621. See P. Kelisher, "Rescission and attribution of knowledge in multi-party cases of dishonest assistance" (2018) 134 L.Q.R. 363.

276 [2017] EWCA Civ 1567; [2017] 2 Lloyd's Rep. 621.

277 Gloster LJ dissented on the ground that this interpretation of conscience was impracticable and introduced the 'moral standards of the vicarage' into commercial transactions: [2017] EWCA Civ 1567; [2017] 2 Lloyd's Rep. 621 at [347].

has passed.[162] It is not unreasonable to delay rescission pending the outcome of an investigation by an expert as to the options available to the claimant.[163]

3-037 **Limitation periods** The statutory limitation periods identified by the Limitation Act 1980 do not apply to bar the right to rescind. However, the consequences of rescission may be barred after a period of six years. So, for example, the claimant's right to restitution of a benefit transferred to the defendant under the contract will be barred after six years.[164]

3-038 The right to rescission in Equity may be barred by the application of the statutory limitation period by analogy.[165] So, for example, a claim to rescind for fraudulent misrepresentation will be barred after six years, since the statutory limitation period which applies to claims for the tort of deceit will be applied by analogy.[166] Similarly a claim to rescind a contract for dishonest breach of fiduciary duty will be subject to a six-year limitation period by analogy with the statutory limitation period.[167] Where, however, there is a claim for breach of fiduciary duty without proof of dishonesty, the statutory limitation period which applies for breach of trust will not be applied by analogy[168] and similarly where rescission is triggered by undue influence.[169]

3-039 **Promissory estoppel** Where the effect of the delay is to constitute a clear and unequivocal representation that the claimant would not set the contract aside, that representation was made with the knowledge or intention that it would be acted on by the defendant and the defendant did rely on it to their detriment or in some other way to make it inequitable for the claimant to seek rescission, the claimant will be estopped from seeking rescission of the contract.[170] It will, however, be difficult to identify such a knowing representation from the simple fact of delay in seeking rescission.

IV. Third Party Rights

3-040 **Nature of the bar** Rescission is also traditionally barred where the effect of rescission of the contract made by the claimant and the defendant would be to harm the rights of third parties.[171] In particular, the right of rescission will be barred if a

[162] *Allcard v Skinner* (1887) 36 Ch D. 145 at 192 (Bowen LJ). In *Leaf v International Galleries* [1950] 2 K.B. 86 rescission of a contract to buy a picture was barred after five years, although the claimant was only aware of the misrepresentation shortly before the proceedings were commenced. It is difficult to characterise the delay in such circumstances as unreasonable. See *Salt v Stratstone Specialist Ltd* [2015] EWCA Civ 745, [2015] 2 C.L.C. 269 where it considered that the decision turned on the equation of the lapse of time bar with the contractual right to reject goods, an equation which is no longer appropriate: at [49] (Roth J).

[163] *Fiona Trust and Holding Corp v Privalov* [2006] EWHC 2583 at [36] (Morison J).

[164] Limitation Act 1980 s.5. A similar limitation period applies to claims to recover property: Limitation Act 1980 ss.2 and 3.

[165] Limitation Act 1980 s.36(1).

[166] *Redgrave v Hurd* (1881) 20 Ch D. 1 at 13 (Sir George Jessel MR).

[167] *Armstrong v Jackson* [1917] 2 K.B. 822 at 831 (McCardie J).

[168] *Tito v Waddell (No.2)* [1977] Ch. 106 at 250 (Megarry VC); *Wood v Commercial First Business Ltd* [2019] EWHC 2205 Ch at [180] (Deputy High Court Judge James Pickering).

[169] *Allcard v Skinner* (1887) 36 Ch D. 145.

[170] *Allcard v Skinner* (1887) 36 Ch D. 145 at 192 (Bowen LJ); *Holder v Holder* [1968] Ch. 353 at 403 (Sachs LJ); *Goldsworthy v Brickell* [1987] Ch. 378 at 410 (Nourse LJ).

[171] *Tennent v The City of Glasgow Bank and Liquidators* (1879) 4 App. Cas. 615 at 621 (Earl Cairns LC); *Society of Lloyds v Leighs* [1997] EWCA Civ 2283.

third party subsequently acquires a legal[172] or equitable interest in property which was transferred to the defendant under a voidable contract, where the third party acquired the property for value and without notice of the defect which provides the reason for the claimant wishing to rescind it.

3-041 **Critique of the bar** The existence of the third party rights bar is difficult to defend. Whilst it is correct that, if a third party has acquired proprietary rights in good faith and for value, the claimant should not be able to bring a claim against the third party to recover the property, it does not necessarily follow that the acquisition of third party proprietary rights should prevent the claimant from rescinding the contract with the defendant[173] and so protect the defendant. Although an effect of rescission is traditionally to revest title in property to the claimant,[174] it would not be appropriate for rescission to have this effect where a third party has acquired rights in the property transferred for value; the security of the third party's receipt is then paramount. But there is no reason why this should bar rescission completely since rescission has other consequences, such as to avoid future contractual obligations and to enable the claimant to recover the value of the property transferred to the defendant.[175] This can still occur, however, and the third party's proprietary right can be left unaffected.[176]

3-042 The only justification for a bar to rescission relating to the acquisition of rights by a third party is where rescission of the contract between the claimant and the defendant would destroy or necessarily frustrate rights, that were acquired by the third party for value and in reliance on the validity of the contract between the claimant and the defendant. So, for example, in *Society of Lloyds v Leighs*[177] a contract could not be rescinded for fraudulent misrepresentation since the effect of rescission would have been to revoke the authority of the rescinding parties to enter into contracts with third parties.

3-043 **Winding up** The bankruptcy of the other party to the contract will not bar rescission.[178] It has, however, been recognised that the winding up of a company will bar rescission of the statutory contract between the shareholder and the company, typically where rescission is sought for misrepresentation. [179] It follows that the shareholder who owns partly paid shares is unable to rescind the contract once the winding up has commenced, in order to avoid liability as a contributory to the creditors of the company. The bar will also operate to prevent a shareholder

[172] *White v Garden* (1851) 10 C.B. 919, 138 E.R. 364; *Clough v The London and North Western Rly Co* (1871) L.R. 7 Ex. 26 at 35; *Phillips v Brooks Ltd* [1919] 2 K.B. 243.

[173] N.Y. Nahan, "Rescission: A Case For Rejecting the Classical Model?" (1997) 27 Univ. W.A.L.R. 66 at 74.

[174] See para.4-023. Cf. W. Swadling, "Rescission, Property, and the Common Law" (2005) 121 L.Q.R. 123.

[175] See para.4-018.

[176] B. Häcker, "Rescission and Third Party Rights" [2006] R.L.R. 21 at 36.

[177] [1997] EWCA Civ 2283. See also *Crystal Palace FC (2000) Ltd v Dowie* [2007] EWHC 1392 (QB) at [216] (Tugendhat J) (rescission would have revived an employment contract of a football manager who was now employed by another football club).

[178] *Load v Green* (1846) 15 M. and W. 216; 153 E.R. 828.

[179] *Oakes v Turquand and Harding* (1867) L.R. 2 HL 325; *Stone v The City and Country Bank Ltd* (1877) 3 C.P.D. 282; *Tennent v City of Glasgow Bank* (1879) 4 All Cas 615; *Soden v British and Commonwealth Holdings Plc* [1998] A.C. 298 at 324 (Lord Browne-Wilkinson).

from recovering the price paid for shares issued by the company.[180] It appears that the bar is only available where the person seeking rescission is a shareholder.[181] The function of this bar is to protect creditors whose rights would be defeated by the rescission,[182] by ensuring that shareholders did not avoid their liability to creditors by avoiding their contract. But the bar is of much less significance now since partly paid shares are less common and the shareholder will be able to obtain a pecuniary remedy for the misrepresentation where it was made fraudulently or negligently.[183]

V. Damages in Lieu of Rescission

3-044 **General principles** Whilst the bars which have been considered so far are of general application regardless of the reason for rescission, there is one specific bar which is potentially applicable only where a contract has been induced by non-fraudulent misrepresentation. In such circumstances s.2(2) of the Misrepresentation Act 1967 provides that the court has a discretion to declare that the contract is subsisting and to award damages in lieu of rescission. This discretionary bar to rescission can only apply where rescission would otherwise be available and where the court considers it to be equitable to award damages instead of rescinding the contract. The court has jurisdiction under the provision to restore a contract which has already been lawfully rescinded by election at Common Law.[184]

3-045 **Conditions for exercise of discretion** The court only has jurisdiction to award damages in lieu of rescission where the contract has been induced by a non-fraudulent misrepresentation.[185] Although in one case it was recognised that the court has the power to award damages as long as the claimant had the right to rescind the contract, even if that right has since been barred, [186] the language of the statute has been interpreted as requiring the claimant still to be entitled to rescind the contract, so the jurisdiction to award damages will not be available if rescission is barred.[187] Misrepresentation Act 1967 s.2(2) identifies certain factors which should be considered by the court when determining whether it is equitable to award damages instead of rescission, namely: the nature of the misrepresentation, the loss to the representee if the contract was not rescinded and the loss to the representor which would arise from rescission. Consequently, the court is more likely to award

[180] *Stone v The City and Country Bank Ltd* (1877) 3 C.P.D. 282.

[181] *Re Yorke Street Mezzanine Pty Ltd* [2007] F.C.A. 922 (Federal Court of Australia) at [39]. At [40] it is suggested that this is probably the position in England as well.

[182] *Tennent v City of Glasgow Bank* (1879) 4 All Cas 615 at 621 (Earl Cairns LC).

[183] See para.2-004.

[184] *Atlantic Lines and Navigation Co Inc v Hallam Ltd (The Lucy)* [1983] 1 Lloyd's Rep. 188 at 202 (Mustill LJ).

[185] *Government of Zanzibar v British Aerospace (Lancaster House) Ltd* [2000] 1 W.L.R. 2333 at 2342 (Judge Raymond Jack QC).

[186] *Thomas Witter Ltd v TBP Industries Ltd* [1996] 2 All E.R. 573 at 590 (Jacob J).

[187] *Atlantic Lines and Navigation Co Inc v Hallam (The Lucy)* [1983] 1 Lloyd's Rep. 188 at 202 (Mustill J); *William Sindall Plc v Cambridgeshire CC* [1994] 1 W.L.R. 1016 at 1044 (Evans LJ); *Floods of Queensferry Ltd v Shand Construction Ltd* [2000] B.L.R. 81 at 92 (Judge Humphrey Lloyd QC); *Government of Zanzibar v British Aerospace (Lancaster House) Ltd* [2000] 1 W.L.R. 2333 at 2343 (Judge Raymond Jack QC); *Pankhania v Hackney London BC* [2002] EWHC 2441 (Ch) at [76] (Judge Rex Tedd QC); *Salt v Stratstone Specialist Ltd* [2015] EWCA Civ 745; [2015] 2 C.L.C. 269 at [17] (Longmore LJ). See H. Beale, "Points on Misrepresentation" (1995) 111 L.Q.R. 385; D. Malet, "Section 2(2) of the Misrepresentation Act 1967" (2001) 117 L.Q.R. 524; J. O'Sullivan, "Remedies for misrepresentation: up in the air again" (2001) C.L.J. 239.

damages in lieu of rescission where the misrepresentation can be characterised as trivial or where the harm to the representor arising from rescission outweighs any advantages of rescission to the representee.[188] The court may declare the contract to be subsisting even though the claimant has suffered no relevant loss so that no damages will be awarded in lieu of rescission.[189]

3-046 **Assessment of damages** Once the court has determined that damages should be awarded in lieu of rescission the damages operate to compensate[190] the claimant for the loss caused by the misrepresentation as a result of rescission being barred, rather than the loss caused by entering into the contract.[191] This is assessed by comparing the claimant's present position with the position the claimant would have occupied had the misrepresentation been true.[192] Consequently, where the contract was for the purchase of property by the claimant, the damages would be assessed with reference to the difference between the actual value of the property at the time of the purchase and the value of the property as it was represented to be.[193] But the damages should not exceed the sum which would have been awarded had the representation been a term of the contract.[194] If the claimant would not have been in any better position had the representation been true then there will be no loss and no damages will be awarded but rescission may still be barred.[195]

3-047 The claimant cannot be compensated for loss which was not caused by the misrepresentation.[196] So the claimant will not be compensated for consequential loss arising from a fall in the value of the property which the claimant had purchased from the defendant.[197]

[188] See *William Sindall Plc v Cambridgeshire CC* [1994] 1 W.L.R. 1016 at 1036–1038 (Hoffmann LJ).

[189] *Huyton SA v Distribuidora Internacional de Productos Agricolas SA de CV* [2003] 2 Lloyd's Rep. 780 at 846.

[190] Cf. P. Birks, "Unjust Factors and Wrongs: Pecuniary Rescission for Undue Influence" [1997] R.L.R. 72 at 75 who considered that the function of the pecuniary remedy was restitutionary to reverse the defendant's unjust enrichment, rather than as a remedy for the unknown wrong of innocent misrepresentation.

[191] *William Sindall Plc v Cambridgeshire CC* [1994] 1 W.L.R. 1016 at 1037 (Hoffmann LJ).

[192] In *William Sindall Plc v Cambridgeshire CC* [1994] 1 W.L.R. 1016 at 1045–1046 (Evans LJ) this was described as the "contract measure", since the function of the damages is to place the claimant in the position he would have been in had the representation been true, rather than a "tort measure", which would return the claimant to the position before the contract was made, which would operate like pecuniary rescission.

[193] *William Sindall Plc v Cambridgeshire CC* [1994] 1 W.L.R. 1016 at 1037 (Hoffmann LJ).

[194] *William Sindall Plc v Cambridgeshire CC* [1994] 1 W.L.R. 1016 at 1038 (Hoffmann LJ).

[195] *UCB Corporate Services Ltd v Thomason* [2004] EWHC 1164 (Ch); [2004] 2 All E.R. (Comm) 774 at [68] (Pumfrey J).

[196] *William Sindall Plc v Cambridgeshire CC* [1994] 1 W.L.R. 1016 at 1037 (Hoffmann LJ).

[197] *William Sindall Plc v Cambridgeshire CC* [1994] 1 W.L.R. 1016 at 1045 (Evans LJ). Where the defendant had no reasonable grounds for believing the truth of the representation, the claimant could instead sue for damages under Misrepresentation Act 1967 s.2(1), where damages are assessed by reference to the tortious measure so that consequential losses are recoverable: *Royscot Trust Ltd v Rogerson* [1991] 2 Q.B. 297.

unreasonable [for the innocent party] to carry on".[7] Commenting on this array of similar tests, Arden LJ said in *Valilas v Januzaj*[8]:

> "The common law adopts open-textured expressions for the principle used to identify the cases in which one contracting party ('the victim') can claim that the actions of the other contracting party justify the termination of the contract. I will use the formulation that asks whether the victim has been deprived of substantially the whole of the benefit of the contract. The expression 'going to the root of the contract' conveys the same point: the failure must be compared with the whole of the consideration of the contract and not just a part of it. There are other similar expressions. I do not myself criticise the vagueness of these expressions of the principle since I do not consider that any satisfactory fixed rule could be formulated in this field."

8-002 **Breach which "goes to the root" test** In the context of actual breach, the courts have traditionally adopted the metaphor of breach which "goes to the root"[9] of the contract in order to identify a situation where the actual breach of contract is really serious. Besides the trawl undertaken by *Chitty on Contracts*,[10] these are leading modern instances of courts adopting the "goes to the root" test: (i) Lord Wright mentioned this test in *Ross T Smyth & Co Ltd v TD Bailey, Son & Co*[11]; (ii) Devlin J used this test in *Universal Cargo Carriers Corp v Citati (No.1)*[12]; (iii) all five Law

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7 [1938] 2 All E.R. 788 at 794.

8 [2014] EWCA Civ 436; [2015] 1 All E.R. (Comm) 1047 at [59].

9 See fn.1 in this chapter for the history of the phrase.

10 H. Beale (ed), *Chitty on Contracts*, 33rd edn (London: Sweet & Maxwell, 2018), para.24-039: "*In Bettini v Gye* (1876) 1 Q.B.D. 183 at 188 (citing Parke B in *Graves v Legg* (1854) 9 Exch. 709 at 716) Blackburn J stated that, in the absence of an express declaration of intention by the parties, the test was: '... whether the particular stipulation goes to the root of the matter, so that failure to perform it would render the performance of the rest of the contract a thing different in substance from what the defendant had stipulated for'." Chitty also cites at para.24-041, fn.230: *Davidson v Gwynne* (1810) 12 East. 381 at 389; *MacAndrew v Chapple* (1866) L.R. 1 C.P. 643 at 648; *Poussard v Spiers* (1876) 1 Q.B.D. 410 at 414; *Honck v Muller* (1881) 7 Q.B.D. 92 at 100; *Mersey Steel and Iron Co v Naylor, Benzon & Co* (1884) 9 App. Cas. 434 at 443 HL; *Guy-Pell v Foster* [1930] 2 Ch. 169 at 187; *Heyman v Darwins Ltd* [1942] A.C. 356 at 397 HL; *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361 at 391 (Viscount Dilhorne, quoting Lord Atkin in an earlier case), 397 and 399 and Chitty also cites at para.400 and 401 and 403 (Lord Reid, also quoting Lord Denning and Donovan LJ)), 409 and 411 (Lord Hodson) 418 and 422 and 423 (Lord Upjohn) 430 and 431 (Lord Wilberforce), HL; *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 W.L.R. 361 CA at 374; *Cehave NV v Bremer Handelsgesellschaft mbH, "The Hansa Nord"* [1976] Q.B. 44 CA at 60, 73; *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc ("The Nanfri")* [1979] A.C. 757 HL at 779.

11 [1940] 3 All E.R. 60 HL at 73: "It must always be a question in such cases whether a refusal by word or conduct or failure to deliver more than certain instalments or quantities, and not the whole contract quantity, goes to the root of the contract so as to constitute a total repudiation".

12 [1957] 2 Q.B. 401 at 430: "When the delay becomes so prolonged that the breach assumes a character so grave as to go to the root of the contract, the aggrieved party is entitled to [terminate for breach]". In argument at 418, Devlin J noted that the same formulation had been used by Willes J in *Macandrew v Chapple* (1865–66) L.R. 1 C.P. 643 at 648 ("a delay or deviation which, as it has been said, goes to the whole root of the matter, deprives the charterer of the whole benefit of the contract, or entirely frustrates the object of the charterer in chartering the ship, is an answer to an action for not loading a cargo; but that loss, delay, or deviation short of that gives an action for damages, but does not defeat the charter") (Devlin J's exposition of governing principles of breach not disturbed on appeal in either [1957] 1 W.L.R. 979 CA or [1958] 2 Q.B. 254 CA). M. Mustill, "Anticipatory Breach: The Common Law at Work", *Butterworths Lectures 1989–90* (London: Butterworths, 1990), p.69 ff (see also M. Mustill, "The Golden Victory—Some Reflections" (2008) 124 L.Q.R. 569–585).

Lords used this phrase, drawing upon settled usage, in the *Suisse Atlantique* case[13]; (iv) Lords Wilberforce,[14] Fraser,[15] and Russell,[16] used this expression in *Federal Commerce & Navigation Co v Molena Alpha Inc ("The Nanfri")*; (v) Lord Wilberforce,[17] on this occasion joined by Lords Salmon[18] and Scarman,[19] again used this formulation in *Woodar Investment Development Ltd v Wimpey Construction UK Ltd*; and (vi) Buckley LJ[20] adopted this same language in *Decro-Wall International SA v Practitioners in Marketing Ltd*; and Sachs LJ's judgment contains a thesaurus.[21]

8-003 However, Lord Wilberforce in *Federal Commerce & Navigation Co v Molena Alpha Inc ("The Nanfri")*[22] cited other formulations besides the "breach going to the root" test. The following paragraphs refer to all the suggested tests. There are

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13 *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361 at 391 (Viscount Dilhorne, quoting Lord Atkin in an earlier case), 397 and 399 and 400 and 401 and 403 (Lord Reid, also quoting Lord Denning and Donovan LJ)), 409 and 411 (Lord Hodson) 418 and 422 and 423 (Lord Upjohn) 430 and 431 (Lord Wilberforce) HL.

14 [1979] A.C. 757 HL at 778–779.

15 [1979] A.C. 757 at 783, 784.

16 [1979] A.C. 757 at 785, 786.

17 [1980] 1 W.L.R. 277 HL at 283: "Repudiation is a drastic conclusion which should only be held to arise in clear cases of a refusal, in a matter going to the root of the contract, to perform contractual obligations."

18 [1980] 1 W.L.R. 277 HL at 286–287: "If this does not go to the root of the contract and evince an unequivocal intention no longer to be bound by it, and therefore amounts to a repudiation of the contract, I confess that I cannot imagine what would."

19 [1980] 1 W.L.R. 277 HL at 298: "To be repudiatory, the breach, or threatened breach, must go to the root of the contract."

20 [1971] 1 W.L.R. 361 CA at 380: "To constitute repudiation, the threatened breach must be such as to deprive the injured party of a substantial part of the benefit to which he is entitled under the contract. The measure of the necessary degree of substantiality has been expressed in a variety of ways in the cases. It has been said that the breach must be of an essential term, or of a fundamental term of the contract, or that it must go to the root of the contract. Various tests have been suggested". Citing: *Freeth v Burr* (1874) L.R. 9 C.P. 208 at 213, 214 per Lord Coleridge CJ and per Keating J; *Mersey Steel & Iron Co Ltd v Naylor, Benzon & Co* (1884) 9 App. Cas. 434 at 439, 443 per Lord Selborne LC and per Lord Blackburn; *HongKong Fir* case [1962] 2 Q.B. 26 CA at 66 per Diplock LJ.

21 [1971] 1 W.L.R. 361 CA at 374: "For my part I prefer—perhaps at the risk of being dubbed old-fashioned—to adhere to the long-standing phraseology used by Lord Ellenborough CJ, in *Davidson v Wynne* (1810) 12 East. 381 at 389; 104 E.R. 149 at 153, much cited over the next 150 years by eminent judges including in 1884 Lord Blackburn in *Mersey Steel and Iron Co (Ltd) v Naylor, Benzon & Co* (1883–84) L.R. 9 App. Cas. 434 HL at 442–4, and adopted by Upjohn LJ in the *HongKong Fir* case [1962] 2 Q.B. 26 CA at 64, that to constitute repudiation a breach of contract must go to the root of that contract. (Since preparing this judgment our attention has been directed to the use of the same phrase by Lord Denning MR, in *'The Mihalis Angelos'* [1971] 1 Q.B. 164 CA at 193. That leaves the question whether a breach does thus go to the root as a matter of degree for the court to decide on the facts of the particular case ... This constitutes the test even when there are recurring breaches—producing differing results according to the degree of non-compliance: cf. *Maple Flock Co Ltd v Universal Furniture Products (Wembley) Ltd* [1934] 1 K.B. 148 CA at 157 per Lord Hewart CJ. Notice that a breach is likely to occur or to recur cannot, of course, be treated as being a repudiation unless it would have that effect when it did occur or recur." (1810) 12 East 381, 389; 104 E.R. 149 at 153 per Lord Ellenborough CJ: "It is useless to go over the same subject again, which has been so often discussed of late. The sailing with the first convoy is not a condition precedent: the object of the contract was the performance of the voyage, and here it has been performed. The principle laid down in *Boone v Eyre* has been recognised in all the subsequent cases, that unless the non-performance alleged in breach of the contract goes to the whole root and consideration of it, the covenant broken is not to be considered as a condition precedent, but as a distinct covenant, for the breach of which the party injured may be compensated in damages'."

22 [1979] A.C. 757 HL at 778–779.

seven tests. For convenience, these can be encapsulated here as: (i) the breach went to the root; (ii) the breach involved or results in radically different performance (in case of delay); (iii) performance was or is substantially inconsistent with contract; (iv) the facts indicate abandonment of contract or refusal to perform; (v) innocent party has been or is being deprived of substantially the whole contractually intended benefit; (vi) innocent party has been or is being deprived of a substantial part of the contractually intended benefit; (vii) the breach is serious enough that it would be unfair to confine innocent party to damages.

8-004 *Test (i): the "breach going to the root" test:* this has already been introduced.

8-005 *Test (ii); delay rendering the contract radically different from that originally undertaken:* where the breach takes the form of delay the Court of Appeal in *MSC Mediterranean Shipping Co SA v Cottonex Anstalt*[23] adopted the following test to determine whether the delay has become serious enough so as to justify termination[24]:

> "the test for determining whether the [guilty party's default by delay] amounted to a repudiation of the contract was in substance the same as it would be for frustration, namely, whether the delay was such as to render performance of the remaining obligations under the contract of carriage radically different from those which the parties had originally undertaken, or (where the delay was continuing) whether it would be regarded by a reasonable person in the position of the parties as being likely to last that long."

8-006 In *MSC Mediterranean Shipping Co SA v Cottonex Anstalt*[25] the Court of Appeal held that the hirer of ship containers had retained them, in breach of contract, for so long that there had come a point when the whole contract had been repudiated. Applying the test set out in the preceding paragraph, Moore-Bick LJ concluded[26]:

> "On 2nd February 2012 the [owner of the containers] offered to sell the containers to the [hiring party] in order to provide a solution to the problem. Negotiations ensued, albeit unsuccessfully. That, it seems to me, was the clearest indication that the commercial purpose of the adventure had by then become frustrated. Such a sale would have discharged the [hiring party's] obligation to redeliver the containers and with it the final obligations under the contracts of carriage which still remained to be performed. In my view the [hiring party] was in repudiation of the contract as from that date."

8-007 *Test (iii): conduct "substantially inconsistent with his contractual obligations":* this test was suggested by Lord Wright in *Ross T Smyth & Co Ltd v TD Bailey, Son & Co*[27]:

> "I do not say that it is necessary to show that the party alleged to have repudiated should have an actual intention not to fulfil the contract. He may intend in fact to fulfil it, but may be determined to do so only in a manner substantially inconsistent with his obligations, and not in any other way."

[23] [2016] EWCA Civ 789 at [25]–[28].

[24] [2016] EWCA Civ 789 at [25], applying *Universal Cargo Carriers Corp v Citati* [1957] 2 Q.B. 401 and *Nitrate Corp of Chile Ltd v Pansuiza Compania de Navegacion SA ("The Hermosa")* [1980] 1 Lloyd's Rep. 638 at CA.

[25] [2016] EWCA Civ 789 at [25]–[28].

[26] [2016] EWCA Civ 789 at [28].

[27] [1940] 3 All E.R. 60, 72, HL. Immediately before the passage cited in the text above, Lord Wright had said: "It must not be forgotten that repudiation of a contract is a serious matter, not to be lightly found or inferred. I cannot do better than quote the words of Lord Selborne in *Mersey Steel and Iron Co Ltd v Naylor, Benzon & Co* (1883–84) L.R. 9 App. Cas. 434 HL at 438, where he says that you must look at the 'actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other

Lord Wright's discussion in the *Ross T Smyth & Co Ltd* case seems to have been directed at the concept of renunciation, that is, a declared intention to deviate significantly and unacceptably from the contract. But it appears that Lord Wilberforce in *Federal Commerce & Navigation Co v Molena Alpha Inc ("The Nanfri")*[28] found Lord Wright's formulation in the *Ross T Smyth* case to be illuminating on the related question of repudiation by actual breach of the contractual terms. The "substantially inconsistent" test is an attractive way of reformulating the "breach which goes to the root" test. Tests (i) and (iii) can be viewed as alternative and complementary formulations. They are less demanding than test (v), which is unattractively severe (test (v) is: *whether the breach deprives the innocent party of* "of substantially the whole benefit which it was the intention of the parties that [the innocent party] should obtain from the further performance of" *the contract*).

8-008 *Test (iv): conduct is repudiatory if it objectively indicates an intention to abandon and altogether refuse to perform the contract:* it will be seen immediately that this test creates confusion because the reference to intention and (verbal) refusal overlaps both in terms of raw fact and conceptually with renunciation (a separate category of serious breach, examined in Ch.6), in particular, implied renunciation by conduct (para.6-005). Nevertheless, and perhaps regrettably, Etherton LJ in *Eminence Property Developments Ltd v Heaney*[29] formulated this test to determine whether "conduct" is "repudiatory":

> "So far as concerns repudiatory conduct, the legal test is simply stated … It is whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."

8-009 Etherton LJ added[30]: "whether or not there has been a repudiatory breach is highly fact sensitive. That is why comparison with other cases is of limited value". And he commented[31]:

> "all the circumstances must be taken into account insofar as they bear on an objective assessment of the intention of the contract breaker. This means that motive, while irrelevant if relied upon solely to show the subjective intention of the contract breaker, may be relevant if it is something or it reflects something of which the innocent party was, or a reasonable person in his or her position would have been, aware and throws light on the way the alleged repudiatory act would be viewed by such a reasonable person."

8-010 Those remarks were considered by Maurice Kay LJ in *Tullett Prebon Plc v BGC Brokers LP*.[32] The facts were as follows. TB was under attack from BGC, which had lured TB's brokers and was offering them future contracts (those contracts had been

may accept it as a reason for not performing his part …' The facts of that case are significant. The appellants had failed to pay for an instalment, not because they were either unwilling or unable to pay, but in a mistaken view of the legal position. It was held that there was no repudiation".

[28] [1979] A.C. 757 HL at 778–779. Lord Wright in *Ross T Smyth & Co Ltd v TD Bailey, Son & Co* [1940] 3 All E.R. 60 HL at 72.

[29] [2010] EWCA Civ 1168; [2011] 2 All E.R. (Comm) 223 at [61].

[30] [2010] EWCA Civ 1168; [2011] 2 All E.R. (Comm) 223 at [62].

[31] [2010] EWCA Civ 1168; [2011] 2 All E.R. (Comm) 223 at [63].

[32] [2011] EWCA Civ 131; [2011] I.R.L.R. 420 at [22]–[29] per Maurice Kay LJ.

agreed but had yet to commence). TB fought back by convening a meeting at which it attempted to keep the brokers on board. The trial judge, Jack J, concluded that BGC and others had engaged in a tortious conspiracy by unlawful means in order to harm TB. BGC sought to overturn this by contending that, in essence, the true fault lay with TB whose conduct of the meeting with its brokers involved a repudiatory breach of the implied term of trust and confidence. That argument failed both at first instance and on appeal. Maurice Kay LJ said that the judge, in determining whether TB had behaved in a repudiatory fashion, had been right to consider TB's motivation. Kay LJ concluded[33]:

> "The issue is repudiatory breach in circumstances where the objectively assessed intention of the alleged contract-breaker towards the employees is of paramount importance. I have no doubt that the Judge [Jack J] approached this issue correctly. He referred ... to the question whether the conduct of the Tullett hierarchy 'considered objectively was conduct likely to destroy or seriously damage the relationship of trust and confidence between Tullett and the brokers in question'. ... In order to address the issue of repudiatory breach in the circumstances of this case, it was necessary for him to include an objective assessment of the true intention of the Tullett hierarchy. In so doing, he reached the conclusion that that intention was not to attack but to strengthen the relationship. This was a permissible and, in my view, correct finding, reached after a careful consideration of all the circumstances which had to be taken into account 'insofar as they bear on an objective assessment of the intention of the [alleged] contract breaker' (Eminence)."[34]

8-011 *Test (v): whether the breach deprives the innocent party of "substantially the whole benefit which it was the intention of the parties ... that he should obtain":* This test was suggested by Diplock LJ in the *HongKong Fir* case, in the context of intermediate or innominate terms (on which Ch.12).[35] According to this test, breach will justify termination only if it deprives

> "the [innocent party] of substantially the whole benefit which it was the intention of the parties ... that the charterers should obtain from the further performance of their own contractual undertakings".

Arguably, this criterion is pitched too high, in favour of the guilty party, and (from the innocent party's perspective) is unacceptably severe, presenting too high a hurdle. But there is no doubt that this formulation enjoys judicial currency. For example, it was used by Lord Diplock in *"The Afovos"*,[36] by Etherton C in *Urban 1 (Blonk Street) Ltd v Ayres*,[37] in *Valilas v Januzaj* by both Floyd LJ[38] and Arden LJ,[39] and in the *C & S Associates UK* case by Males J.[40]

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33 [2011] EWCA Civ 131; [2011] I.R.L.R. 420 at [27] per Maurice Kay LJ.

34 The internal quotation at the end of the cited passage is a reference to *Eminence Property Developments Ltd v Heaney* [2010] EWCA Civ 1168; [2011] 2 All E.R. (Comm) 223 at [63] per Etherton LJ.

35 *HongKong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 Q.B. 26 at 72 per Diplock LJ.

36 [1983] 1 W.L.R. 195 HL at 203 per Lord Diplock.

37 [2013] EWCA Civ 816; [2014] 1 W.L.R. 756 at [48] (see also *Ampurius Nu Homes Holdings Ltd v Telford Homes (Creekside) Ltd* [2013] EWCA Civ 577; [2013] 4 All E.R. 377).

38 [2014] EWCA Civ 436; [2015] 1 All E.R. (Comm) 1047 at [43]–[48] (noting a range of tests).

39 [2014] EWCA Civ 436; [2015] 1 All E.R. (Comm) 1047 at [59]: "I will use the formulation that asks whether the victim has been deprived of substantially the whole of the benefit of the contract. The expression 'going to the root of the contract' conveys the same point: the failure must be compared with the whole of the consideration of the contract and not just a part of it. There are other similar

8-012 In *Urban 1 (Blonk Street) Ltd v Ayres*,[41] Etherton C, adopting Lord Wilberforce's presentation in *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc ("The Nanfri")*, elided tests (iii) (iv) and (v) as follows[42]:

> "the contract-breaker will have repudiated the contract, or as it is sometimes put, renounced the contract, entitling the other party to terminate it, if the contract-breaker has demonstrated an intention never to carry out the contract or at any event, only to do so in a manner substantially inconsistent with his or her contractual obligations such as to deprive the other party of substantially the whole benefit which it was intended they should receive under the contract: *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc ('The Nanfri')* [1979] A.C. 757 at 778–779 (Lord Wilberforce citing passages from several other cases)."

8-013 *Test (vi): whether the breach "deprive[s] the injured party of a substantial part of the benefit to which he is entitled under the contract":* this test was stated as follows in *Decro-Wall International SA v Practitioners in Marketing Ltd*[43] per Buckley LJ:

> "to constitute repudiation, the threatened breach must be such as to deprive the injured party of a substantial part of the benefit to which he is entitled under the contract".

It will be noted that, unlike test (v) already considered, test (vi) is satisfied even if the default concerns (only) a substantial "part" of the contemplated contractual benefit. Etherton C in *Urban 1 (Blonk Street) Ltd v Ayres*[44] noted Lewison LJ's observation in *Ampurius Nu Homes Holdings Ltd v Telford Homes (Creekside) Ltd* that there is a manifest discrepancy, therefore, between tests (v) and (vi), that is, (whether the deprivation is of the "whole" or "part" of the intended contractual benefit). The following remarks by Lewison LJ in *Ampurius Nu Homes Holdings Ltd v Telford Homes (Creekside) Ltd* show that the courts have not yet made a final election whether to adopt test (v) and (vi)[45]:

> "[The earlier cases] adopt as the relevant test whether the breach has deprived the injured party of 'substantially the whole benefit' of the contract; which is the same test as that applicable to frustration. This sets the bar high. Other cases adopt a view that is more favourable to the injured party. Thus in *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 W.L.R. 361 ... Buckley LJ said: 'To constitute repudiation, the threatened breach must be such as to deprive the injured party of a substantial part of the benefit to which he is entitled under the contract'"

8-014 Lewison LJ added[46]:

> "On the face of it therefore there is a tension between the test of deprivation of

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expressions. I do not myself criticise the vagueness of these expressions of the principle since I do not consider that any satisfactory fixed rule could be formulated in this field."

40 *C & S Associates UK Ltd v Enterprise Insurance Co Plc* [2015] EWHC 3757 at [86].

41 [2013] EWCA Civ 816; [2014] 1 W.L.R. 756 at [44] (7) per Etherton C.

42 [2013] EWCA Civ 816; [2014] 1 W.L.R. 756 at [48] (see also *Ampurius Nu Homes Holdings Ltd v Telford Homes (Creekside) Ltd* [2013] EWCA Civ 577; [2013] 4 All E.R. 377).

43 [1971] 1 W.L.R. 361 CA at 380.

44 [2013] EWCA Civ 816; [2014] 1 W.L.R. 756 at [57].

45 *Ampurius Nu Homes Holdings Ltd v Telford Homes (Creekside) Ltd* [2013] EWCA Civ 577; [2013] 4 All E.R. 377 at [48].

46 *Ampurius Nu Homes Holdings Ltd v Telford Homes (Creekside) Ltd* [2013] EWCA Civ 577; [2013] 4 All E.R. 377 at [49].

'substantially the whole benefit' (Diplock LJ) and 'a substantial part of the benefit' (Buckley LJ). In *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc ('The Nanfri')* [1979] A.C. 757 Lord Wilberforce ... said: 'The difference in expression between these two last formulations does not, in my opinion, reflect a divergence of principle, but arises from and is related to the particular contract under consideration: they represent, in other words, applications to different contracts, of the common principle that, to amount to repudiation a breach must go to the root of the contract'."

8-015 In *Rice v Great Yarmouth BC*[47] Hale LJ adopted the present criterion, that is test (vi), by posing the question whether, as a result of (on those facts) a set of breaches, the innocent party: "would thereby be deprived of a substantial part of that which it had contracted for" or failure to supply (adequately) "aspects of the contract" which are "so important" that failure is "sufficient in itself" to justify termination.

8-016 But once more the tendency, to juxtapose or elide tests should be noted. For example, in the next quotation, the judge adopted the present test (test (vi)) and then presented the issue by reference to test (vii) (see para.8-017). Thus, in *Future Publishing Ltd v Edge Interactive Media Inc*[48] Proudman J said:

"The test for fundamental breach, approved by Lord Wilberforce in *Federal Commerce v Molena Alpha* [1979] A.C. 757 at 778–9 is that expounded by Buckley LJ in *Decro-Wall v Practitioners in Marketing* [1971] 1 W.L.R. 361 at 380: 'the breach must be such as to deprive the injured party of a substantial part of the benefit to which he is entitled under the contract? Will the consequences of the breach be such that it would be unfair to the injured party to hold him to the contract and leave him to his remedy in damages'."

8-017 *Test (vii) whether it would be "unfair" on the innocent party to confine him to damages, without the further option of termination:* this test was suggested by Buckley LJ in the *Decro-Wall* case[49]:

"Will the consequences of the breach be such that it would be unfair to the injured party to hold him to the contract and leave him to his remedy in damages ...?"

It is submitted that Buckley LJ's formulation in the *Decro-Wall* case is an unattractively nebulous test. And this approach should not be adopted, for these reasons: (i) the "Buckley LJ *Decro-Wall*" test would inject a large element of ex post facto subjective evaluation; and (ii) it would create great uncertainty; and (iii) because it manifests a bias in favour of non-termination, by suggesting that termination is a "super-response", this approach tends to undercut the legitimate expectations of the innocent party that the contract would be performed properly and not reconstituted at the whim of the guilty party, leaving the innocent party only with the opportunity to sue for damages.

8-018 Lord Wilberforce in *Federal Commerce & Navigation Co v Molena Alpha Inc ("The Nanfri")*[50] did not refer to test (vii) and, impliedly, did not find it attractive.

[47] (2000) *Times*, 26 July; (2001) 3 L.G.L.R. 4 CA at [38]; distinguished in *Alan Auld Associates Ltd v Rick Pollard Associates* [2008] EWCA Civ 655; [2008] B.L.R. 419 at [17] and [20] as a case where there was a "raft of obligations" of different significance.

[48] [2011] EWHC 1489 (Ch); [2011] E.T.M.R. 50 at [60] per Proudman J.

[49] [1971] 1 W.L.R. 361 CA at 380.

[50] [1979] A.C. 757 HL at 778–779: "The difference in expression between these two last formulations [viz. (iii) and (iv) cited in the preceding paragraph of the text] does not, in my opinion, reflect a divergence of principle, but arises from and is related to the particular contract under consideration: they represent, in other words, applications to different contracts, of the common principle that, to amount to repudiation a breach must go to the root of the contract."

By contrast, Lord Fraser did adopt test (vii) in that case.[51] But it is submitted that Buckley LJ's test, test (vii), should not be allowed to "catch on". Indeed it should be excised.

8-019 **Conclusion on the battle of the rival tests** It will be helpful to list the tests which have emerged: (i) the "breach going to the root" test; (ii) breach (notably, inexcusable delay) rendering the contract radically different from that originally undertaken; (iii) conduct "substantially inconsistent with his contractual obligation"; (iv) conduct is repudiatory if it objectively indicates an intention to abandon and altogether refuse to perform the contract; (v) whether the breach deprives the innocent party of "substantially the whole benefit which it was the intention of the parties that [the innocent party] should obtain from the further performance of" the contract; (vi) whether the breach "deprive[s] the injured party of a substantial part of the benefit to which he is entitled under the contract"; and (vii) whether it would be "unfair" on the innocent party to confine him to damages, without the further option of termination.

8-020 Tests (i) (*breach which "goes to the root" of the contract), test (ii) (delay rendering the contract radically different from that originally undertaken) and test (iii) ("substantially inconsistent with his contractual obligations"*) should prevail. Each of these three tests adopts essentially the same criterion, although in different language. They are attractive. The degree of seriousness must be such that the innocent party has a clear justification for quitting the contract. For this purpose, the level of default must be much greater than trivial, but need not be total, nor is it necessary that it should be almost total. The level is reliably conveyed by tests (i) to (iii).

8-021 Test (iv) (*conduct is repudiatory if it objectively indicates an intention to abandon and altogether refuse to perform the contract*) is confusing because it invites overlap, factual and conceptual, with renunciation and, in particular, implied renunciation by conduct (para.6-005). But renunciation is a separate category of serious breach, examined in Ch.6.

8-022 Test (v) (*whether the breach deprives the innocent party of "substantially the whole benefit which it was the intention of the parties...that he should obtain"*) is arguably too severe a formulation, although it is sometimes used by English judges, for example, by both Floyd LJ[52] and Arden LJ[53] in *Valilas v Januzaj* and Males J in the *C & S Associates UK* case.[54]

8-023 Test (vi) (*whether the breach "deprive[s] the injured party of a substantial part of the benefit to which he is entitled under the contract"*), although not as severe as test (v), is easily confused with it and offers scope for confusion, therefore.

8-024 As for test (vii) (*"unfair to the injured party to hold him to the contract"*), this test is too nebulous, and it is furthermore unattractively weighted against termination. It should not be adopted.

8-025 It follows that the most attractive approach is to adopt either test (i) or test (iii)

[51] [1979] A.C. 757 at 783: "I shall adopt the formulation by Buckley LJ in *Decro-Wall International SA v Practitioners in Marketing Ltd* (1971) as follows: 'Will the consequences of the breach be such that it would be unfair to the injured party to hold him to the contract and leave him to his remedy in damages as and when a breach or breaches may occur? If this would be so, then a repudiation has taken place'."

[52] [2014] EWCA Civ 436; [2015] 1 All E.R. (Comm) 1047.

[53] [2013] EWCA Civ 816; [2014] 1 W.L.R. 756 at [59].

[54] *C & S Associates UK Ltd v Enterprise Insurance Co Plc* [2015] EWHC 3757 at [86].

and, in the case of delay, test (ii): (i) *the "breach going to the root" test*; or (ii) *conduct "substantially inconsistent with his contractual obligation"* (or (iii) *delay rendering the contract radically different from that originally undertaken*). Test (iii) is a specialised test peculiar to the problem of delay. Otherwise, and in the interest of economy, perhaps test (i) alone[55] should be adopted, suitably supplemented by reference to illustrative cases (for example, the discussion of repudiatory facts in the text at para.8-026 ff).

8-026 **The "high bar" of repudiatory breach** Males J said in the *C & S Associates UK* case[56] that repudiation requires a high level of default, so as to go to the root of the contract, having regard to a range of factors (see the quotation in para.8-027):

> "There was no real dispute between the parties as to the principles to be applied, which can conveniently be taken from Chitty on Contracts, 32nd edn (2015), Vol.1 para.24-041, citing among other cases *Ampurius Nu Homes Holdings Ltd v Telford Homes (Creekside) Ltd* [2013] EWCA Civ 577; [2013] 4 All E.R. 377 and *Valilas v Januzaj* [2014] EWCA Civ 436; [2015] 1 All E.R. (Comm) 1047: '... regard must be had to the nature and consequences of the breach in order to determine whether this right has arisen. The question whether a breach of an intermediate term is sufficiently serious to entitle the innocent party to treat himself as discharged is to be determined "by evaluating all the relevant circumstances". In conducting this inquiry, the court is not exercising a discretion, but is engaged in a fact-sensitive inquiry which involves "a multi-factorial assessment" and the use of various "open-textured expressions". The bar which must be cleared before there is an entitlement in the innocent party to treat himself as discharged is therefore a "high" one. A number of expressions have been used to describe the circumstances that warrant discharge, the most common being that the breach must 'go to the root of the contract'."

8-027 Males J added in the *C & S Associates UK* case[57]:

> "It was common ground also that in determining whether a breach is repudiatory the questions identified by Lewison LJ at [51] and [52] of his judgment in *the Ampurius Nu Homes Holdings Ltd v Telford Homes (Creekside) Ltd* [2013] EWCA Civ 577; [2013] 4 All E.R. 377 would be relevant: 'Whatever test one adopts, it seems to me that the starting point must be to consider what benefit the injured party was intended to obtain from performance of the contract ... The next thing to consider is the effect of the breach on the injured party. What financial loss has it caused? How much of the intended benefit under the contract has the injured party already received? Can the injured party be adequately compensated by an award of damages? Is the breach likely to be repeated? Will the guilty party resume compliance with his obligations? Has the breach fundamentally changed the value of future performance of the guilty party's outstanding obligations?'"

8-028 Males J further commented[58]:

> "For present purposes I must assume without deciding that it will be able to do so, and that the breaches which can be proved are serious and extensive. It seems to me that, if proved on a sufficient scale, the breaches alleged are undoubtedly capable of satisfying the criteria for a repudiatory breach identified above. Enterprise's case, put bluntly, is that far from receiving the services of a specialist claims handler exercising an appropriate

[55] As preferred by M.G. Bridge, *The Sale of Goods*, 4th edn (Oxford: Oxford University Press, 2017), 10.30, 10.31.
[56] *C & S Associates UK Ltd v Enterprise Insurance Co Plc* [2015] EWHC 3757 at [78].
[57] *C & S Associates UK Ltd v Enterprise Insurance Co Plc* [2015] EWHC 3757 at [79].
[58] *C & S Associates UK Ltd v Enterprise Insurance Co Plc* [2015] EWHC 3757 at [86].

> level of skill and care, it turns out to have entrusted the handling of its third party motor claims to a company whose systems and procedures were fundamentally flawed and which repeatedly acted incompetently. If that proves to be so, it should not be difficult to conclude that the breaches had the effect of depriving Enterprise of substantially the whole benefit which it was intended to obtain from the contract and thus that they were sufficiently serious to entitle Enterprise to terminate the contract."

8-029 **Repudiation found by reference to a range of factors** In *Future Publishing Ltd v Edge Interactive Media Inc*[59] the defendant companies, acting through Dr Langdell, had breached an agreement with the claimants that prevented the defendants from using a trademarked logo. Proudman J concluded that the breach was a repudiation, going to the root of the contract, taking into account three factors (although it should be noted that none is necessary and each is directed at the central determination whether breach goes to the root of the contract): (i) whether the breach involves non-compliance with one or more "critically important" obligations or terms; (ii) whether the breach was exacerbated by being deliberate (but it should be noted that there is no special category of general breach based on "deliberateness"; see para.5-029); and (iii) the wider and long-term impact on the claimant's commercial reputation if it remained associated with the defendant. Proudman J said[60]:

> "the breaches are of critically important terms of the [contract]. They are breaches of the terms regulating the ongoing obligations of the parties. ... Where, as here, the parties have agreed terms which are to apply to both sides, the defendants' continuing refusal to comply with their side of the bargain is inconsistent with a right to insist on the contract continuing in force. Dr Langdell on behalf of the defendants has made it quite clear before and during this trial that they intend to continue to use their versions of the EDGE logo [in breach, as it was now decided, of the agreement]."

8-030 Proudman J added[61]:

> "Secondly, the defendants' breaches were deliberately calculated to cause confusion. Thirdly, that confusion has necessarily caused substantial damage to the claimant's reputation."

8-031 **Breach to be assessed in the context of the entire relationship** In a continuing or "relational" contract, it has been said that the test is not whether something bad, even something quite heinous, indeed even something dishonest and under-hand, has occurred, but whether the event or series of events, taking also into account the possibility or likelihood of recurrence, has destroyed or sufficiently damaged the parties commercial or working relationship. In *Bristol Groundschool v Intelligent Data Capture Ltd* Deputy High Court judge Richard Spearman QC held that no repudiatory breach had occurred when a party hacked into the other's computer during their contractual relationship. The event was now "historic" and did not destroy or wholly undermine their continuing commercial relationship[62]:

> "(xii) The conduct complained of was commercially unacceptable...(xiii) Nevertheless, I do not consider that the above breaches were repudiatory [because] ... these breaches

[59] [2011] EWHC 1489 (Ch); [2011] E.T.M.R. 50.
[60] [2011] EWHC 1489 (Ch); [2011] E.T.M.R. 50 at [63] per Proudman J.
[61] [2011] EWHC 1489 (Ch); [2011] E.T.M.R. 50 at [64] per Proudman J.
[62] [2014] EWHC 2145 (Ch) at [196].

tive in seeking to end the contract was that there had been a significant fall in the market rate for hire of such vessels, so that they were now locked into an uneconomic, or at least financially unattractive, contract.[5] The charterer was seeking to go elsewhere for a cheaper and better service

12-003 The Court of Appeal in the *Hongkong Fir* case (1962) held that the express terms as to seaworthiness should not be treated as conditions, but instead as intermediate terms. Furthermore, termination was not justified on these facts. They noted that the "seaworthiness" obligations could be breached in a variety of ways, some of them serious, others relatively minor. Diplock LJ regarded the terms as intermediate. Upjohn LJ, adopting a similar approach[6]; agreed that, on the *facts which had occurred*, the only remedy was damages rather than termination of the contract.[7] The third judge, Sellers LJ, in fact classified the term as a "warranty",[8] but that characterisation cannot be accepted. This was a set of intermediate terms and the level of contractual default fell short of the level required to justify termination.

II. Criteria for Identifying Intermediate Terms

12-004 In Ch.10, during discussion of conditions, we noted the criteria for classifying a term as a condition or intermediate term, or occasionally as a pure warranty (if a warranty, incapable of giving rise to the right to terminate). As Hamblen LJ noted in *Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd ("The Spar Draco")*,[9] the intermediate term has become the "default term" in the sense that a promissory obligation will be categorised as such unless the obligation can be upgraded to a condition, applying the tests of (i) statutory characterisation as a condition; (ii) party designation of the term as having that quality; or (iii) (in the absence of (i) or (ii)) judicial determination that the term is a condition, based on either precedent or construction. Lists of factors suggested by commentators are presented at para.10.083. Attention was also given at para.10.084 ff, to judicial guidelines emerging from the following cases: *State Trading Corp of India Ltd v M Golodetz Ltd*[10] and *Ark Shipping Co LLC v Silverburn Shipping (IoM) Ltd*. For the sake of economy, that discussion will not be repeated here. It is enough to list the factors which were considered in those two cases.[11]

12-005 First, in the *State Trading Corp of India* case, Kerr LJ referred to these factors[12]:

5 [1962] 2 Q.B. 1, at 39 (Salmon J).
6 [1962] 2 Q.B. 1 CA, at 62.
7 [1962] 2 Q.B. 1 CA, at 64.
8 [1962] 2 Q.B. 1 CA, at 60.
9 [2016] EWCA Civ 982; [2016] 2 Lloyd's Rep. 447 at [92]: "The modern English law approach to the classification of contractual terms is that a term is innominate unless it is clear that it is intended to be a condition or a warranty—see, for example, *Cehave N.V. v Bremer Handelgesellschaft ('The Hansa Nord')* [1976] Q.B. 44 at 70H–71B (Roskill LJ); *Bremer v Vanden* [1978] 2 Lloyd's Rep. 109 at 113, HL (Lord Wilberforce); *Bunge v Tradax* at 715H–716A (Lord Wilberforce) at 717G-H (Lord Scarman) and at 727E (Lord Roskill). As Lord Scarman stated at 717: 'Unless the contract makes it clear, either by express provision or by necessary implication arising from its nature, purpose, and circumstances.... that a particular stipulation is a condition or only a warranty, it is an innominate term, the remedy for a breach of which depends upon the nature, consequences, and effect of the breach.'"
10 [1989] 2 Lloyd's Rep. 277 at 283 col.2 to 284 per Kerr LJ.
11 [2019] EWCA Civ 1161; [2019] 2 Lloyd's Rep. 603.
12 [1989] 2 Lloyd's Rep. 277 at 283 col.2 to 284.

(i) it is not decisive[13] that a commercial contract prescribes a precise time for compliance;
(ii) it might be that the relevant obligation is relatively minor and not central to the contract;
(iii) there might be that there are internal points of construction tending against the conclusion that the obligation is a condition (in that case a similar obligation elsewhere in the contract was expressly described as *not being a condition*);
(iv) the loss flowing from breach might not be great in comparison with other sums payable, and possible sources of loss capable of arising, under the same contract;
(v) the relevant obligation might not be one which needs to be satisfied before the other contractual machinery can proceed; and
(vi) it might be significant that the contract does not form part of a "string"[14] of transactions.

Next, the Court of Appeal in *Ark Shipping Co LLC v Silverburn Shipping (IoM) Ltd* considered these factors (reaching the conclusion that a term in a 15-year demise charterparty requiring the charterer to maintain at all times the vessels' classification was an intermediate term): **12-006**

(i) the absence of express stipulation that it was a condition[15];
(ii) the clause did not require performance at a particular time (but rather maintenance of a complex set of documentary statuses)[16];
(iii) there was no issue of interdependent performance[17];
(iv) admittedly, there was only one type of breach possible here, rather than a range, but this factor was outweighed by the others[18];
(v) the relevant clause was part of a set of repair and maintenance-related obligations, and these other obligations were not conditions[19];

13 *Bunge Corp New York v Tradax SA* [1981] 1 W.L.R. 711 HL at 719 per Lord Lowry: "The treatment of time limits as conditions in mercantile contracts does not appear to me to be justifiable by any presumption of fact or rule of law, but rather to be a practical expedient founded on and dictated by the experience of businessmen." But Lord Wilberforce at 715–716 indicated that the court might lean in favour of the condition analysis if the clause is a time obligation (other than for payment of money) and it appears in a mercantile contract: "It remains true, as [Roskill LJ] has pointed out in *Cehave NV v Bremer Handelsgesellschaft mbH ('The Hansa Nord')* [1976] Q.B. 44 at 70–71, that the courts should not be too ready to interpret contractual clauses as conditions. And I have myself commended, and continue to commend, the greater flexibility in the law of contracts to which *Hongkong Fir points the way (Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 W.L.R. 989 at 998). But I do not doubt that, in suitable cases, the courts should not be reluctant, if the intentions of the parties as shown by the contract so indicate, to hold that an obligation has the force of a condition, and that indeed they should usually do so in the case of time clauses in mercantile contracts." Roskill LJ said in *"The Hansa Nord"* [1976] Q.B. 44 CA at 70–71: "a court should not be over ready, unless required by statute or authority so to do. to construe a term in a contract as a 'condition' any breach of which gives rise to a right to reject rather than as a term any breach of which sounds in damages".
14 *Contrasting Bunge Corp New York v Tradax SA* [1981] 1 W.L.R. 711 HL (noted F. Reynolds, "Discharge of Contract by Breach" (1981) 97 L.Q.R. 541; J. Carter, "Classification of Contractual Terms: The New Orthodoxy" [1981] C.L.J. 219).
15 [2019] EWCA Civ 1161; [2019] 2 Lloyd's Rep. 603 at [54].
16 [2019] EWCA Civ 1161; [2019] 2 Lloyd's Rep. 603 at [55].
17 [2019] EWCA Civ 1161; [2019] 2 Lloyd's Rep. 603 at [56].
18 [2019] EWCA Civ 1161; [2019] 2 Lloyd's Rep. 603 at [57].
19 [2019] EWCA Civ 1161; [2019] 2 Lloyd's Rep. 603 at [58]–[61].

(vi) there was a troubling widening of the category of documents, beyond the classification certificate, to "other required certificates in force at all times[20];

(vii) even the discrete obligation to maintain insurance was not a condition[21];

(viii) the consequences of breach would vary a lot: ranging across "trivial, minor or very grave consequences" (at [77] the underlying factual situation "peeped out", Gross LJ noting that the lapse in certification took place during a short period when the vessel, a tug, was in dry dock undergoing repair)[22];

(ix) the advantages of certainty are outweighed here by the danger of "trivial breaches having disproportionate consequences".[23]

12-007 In *Wuhan Ocean Economic & Technical Cooperation Co Ltd, Nantong Huigang Shipbuilding Co Ltd v Schiffahrts-Gesellschaft ("Hansa Murcia") MBH & Co KG* (2012)[24] Cooke J was asked to categorise an implied term that sellers of a ship would procure (within a reasonable time) extension of a guarantee in respect of a possible refund of monies by the seller to the purchaser. He held that this should be regarded as an intermediate term and not as a warranty. He noted[25]:

> "The Sellers relied on *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 Q.B. 26 and *Woodar v Wimpey* [1980] 1 W.L.R. 277 for the proposition that, where a breach of a term could never deprive the other party of substantially the whole benefit of the contract or strike at its root, that term could only be a warranty."

Cooke J concluded[26]: "The term must be an innominate term because a breach could deprive the Buyers of substantially the whole benefit of the Contract, if they did not institute arbitration and thus extend the guarantee."

III. DOES THIS BREACH OF THE INTERMEDIATE TERM ENTITLE THE INNOCENT PARTY TO TERMINATE

12-008 **Level of default required: competing formulations** Diplock LJ[27] (but not Upjohn LJ)[28] in the *Hongkong Fir* case (1962) suggested that the true test is to consider whether the breach's effect has been to "deprive the [innocent party] of substantially the whole benefit which it was the intention of the parties that he should obtain".[29] Judges continue to recant this formulation, including in the wider context of "repudiation".[30] In fact the terminology is not stable and a various of formulations have been adopted. Thus Lewison LJ in *Urban 1 (Blonk Street) Ltd v*

[20] [2019] EWCA Civ 1161; [2019] 2 Lloyd's Rep. 603 at [62]–[65].
[21] [2019] EWCA Civ 1161; [2019] 2 Lloyd's Rep. 603 at [66]–[71].
[22] [2019] EWCA Civ 1161; [2019] 2 Lloyd's Rep. 603 at [72]–[77]).
[23] [2019] EWCA Civ 1161; [2019] 2 Lloyd's Rep. 603 at [78] and [81].
[24] [2012] EWHC 3104 (Comm); [2013] 1 All E.R. (Comm) 1277; [2013] 1 Lloyd's Rep. 273, at [32]–[39].
[25] [2012] EWHC 3104 (Comm); [2013] 1 All E.R. (Comm) 1277; [2013] 1 Lloyd's Rep. 273, at [32].
[26] [2012] EWHC 3104 (Comm); [2013] 1 All E.R. (Comm) 1277; [2013] 1 Lloyd's Rep. 273, at [39].
[27] [1962] 2 Q.B. 1 CA, at 69–70.
[28] [1962] 2 Q.B. 1, at 64
[29] Diplock LJ's criterion ([1962] 2 Q.B. 1 CA, at 69–70) was applied, but the facts were held to fall short of this requirement, in *H TV Ltd (formerly Can Associates TV Ltd) v ITV2 Ltd* [2015] EWHC 2840 (Comm), at [277] and [278] per Flaux J.
[30] e.g. *Flanagan v Liontrust Investment Partners LLP* [2015] EWHC 2171 (Ch); [2015] Bus. L.R. 1172; [2016] 1 B.C.L.C. 177, at [209] per Henderson J.

Ayres (2013) said that the innocent party is entitled to terminate the contract for breach of an intermediate term only if the resulting harm[31]:

> "was such as to go to the root of the contract, that is to say it deprived the defendants of substantially the whole benefit which it was intended they should have under the contract; or ... the claimant showed that it had no intention of carrying out the contract or, at any event, only to do so in a manner substantially inconsistent with the claimant's contractual obligations such as to deprive the defendants of substantially the whole benefit which it was intended they should receive under the contract."

12-009 It is apparent from both Lewison LJ's analysis in *Urban 1 (Blonk Street) Ltd v Ayres* (2013)[32] and from Arden LJ's remarks in *Valilas v Januzaj* (2014)[33] that some judges regard the "going to the root" idea as a calibration of seriousness equivalent to the "substantial deprivation of the whole benefit" test:

> "The common law adopts open-textured expressions ... I will use the formulation that asks whether the victim has been deprived of substantially the whole of the benefit of the contract. The expression 'going to the root of the contract' conveys the same point ... There are other similar expressions." (The relevant passage is quoted in full at para.8-001.)

12-010 But it is suggested, with respect, that it is arguable that Diplock LJ's test imposes on the innocent party a very high threshold., requiring the innocent party to show that breach on the facts has deprived him "of substantially the whole benefit which it was the intention of the parties that he should obtain".[34] For many people, the "going to the root" notion (suggesting a truly but not catastrophically serious default) would be understood to operate as a less demanding criterion than breach which involves, as it were, almost total wipe-out of performance (the "substantial deprivation of the whole benefit" test). If so, the further issue arises: should it be enough that the breach is serious and "goes to the root"? There has been inconclusive re-examination of this issue.[35] It is interesting that Lord Denning MR in *"The Hansa Nord"* (1976) referred only to Upjohn LJ's "breach going to the root" formulation (made in the *Hongkong Fir* case (1962)),[36] and that Lord Denning made no reference to Diplock LJ's (apparently) more exacting formulation (loss of "substantially the whole benefit") in the *Hongkong Fir* case.[37]

12-011 Judicial usage indicates that the courts are using these phrases in the knowledge that they are mere short-hand for a wider inquiry into the seriousness of breach and the overall assessment whether termination is an appropriate response to the relevant default. For example, in the context of an intermediate term, Males J said

[31] [2013] EWCA Civ 816; [2014] 1 W.L.R. 756, at [48] (see also *Ampurius Nu Homes Holdings Ltd v Telford Homes (Creekside) Ltd* [2013] EWCA Civ 577; [2013] 4 All E.R. 377).
[32] [2013] EWCA Civ 816; [2014] 1 W.L.R. 756, at [48] (see also *Ampurius Nu Homes Holdings Ltd v Telford Homes (Creekside) Ltd* [2013] EWCA Civ 577; [2013] 4 All E.R. 377).
[33] [2014] EWCA Civ 436; [2015] 1 All E.R. (Comm) 1047, at [59] (considered by Males J in *C & S Associates UK Ltd v Enterprise Insurance Co Plc* [2015] EWHC 3757, at [78] and [79]).
[34] [1962] 2 Q.B. 1 CA, at 69–70.
[35] *Ampurius Nu Homes Holdings Ltd v Telford Homes (Creekside) Ltd* [2013] EWCA Civ 577; [2013] 4 All E.R. 377, at [38]–[50] per Lewison LJ (considered by Males J in *C & S Associates UK Ltd v Enterprise Insurance Co Plc* [2015] EWHC 3757, at [78] and [79]); *Urban 1 (Blonk Street) Ltd v Ayres* [2013] EWCA Civ 816; [2014] 1 W.L.R. 756, at [57] per Etherton C.
[36] [1962] 2 Q.B. 1 CA, at 64.
[37] [1976] Q.B. 44 CA, at 60–1 (citing Upjohn LJ in *HongKong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 Q.B. 1 CA, at 64).

in the *C & S Associates UK* case (2015)[38] that termination will be justified if there is a high level of default, so as to go to the root of the contract, having regard to a range of factors:

> "the court is not exercising a discretion, but is engaged in a fact-sensitive inquiry which involves 'a multi-factorial assessment' and the use of various 'open-textured expressions'. The bar which must be cleared before there is an entitlement in the innocent party to treat himself as discharged is therefore a 'high' one. A number of expressions have been used to describe the circumstances that warrant discharge, the most common being that the breach must 'go to the root of the contract'."

It is submitted that the UK Supreme Court might usefully re-open this question and that the test justifying termination of an intermediate term should be: "was the breach serious, as opposed to trivial or insignificant, in its impact?" An attractive lowering of the bar for termination for breach of an intermediate term is discernible in the leading Australian decision. The High Court of Australia in *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007)[39] said that the intermediate term doctrine permits termination for "serious and substantial breaches of contract". The same court appeared to treat the phrase "breach going to the root of the contract" and breach depriving the innocent party of "a substantial *part* of the contract" as synonymous.[40] It is submitted that it should be enough if the breach of an intermediate term produces very serious or substantial adverse consequences for the innocent party so that termination is a proportionate and reasonable response.

12-012 **Factors relevant to the issue whether termination is appropriate for breach of an intermediate term** There has been one judicial statement of relevant factors and, as we shall see, some textbook lists. In *Ampurius Nu Homes Holdings Ltd v Telford Homes (Creekside) Ltd* (2013) Lewison LJ posed these questions[41]:

> "The next thing to consider is the effect of the breach on the injured party. What financial loss has it caused? How much of the intended benefit under the contract has the injured party already received? Can the injured party be adequately compensated by an award of damages? Is the breach likely to be repeated? Will the guilty party resume compliance with his obligations? Has the breach fundamentally changed the value of future performance of the guilty party's outstanding obligations?"

12-013 In *Seadrill Management Services Ltd v OAO Gazprom* Flaux J concluded that the *HongKong Fir* test had not been satisfied and that the facts disclosed an instance of negligence in the performance of a contract for supply of a drilling rig which did not go to the root of the contract or deprive the hiring party of substantially the whole of the expected benefit.[42]

12-014 McKendrick compiles a list of factors which might be relevant to the assessment whether to declare that termination is justified in this context (numbering

[38] *C & S Associates UK Ltd v Enterprise Insurance Co Plc* [2015] EWHC 3757, at [78].
[39] [2007] HCA 61; (2007) 82 A.L.J.R 345; (2008) 241 A.L.R. 88, at [52] H.Ct. Aust. (Gleeson CJ, Gummow, Heydon, Crennan JJ).
[40] [2007] HCA 61; (2007) 82 A.L.J.R 345; (2008) 241 A.L.R. 88, at [54] and [71] H.Ct. Aust.
[41] [2013] EWCA Civ 577; [2013] 4 All E.R. 377, at [52].
[42] [2009] EWHC 1530 (Comm); [2010] 1 Lloyd's Rep. 543; affm.'d [2010] EWCA Civ 691; [2011] 1 All E.R. (Comm) at [225]–[246].

added here)[43]:

> "(1) the benefit which it was intended that the innocent party would obtain from performance … , (2) the losses suffered by the innocent party … (3) the cost of making performance comply with the terms of the contract, (4) the value of the performance that has been received by the innocent party, (5) the willingness of the party in breach to make good the consequences of the breach, (6) the likelihood of a further breach by the party in breach, and (7) the adequacy of damages as a remedy to the innocent party. Given the range of factors … and their generality, the balancing of these factors must, at the end of the day, depend to a large extent upon the facts of the individual case."

Similarly, Carter suggests that, when deciding whether breach of an intermediate term justifies termination in the particular case, the courts will take into account[44]: **12-015**

> "(a) any detriment caused, or likely to be caused, by the breach;
> (b) any delay caused, or likely to be caused, by the breach;
> (c) the value of any performance received by tendered to the [innocent party];
> (d) the cost of making any performance, given or tendered by the party in breach, conform with the requirements of the contract;
> (e) any offer by the party in breach to remedy the breach;
> (f) whether the party in breach has previously breached the contract or is likely to breach it in the future; and
> (g) whether the [innocent party] will be adequately compensated by an award of damages in respect of the breach."

Date for determining whether breach was serious enough to justify termination The Court of Appeal in *Ampurius Nu Homes Holdings Ltd v Telford Homes (Creekside) Ltd* (2013) made clear that the relevant date is the time when the innocent party purports justifiably to terminate for repudiation (including, as on the facts of that case, breach of an intermediate terms, when the severity of the breach is to be assessed), and not the earlier date of actual breach.[45] This is because matters might have changed in the interval (however, short it might be) between breach and the decision to terminate. For example, as in the *Ampurius* case, the guilty party might have taken steps towards curing or mitigating his earlier default.[46] Lewison LJ said[47]: **12-016**

> "There are three points which emerge from this [analysis of the statements in the *HongKong Fir* case and other cases]. First, the task of the court is to look at the position as at the date of purported termination of the contract even in a case of actual rather than anticipatory breach. Second, in looking at the position at that date, the court must take into account any steps taken by the guilty party to remedy accrued breaches of contract. Third,

[43] E. McKendrick, *Text, Cases, and Materials*, 8th edn (Oxford: Oxford University Press, 2018), p.772; for a similar list, US *Restatement on Contracts* (2d) s.241, on which G.H. Jones (with P. Schlechtriem) "Breach of Contract" in *International Encyclopaedia of Comparative Law* Vol.VII (Contracts in General), (Tübingen: Mohr Siebeck Publishing, 1999), 15–131.
[44] J.W. Carter, *Carter's Breach of Contract*, 2nd edn (Oxford: Hart Publishing, 2019), 6.57.
[45] [2013] EWCA Civ 577; [2013] 4 All E.R. 377, at [43], citing Diplock LJ in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 Q.B. 26 CA, at 72 (the *Ampurius* case was considered in *Bristol Groundschool v Intelligent Data Capture Ltd* [2014] EWHC 2145 (Ch), at [178]–[196], on the latter case see text at para.8-031).
[46] [2013] EWCA Civ 577; [2013] 4 All E.R. 377, at [44] and [63] per Lewison LJ (approved by Longmore LJ at [79]).
[47] [2013] EWCA Civ 577; [2013] 4 All E.R. 377, at [44] per Lewison LJ.

mercial value of the goods at about £65,000).[57] It appears that the product had not deteriorated to the point that it could not be used lawfully and successfully to produce animal feed (and Lord Denning MR emphasised that the goods had been successfully used to produce animal feed and that the buyer had not shown any loss caused by the fact that the pellets had been less than perfect on arrival). The seller contended successfully that the buyer had not been entitled to reject the goods, and therefore the buyer should have been confined to a claim for damages. The price had already been paid before the goods arrived.

12-023 The result of the Court of Appeal's decision, therefore, was that the seller was entitled to retain the price, less a modest price allowance to reflect the fact that the pellets had been less than perfect:

> "the buyers were not entitled to reject the goods. They are, however, entitled to damages for the difference in value between the damaged goods and sound goods on arrival at Rotterdam. The case must be remitted to the board for this to be determined."[58]

12-024 In *"The Hansa Nord"* (1976) the Court of Appeal classified the present obligation as an intermediate term, rather than an express condition. It also held that there had been no breach of the (then applicable) statutory implied term that the goods must be of "merchantable quality" on the present facts.[59] So the court revoked the arbitrator's order for repayment of the price, and instead remitted the case for assessment of damages, based on the difference in the value of the goods supplied and of sound goods.

V. The Pros and Cons of the Intermediate Term

12-025 The question whether breach of an intermediate term justifies termination requires assessment of the consequences of breach. If those consequences are really severe, the innocent party can justifiably terminate. Thus the doctrine of the intermediate term involves a more flexible approach. It is intended to work in favour of the guilty party because (unlike the operation of promissory "conditions") the intermediate term can shields the guilty party from the innocent party's overzealous or punctilious demand for precise performance. In this way, the intermediate term approach is certainly an antidote to a ("draconian") regime of "zero-tolerance", where the innocent party can terminate a contract for technical and trivial breach, snapping at the slightest opportunity to end the contract.

12-026 But this antidote comes at a price. First, it introduces considerable uncertainty in the application of contractual terms both (i) at the stage when it must be determined whether a term is or is not an intermediate term, and (ii) at the subsequent stage when the court must assess whether breach on the facts of the case was so serious that it justifies the innocent party's decision to terminate the contract. These issues can divide both arbitral panels and judges. Obtaining a final answer might require protracted and expensive litigation, and the decision might be taken on more than one appeal. A second problem is that recognition of intermediate terms can induce sloppiness in performance of commercial contexts, because the guilty party will know that the contract cannot be terminated unless the breach is really

[57] J.W. Carter, *Carter's Breach of Contract*, 2nd edn (Oxford: Hart Publishing, 2019), [6-72], fn.438.

[58] *"The Hansa Nord"* [1976] Q.B. 44 CA, at 63–4 per Lord Denning MR.

[59] [1976] Q.B. 44 CA, at 61–3, 77, 79, considering Sale of Goods Act 1893 s.14(2); now Sale of Goods Act 1979 s.14(2), which is concerned with the implied term that goods should be of "satisfactory quality", as amplified by s.14(2A)–(2F).

bad, and instead the innocent party is confined to the less dramatic remedy of seeking compensatory damages.

IV. Was the *Hongkong* Decision the Re-invention of the Wheel?

12-027 The jury is arguably still out on this question, although the more likely answer is that the Court of Appeal was merely articulating a legal approach or concept which was already embodied in the nineteenth century case law. Thus Lord Wilberforce in the *Schuler* case (1974)[60] and Lord Denning in *"The Hansa Nord"* (1976)[61] suggested that the category of intermediate terms had ante-dated the *HongKong* decision in 1962 and that it could be traced far back into the nineteenth century and well before the 1893 Sales of Goods Act (now the 1979 Act). According to these judicial historians, the existence of that third category of promissory term, intermediate between conditions and warranties, had become obscured by the binary structure of the sale of goods legislation. It has been suggested that the jurist responsible for this conceptual over-simplification was Sir Frederick Pollock. The finger was pointed at this celebrated commentator by Robert Goff QC and Brian Davenport during argument before the Court of Appeal in *"The Mihalis Angelos"*,[62] and this contention was adopted by Lord Denning MR in that case.[63] According to this view, Pollock introduced in the late nineteenth century the so-called condition/

[60] [1974] A.C. 235 HL, at 262 F: "I do not think this was anything new …".

[61] *"The Hansa Nord"* [1976] 1 Q.B. 44 CA, at 60.

[62] *Maredelanto Compania Naviera SA v Bergbau-Handel GMBH ("The Mihalis Angelos")* [1971] 1 Q.B. 164, at 187 (counsel):

> "The *Hongkong Fir* case re-established the law as accepted in the mid-nineteenth century, viz., that the right to determine depends on whether the breach goes to the root of the contract: see *Freeman v Taylor* (1831) 8 Bing. 124, at 132, 138; *Glaholm v Hays* (1841) 2 Man. & G. 257, at 266; *Clipsham v Vertue* (1843) 5 Q.B. 265; *Ollive v Booker* (1847) 1 Exch. 416; *Tarrabochia v Hickie* (1856) 1 H. & N. 183, … *Behn v Burness* 1 B. & S. 877 at 878, 881, 887 and (1863) 3 B & S 751, 757–760 … [But in] the late nineteenth century, the heresy developed that all terms must be classified as either conditions or warranties (as those terms were understood in the years preceding The *Hongkong Fir* case). This heresy may have originated in the first edition of *Pollock on Formation of Contract* (1876), and was enshrined in the Sale of Goods Act, 1893: the analysis was accepted and followed in all subsequent textbooks and in many reported cases until The *Hongkong Fir* case (see, e.g. *Bentsen v Taylor Sons & Co* [1893] 2 Q.B. 274). In the latter case, Bowen LJ at 281–2 said: 'assuming the Court to be of opinion that the statement made amounts to a promise, or, in other words, a substantive part of the contract, it still remains to be decided by the Court, as a matter of construction, whether it is such a promise as amounts merely to a warranty, the breach of which would sound only in damages, or whether it is that kind of promise the performance of which is made a condition precedent to all further demands under the contract by the person who made the promise against the other party—a promise the failure to perform which gives to the opposite party the right to say that he will no longer be bound by the contract'."

[63] *Maredelanto Compania Naviera SA v Bergbau-Handel GMBH ("The Mihalis Angelos")* [1971] 1 Q.B. 164 CA, at 193 where Lord Denning MR said:

> "Sir Frederick Pollock (*Formation of Contracts*) divided the terms of a contract into two categories: conditions and warranties. The difference between them was this: if the promisor broke a condition in any respect, however slight, it gave the other party a right to be quit of his future obligations and to sue for damages: unless he by his conduct waived the condition, in which case he was bound to perform his future obligations but could sue for the damage he suffered. If the promisor broke a warranty in any respect, however serious, the other party was not quit of his future obligations. He had to perform them. His only remedy was to sue for damages. This division was adopted by Sir Mackenzie Chalmers when he drafted the Sale of Goods Act, 1893, and by Parliament when it passed it. It was stated by Fletcher Moulton LJ in his celebrated dis-

Lords. The seller had omitted to tender the bill of lading and had sold the cargo to a third party. Phillips J in the Commercial Court, upholding the award, treated the seller's conduct, which was known to the guilty party, as acceptance of the repudiation and hence as effective termination of the contract. The House of Lords agreed, reversing the Court of Appeal.

14-058 Lord Steyn said in *Vitol SA v Norelf Ltd ("The Santa Clara")*[114]:

> "An act of acceptance of a repudiation requires no particular form: a communication does not have to be couched in the language of acceptance. It is sufficient that the communication or conduct clearly and unequivocally conveys to the repudiating party that that aggrieved party is treating the contract as at an end."

14-059 Lord Steyn added[115]:

> "[The innocent party] need not personally, or by an agent, notify the repudiating party of his election to treat the contract as at an end. It is sufficient that the fact of the election comes to the repudiating party's attention, e.g. notification by an unauthorised broker or other intermediary may be sufficient."

14-060 **Decision to terminate inferred from omission to act in circumstances where positive conduct was expected** *Vitol SA v Norelf Ltd ("The Santa Clara")*[116] turned on positive conduct, rather than an omission to act or pure silence. But Lord Steyn in the following passages did contemplate that sometimes an omission to act might be pregnant with an implied message that the innocent party's inaction betokens a decision to terminate the contract for breach and, furthermore, that inference must have been objectively apparent to the other party, that is, to the party in repudiatory breach, etc. Thus Lord Steyn said[117]:

> "I am satisfied that a failure to perform may sometimes signify to a repudiating party an election by the aggrieved party to treat the contract as at an end. Postulate the case where an employer at the end of a day tells a contractor that he, the employer, is repudiating the contract and that the contractor need not return the next day. The contractor does not return the next day or at all. It seems to me that the contractor's failure to return may, in the absence of any other explanation, convey a decision to treat the contract as at an end. Another example may be an overseas sale providing for shipment on a named ship in a given month. The seller is obliged to obtain an export licence. The buyer repudiates the contract before loading starts. To the knowledge of the buyer the seller does not apply for an export licence with the result that the transaction cannot proceed. In such circumstances it may well be that an ordinary businessman, circumstanced as the parties were, would conclude that the seller was treating the contract as at an end."

14-061 Lord Steyn further commented[118]:

[114] [1996] A.C. 800 HL at 810–811; Q. Liu, *Anticipatory Breach* (Oxford: Hart Publishing, 2011), pp.118–120.

[115] [1996] A.C. 800 HL at 811, citing *Wood Factory Pty Ltd v Kiritos Pty Ltd* (1985) 2 N.S.W.L.R. 105 at 146 per McHugh JA; *Majik Markets Pty Ltd v S & M Motor Repairs Pty Ltd (No.1)* (1987) 10 N.S.W.L.R. 49 at 54, per Young J.

[116] [1996] A.C. 800, HL.

[117] [1996] A.C. 800 HL at 811.

[118] [1996] A.C. 800 HL at 812.

> "the passage from the judgment of Kerr LJ in *State Trading Corporation of India Ltd v M Golodetz* (1989),[119] if it was intended to enunciate a general and absolute rule [that non-performance by the innocent party is equivocal and so cannot constitute a decision to terminate the contract], goes too far. It will be recalled, however, that Kerr LJ spoke of a *continuing* failure [by the innocent party] to perform. One can readily accept that a continuing failure to perform, i.e. a breach commencing before the repudiation and continuing thereafter, would necessarily be equivocal. In my view too much has been made of the observation of Kerr LJ."

Finally, Lord Steyn said[120]: **14-062**

> "[As for the submission] that a failure to perform a contractual obligation is necessarily and always equivocal I respectfully disagree. Sometimes in the practical world of businessmen an omission to act may be as pregnant with meaning as a positive declaration … Thus in *Rust v Abbey Life Assurance Co Ltd* (1972)[121] the Court of Appeal held that a failure by a proposed insured to reject a proffered insurance policy for seven months justified on its own an inference of acceptance … Similarly, in the different field of repudiation, a failure to perform may sometimes be given a colour by special circumstances and may only be explicable to a reasonable person in the position of the repudiating party as an election to accept the repudiation."

It will be seen that Lord Steyn's statement in *"The Santa Clara"* is concerned not only with the innocent party's mental decision to "call off the contract" but with the "conveying" of that decision to the other party. It is in this sense that Rix LJ's statement in *Force India Formula One Team Ltd v Etihad Airways PJSC* concerning the converse situation—an election to affirm the contract—should be understood. Rix LJ said[122]: **14-063**

> "a party may be taken to have elected to affirm where it acts in a manner which is consistent only with a decision to affirm or where it allows too much time to pass by without indicating any decision".

VI. INNOCENT PARTY WAIVING RIGHT TO TERMINATE OR LOSING RIGHT BECAUSE OF ESTOPPEL

A party can waive[123] a breach of condition (or other right to terminate for breach) (for example, see the first of the three phases of default in the *Schuler* case, **14-064**

[119] [1989] 2 Lloyd's Rep. 277 CA at 286.

[120] [1996] A.C. 800 HL at 812

[121] [1972] 2 Lloyd's Rep. 334 CA: this case is concerned with formation of contract; the defendant had acted *on the claimant's request* to open an investment bond and the claimant had earlier sent a cheque for this bond. But the claimant now sought return of her money. The first ground of decision was that the claimant had made an offer to the defendant which the latter had accepted by conduct. But a *second ground of decision* emerged. Even if the offer in fact emanated from the defendant, who had sent the relevant policy to the claimant, the claimant's substantial delay in acquiescing in receipt of that policy, and not seeking to cancel the apparent deal, was enough to indicate assent: generally on silence and acceptance, N. Andrews, *Contract Law*, 2nd edn (Cambridge: Cambridge University Press, 2015), 3.15–3.19. The *Rust* case makes sense: for if X starts the negotiations, and receives an offer or counter-offer from Y, on which X "sits" for a significant period, X's silence might be treated as consent; in this context, X cannot complain that he has been taken by surprise.

[122] [2010] EWCA Civ 1051; [2011] E.T.L.R. 10 at [112].

[123] H. Beale (ed), *Chitty on Contracts*, 33rd edn (London: Sweet & Maxwell, 2018), para.24-007 ff (on the need for careful analysis). In *Ross T Smyth & Co v TD Bailey Son & Co* [1940] 3 All E.R. 60 HL at 70, Lord Wright said: "The word 'waiver' is a vague term used in many senses. It is always necessary to ascertain in what sense and with what restrictions it is used in any particular case. It is

chronicled at para.10-042), or—in the case of sales of goods—a buyer can be treated under statutory rules as having "accepted" the goods.[124] Other examples of affirmation of the contract, that is, waiver of the right to terminate, are *Peregrine Systems Ltd v Steria Ltd*[125] and *Bentsen v Taylor Sons and Co (No.2)*.[126]

14-065 The Court of Appeal in *Bentsen v Taylor Sons & Co (No.2)*[127] held that a claimant shipowner's statement that a particular ship "had sailed or was about to sail" from a particular port (Mobile, in the US) was a condition. The defendant shipowner erroneously made the statement just quoted, whereas in fact the ship eventually left the port 24 days later. However, waiver of the entitlement to terminate can occur. Here the charterer had elected not to terminate and had instead allowed the vessel to go from Mobile to Quebec. That constituted a waiver of the right to terminate for breach, relegating the charterer to a claim for damages if that it had sustained loss by reason of the delay in the vessel reaching Quebec. However, at Quebec the charterer failed to load a cargo, for which breach the charterer was liable for damages. The result, therefore, was that the owner had been in breach and then the charterer had been in breach, and there should be a set-off of those sums and judgment for the difference. The latter question, of quantification, was remitted by the Court of Appeal to arbitration. Lord Esher MR (and the other members of the court agreed) held that the right to terminate had been waived[128]:

> "The defendants [the charterer] had then a right to treat the contract as at an end, or they could, if they chose, treat it as still subsisting. But, if they intended to treat the contract as at an end, it was their duty so to exercise their right as not to lead the plaintiff to believe that he was still bound by the contract. Was the plaintiff [owner] led by the defendants to suppose that he was still bound? The defendants' letters, to my mind, clearly come to this: "You, the plaintiff, are bound to send the ship out to Quebec, and we shall load her there; but we shall do so under protest that is, we shall claim damages from you for breach of contract." No reasonable man can say that the plaintiff was not told by the defendants that he was still bound by the contract. The defendants cannot, therefore, now treat the contract as at an end; but they have a right to claim damages from the plaintiff, if they can prove that they have sustained any by reason of the delay in the sailing of the ship from Mobile."

sometimes used in the sense of election as where a person decides between two mutually exclusive rights. Thus, in the old phrase, he claims in assumpsit and waives the tort. It is also used where a party expressly or impliedly gives up a right to enforce a condition or rely on a right to rescind a contract, or prevents performance, or announces that he will refuse performance, or loses an equitable right by laches. The use of so vague a term without further precision is to be deprecated." See also Lord Hailsham's comments in *Banning v Wright* [1972] 1 W.L.R. 972 HL at 978–980: (1) "the primary meaning of the word 'waiver' in legal parlance is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted"; Lord Hailsham adding (2): "Waiver is the abandonment of a right ... When a contract is broken the injured party in condoning the fault may be said either to waive the breach or to waive the term in relation to the breach. What in each case he waives is the right to rely on the term for the purpose of enforcing his remedy to the breach. I cannot construe 'waiver' as only applicable to the total abandonment of any term in the lease both as regards ascertained and past breaches, and as regards unascertained or future breaches."

124 For "acceptance" in the context of sales of goods, Sale of Goods Act 1979 ss.11(4), 35, 35A, 36; J. Beatson, A. Burrows and J. Cartwright, *Anson's Law of Contract*, 30th edn (Oxford: Oxford University Press, 2015), pp.159–160; but Sale of Goods Act 1979 s.11(4) is disapplied to consumer purchases by Consumer Rights Act 2015 Sch.1 para.10 (inserting a new s.11(4A), Sale of Goods Act 1979), and instead the regime under the Consumer Rights Act 2015 ss.19–22 applies.

125 *Peregrine Systems Ltd v Steria Ltd* [2005] EWCA Civ 239; [2005] Info T.L.R. 294 at [16]–[23].

126 [1893] 2 Q.B. 274, CA.

127 [1893] 2 Q.B. 274, CA.

128 [1893] 2 Q.B. 274, CA, 279–280.

In *Parbulk II A/S v Heritage Maritime Ltd SA*[129] Eder J held (1) that there was no principle that a demand for payment acted as a continuing affirmation of a contract. He then held that where there is a pattern of late payment, it is possible that fresh instances of late payment will provide grounds for termination, and an earlier waiver of late payment (in the sense that the innocent party chose not to terminate at that stage) will not operate prospectively. Furthermore, (2) the judge held that (a) if the innocent party has a ground for termination (by reason of the other party's default during period (i)), in respect of which the innocent party serves notice of default (consistent with an agreed notice period), no waiver of that right to terminate occurs if the innocent party goes on to serve an anticipatory notice of default in respect of (b) the next payment period (period (ii)). The judge's reasoning on point (2) seems to be that there can be no waiver capable of operating backwards in respect of the default during period (i)) at stage (2)(b) since the payor has yet to default in respect of period (ii). **14-066**

VII. Innocent Party Losing Right to Terminate because of Estoppel

Lord Goff in *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India ("The Kanchenjunga")* acknowledged that it might sometimes happen that the innocent party will be estopped from terminating because his conduct has caused the other party to change his position.[130] **14-067**

In *Garside v Black Horse Ltd*[131] King J explained the essence of estoppel, as it applies in this context of the election to affirm the contract or to terminate the contract for breach: **14-068**

> "The doctrine of estoppel is a different animal from that of affirmation. See *Chitty supra*, at 24–008 [now 33rd edn (2018)]. [Estoppel] does not require in the innocent party knowledge as above, but rather a clear and unequivocal representation by words or conduct by the innocent party to the party in breach that he will not exercise his strict legal rights to treat the contract as repudiated, followed by a reliance by that party upon it in circumstances where it would be inequitable for the representor to go back on his representation. Estoppel in this sense, with its requirements of representation, reliance and detriment, has not been relied upon in this case."

In *Fermometal SARL v Mediterranean Shipping Co SA ("The Simona")* it was held that no estoppel had arisen so as to preclude the charterers from invoking the right to terminate by reason of late loading (for the facts and the result see para.14-028 to 14-037). Lord Ackner explained[132]: **14-069**

> "If, in relation to this option to cancel, the owners had been able to establish that the charterers had represented that they no longer required the vessel to arrive on time because they had already [arranged to hire a different ship] and in reliance upon that representa-

129 [2011] EWHC 2917 (Comm); [2012] 2 All E.R. (Comm) 418 at [22]–[26].

130 *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India ("The Kanchenjunga")* [1990] 1 Lloyd's Rep. 391 HL at 399 per Lord Goff; G.H. Jones (with P. Schlechtriem) "Breach of Contract" in *International Encyclopaedia of Comparative Law* Vol.VII (Contracts in General) (Tübingen: J.C.B. Mohr (Paul Siebeck), 1999), 15-134 and 15-135.

131 [2010] EWHC 190 (QB) at [29].

132 [1989] A.C. 788 HL at 805–806.

tion, the owners had given notice of readiness only after the cancellation date, then the charterers would have been estopped from contending they were entitled to cancel the charterparty ...[But there] is a total lack of any material to show that the owners, because of the charterers' repudiatory conduct, viewed the cancellation clause as other than fully operative and therefore capable of being triggered by the vessel not being ready in time. The non-readiness of the vessel by the cancelling date was in no way induced by the charterers' conduct. It was the result of the owners' decision to load other cargo first."

14-070 Lord Ackner had earlier explained the nature of the estoppel argument as follows[133]:

"Towards the conclusion of his able address, Mr. Boyd [counsel for the owners] ... submitted that the charterers' conduct had induced or caused the owners to abstain from having the ship ready prior to the cancellation date. Of course, it is always open to A, who has refused to accept B's repudiation of the contract, and thereby kept the contract alive, to contend that in relation to a particular right or obligation under the contract, B is estopped from contending that he, B, is entitled to exercise that right or that he, A, has remained bound by that obligation. If B represents to A that he no longer intends to exercise that right or requires that obligation to be fulfilled by A and A acts upon that representation, then clearly B cannot be heard thereafter to say that he is entitled to exercise that right or that A is in breach of contract by not fulfilling that obligation."

14-071 In *Cantt Pak Ltd v Pak Southern China Property Investment Ltd*,[134] Barling J provided a careful analysis and application of *"The Simona"* doctrine (para.14-028 to 14.039). In the *Cantt Pak* case the purchaser of commercial premises was held to have committed a repudiatory breach (failure to complete on the completion date, time having become of the essence). The vendor accepted this repudiation. Termination based on the buyer's breach occurred even though there had been an earlier serious breach by the vendor: the vendor's breach had been failure to clear the land so that he could give vacant possession; in a sense the vendor's breach was ongoing. The buyer's further argument based on estoppel failed on the facts: the vendor had made no representation to the defendant that it was, in effect, unnecessary for the defendant to continue to complete.[135] Barling J's judgment also contains valuable analysis of the Australian High Court's decision in *Foran v Wight*[136] (on which see also para.14-078 below).

14-072 Barling J's comments in *Cantt Pak Ltd v Pak Southern China Property Investment Ltd* are cited here[137]:

"[121] *Foran v Wight* (1989)[138] concerned a contract for the sale of land. The time for completion had been made of the essence and it was due to take place by 22 June 1983. It was a condition of the contract that before completion the vendor would obtain registration of a right of way. On 20 June the vendor notified the purchaser that it would not be able to do this by that date and could not complete on that date. By 20 June the purchaser had not been able to raise funds to purchase the property, and made no further attempt to do so. On 24 June the purchaser terminated the contract on the ground of the vendor's

[133] [1989] A.C. 788 HL at 805.
[134] *Cantt Pak Ltd v Pak Southern China Property Investment Ltd* [2018] EWHC 2564 (Ch).
[135] *Cantt Pak Ltd v Pak Southern China Property Investment Ltd* [2018] EWHC 2564 (Ch) at [133]–[137].
[136] *Foran v Wight* (1989) 168 C.L.R. 385, High Court of Australia, see text below.
[137] *Cantt Pak Ltd v Pak Southern China Property Investment Ltd* [2018] EWHC 2564 (Ch) at [121]–[125].
[138] *Foran v Wight* (1989) 168 C.L.R. 385, High Court of Australia.

failure to complete. The purchaser then sought the return of its deposit. The majority of the court concluded that the purchaser was entitled to recover the deposit. However, the members took different approaches to the right of a party who was himself in breach of contract to accept a repudiation by the other party.

[122] One judge, Gaudron J, considered that *Fercometal* was correct, and that the vendor's notification of an inability to complete meant that the purchaser was not obliged to tender the purchase price and was entitled to accept the vendor's repudiatory breach without having to establish that it was itself ready willing and able to complete on the date for completion. Deane J considered that where both parties were in breach either of them could accept the other's repudiation and terminate the contract, recovering any deposit but not suing for damages. Brennan and Dawson JJ were of the view that where one party notified the other of its refusal or inability to perform its contractual obligations, and the other did not accept the repudiation until later, the latter must establish that when it received notification it was ready willing and able to fulfil its obligations. It was not, however, required to take further steps. These two members of the court were of the view that on the facts the purchaser was ready willing and able at the time of notification. Finally, Mason CJ, who dissented in the result, held that since the purchaser had not accepted the repudiation before the completion date, it was required to prove it was ready willing and able to complete on the completion date, which it had not done.

[123] *Foran* is of considerable interest for its exploration of the tricky issues involved. [Counsel for the purchaser in the present case] submitted that the majority of the members of the court were of the opinion that a party not ready willing and able ['RWA'] to perform its own obligations could not accept the other's unwillingness or inability to perform their obligations as a repudiatory breach. Whether or not that analysis of the decision is strictly accurate, the multiplicity of views expressed by the High Court of Australia render it very difficult to identify precisely what principles are to be derived from it. I share the view of the learned authors of Jones & Goodhart *[Specific Performance*, 2nd edn (London: Butterworths, London, 1996), pp.68-72: noted at para.14-043 fn. 60 above] who, when posing the question whether a party can accept a repudiation by the other party even when it is not itself ready willing and able to perform the contract, state that in the light of *Foran* so far as Australian law is concerned the answer is 'unclear'.

[124] However, the authors Goodhart and Jones, *Specific Performance*, 2nd edn (London: Butterworths, London, 1996), pp.68-72] are in no real doubt that English law provides a positive answer to that question [that is, a party can terminate for breach even though himself not ready willing and able to perform], based on [the leading decision in] *Fercometal*. The same authors [Goodhart and Jones, *Specific Performance*, 2nd edn (London: Butterworths, London, 1996), pp.68-72] point out that such a position is not optimal, in that it presents problems for a party who is [not yet] in breach himself and [who] wishes to keep the contract alive in the face of repudiation by the other side. In those circumstances [in order himself to avoid lapsing into repudiatory default] that innocent party may be driven to incur the expense and trouble of making a useless tender of performance in order not to provide the repudiator with an opportunity of himself terminating the contract by accepting the repudiatory non-performance of the "innocent" party. The authors suggest that hard cases might be mitigated by recourse to estoppel, or by restricting *Fercometal* to cases where specific performance is not an option [viz that the RWA requirement might be applied if the contract is specifically enforceable].

[125] However, I note that most, if not all, of the alternative approaches to this problem discussed by the authors have disadvantages of their own. In support of the *Fercometal* approach is the fact that it avoids...a 'Mexican stand-off', where a party who is in breach of an essential term of the contract cannot terminate it if the other party is also in breach, so that the contract is in limbo."

Such limbo would have arisen in the *Foran* case had not the High Court of Australia decided that the purchaser could validly terminate, notwithstanding the fact that the purchaser had not been RWA.

14-073 The High Court of Australia in *Peter Turnbull & Co Pty Ltd v Mundus Trading*

degree of indemnity to which he is entitled, I must, I think, award him a gross sum in damages equal to the gross amount of the profit which he would be likely to have made had there been no breach of contract."[101]

21-032 In *Diamond v Campbell-Jones*[102] the balance was indeed probably fairly near. But, largely with a view to saving time and trouble,[103] the courts made it clear that (perhaps subject to revision in truly exceptional circumstances[104]) they were willing to ignore even fairly patent differences. Thus in *Julien Praet et Cie SA v Poland Ltd*,[105] where damages taxable in England replaced Belgian income which indubitably would have borne higher tax there, Mocatta J still refused to make any *Gourley*-style adjustment. Furthermore, a good deal later Potter J did the same thing in *Deeny v Gooda Walker Ltd*,[106] where in compensating Lloyds underwriters for profits lost by underwriters' negligence, he refused to make any adjustment to reflect the labyrinthine tax structures of the insurance business.

21-033 Nevertheless, despite the suggestion in these cases that in the commercial context the principle of taking tax into account is effectively a dead letter,[107] the decisions are not all one way. In at least two cases the Technology and Construction Court has adjusted damages to take account of differential treatment of profits and damages.[108] The matter thus remains uncertain, though it may well be that these later decisions represent the trend of future developments.

21-034 It is thought that what goes for income and corporation tax will also go for VAT: that is, where the damages and the income they replace would both have been chargeable to VAT, then courts will proceed on the assumption that one will cancel the other and award damages on an ex-VAT basis.[109]

The rule against duplication of loss

21-035 In many cases, the victim of a breach will frequently be able to frame a claim for damages in a number of alternative ways. Nevertheless, there remains an over-

[101] See [1961] Ch. 22 at 27.

[102] [1961] Ch. 22.

[103] "[B]oth the lost profits and the damages to be awarded have the character of taxable subject-matter, and rough justice is done and a great expenditure of time and costs is saved by ignoring the tax on both sides so that in effect the tax on the lost earnings is set off against and cancelled out by the tax on the damages. The actual amounts of the tax (if any) to be paid on the one side and the other would depend on the special circumstances of the particular case and might differ widely, but no attempt is made to ascertain the actual difference and adjust the damages accordingly." (Pearson LJ in *Parsons v BNM Laboratories Ltd* [1964] 1 Q.B. 95 at 134–135). See too *Julien Praet et Cie SA v Poland Ltd* [1962] 1 Lloyd's Rep. 566 at 595 (Mocatta J).

[104] *Parsons v BNM Laboratories Ltd* [1964] 1 Q.B. 95 at 139 (Pearson LJ). Cf. *Gill v Australian Wheat Board* [1980] 2 N.S.W.L.R. 795, where the tax liability on the damages awarded was much larger than that on the income they replaced. This was taken as an exceptional circumstance within Pearson LJ's dictum, and the award adjusted upwards accordingly.

[105] [1962] 1 Lloyd's Rep. 566.

[106] [1995] S.T.C. 439 (upheld by the HL without discussion of the point at [1996] 1 All E.R. 933). See too *Daniels v Anderson* (1995) 16 ACSR 607.

[107] Indeed, Ouseley J effectively let this cat out of the bag in *Finley v Connell Associates* [2002] Lloyd's Rep. PN 62 when he said bluntly that as a normal rule tax was ignored in the computation of damages.

[108] See *Amstrad Plc v Seagate Technology Inc* (1998) 86 B.L.R. 34; also *BSkyB Ltd v HP Enterprise Services UK Ltd* [2010] EWHC 862 (TCC); welcomed in *McGregor on Damages*, 20th edn (London: Sweet & Maxwell, 2019), paras 18-19–18-22.

[109] Compare *Scout Association Trust Corp v Secretary of State for the Environment* [2005] EWCA Civ 980; [2005] S.T.C. 1808 (a compulsory purchase case, but still in point).

riding principle that recovery will be denied in so far as it would result in double-counting, or the same loss being compensated twice over. Suppose, for example, that a claimant pays £1,000 for an asset guaranteed to produce an income of £1,200 during the course of its life. In fact, the asset produces no income and is worthless. In an action for breach of contract, there is no doubt that the buyer can recover £1,200 representing the lost income. Alternatively, he can just as permissibly quantify his loss as £1,000, representing the price paid for, and ultimately wasted on, a valueless asset. But he cannot claim both sums, since if this was permitted it would leave him better off than if there had been no breach at all.[110]

21-036 The decision in *Nahome v Last Cawthra Feather*[111] illustrates the issue in practice. Solicitors acting for commercial lessees negligently failed to take the proper steps to exercise a right to renew their lease under the Landlord and Tenant Act 1954. The clients in due course claimed both the capital value of the lease lost, and also the profit lost as a result of being evicted. But the court correctly struck out the latter claim as essentially duplicative of the former: the capital value was simply another way of expressing the value of the profit to be gained from the use of the premises. Similarly, in the earlier (and better known) *Cullinane v British "Rema" Manufacturing Co Ltd*[112] the Court of Appeal declined to allow the buyer of useless machinery to recover both the capital cost lost and also the profit that the machine should have made but would not. Although double recovery was not the ostensible ground of the decision,[113] it is suggested that it is best explained on the basis of it.[114]

21-037 The double recovery principle may also apply in a more indirect way, as demonstrated in *Corbett v Bond Pearce (A Firm)*.[115] Solicitors negligently prepared an invalid will; the would-be beneficiaries under that will duly recovered their lost entitlement in a direct tort suit against the solicitors.[116] The estate's subsequent claim for the costs incurred in probate proceedings failed in the Court of Appeal, partly because the costs would otherwise have been deducted from the sums due to the beneficiaries, and that therefore allowing the action would indirectly lead to impermissible double recovery by the latter.

[110] More precisely, had there been no breach he would have made a net gain of £200 (£1,200 – £200), whereas to give him damages of £2,200 would leave him with a net gain of £1,200. For useful exposition of the principle, see the judgments in *JP Morgan Chase Bank v Springwell Navigation Corp* [2006] EWCA Civ 161; [2006] P.N.L.R. 28 at [10], [14], [19].

[111] [2010] EWHC 76 (Ch); [2010] P.N.L.R. 19. See too the similar reasoning in *Riyad Bank v Ahli United Bank (UK) Plc* [2005] EWHC 279 (Comm); [2005] 2 Lloyd's Rep. 409 (bad investment advice to investment company: no claim for both diminution in value of assets and excessive distributions to investors); and in *Primavera v Allied Dunbar Assurance Plc* [2002] EWCA Civ 1327; [2003] P.N.L.R. 12 (claimant deprived of capital sum necessary to pay off loan: no award of both pre-judgment interest on capital sum and also costs of servicing loan, since this would amount to double-dipping).

[112] [1954] 1 Q.B. 292.

[113] Which at least in the main, was that claims for lost profits and capital loss were alternative and inconsistent forms of claim between which a claimant had to elect (see Evershed MR at [1954] 1 Q.B. 292 at 303). It will be suggested below (para.21-056 ff) that this is a misguided view.

[114] As may indeed have been at the back of Evershed MR's mind: compare his comment at [1954] 1 Q.B. 292 at 302 that "a claim for loss of profits could only be founded upon the footing that the capital expenditure had been incurred".

[115] [2001] EWCA Civ 531; [2001] P.N.L.R. 31.

[116] Under the principle in the tort case of *White v Jones* [1995] 2 A.C. 207.

III. WAYS OF EXPRESSING THE LOSS RESULTING FROM NON-PERFORMANCE: THE CONCEPTS OF EXPECTATION, RELIANCE AND CONSEQUENTIAL DAMAGE

21-038 There is a venerable academic tradition[117] of dividing the compensatory damages available in a breach of contract case into three heads, reflecting what are known as the claimant's expectation, reliance and restitution interests. In summary, suppose a seller of goods wrongfully fails to supply them. The buyer's expectation interest is typified by his claim for potential lost profit (i.e. the market value of the goods, less their contract price); his reliance interest by his claim for expenditure thrown away in a fruitless attempt to collect the non-existent goods; and the restitution interest by his right to recover any prepayment for which he has received nothing in return. Nevertheless, for all its respectability and the occasional judicial invocation of its terms by English judges,[118] this scheme is not entirely satisfactory. For one thing, it fails to take proper account of consequential losses, which cannot plausibly fit into any of its categories.[119] Furthermore, the restitution interest seems logically superfluous. A buyer's claim to get back money paid for nothing, in so far as it is based on loss, is simply an aspect of reliance loss: and in so far as bottomed on a failure of consideration, it is not a claim for loss at all and hence lies outside the field of damages in any case.[120] For this reason, this book, while accepting that damages do vary in the interest protected, will use a slightly different categorisation: namely, expectation, reliance and consequential losses.

The modern categories of damage: Expectation, reliance and consequential losses

21-039 It is convenient to classify damages for financial loss resulting from a breach of contract into three rough categories, depending on the kind of damage that they aim to make whole. This is because, although they all reflect the same fundamental principle (i.e. that the claimant is entitled to that sum which will put him in the position he would have occupied had he received the performance to which he was entitled[121]), the issues they raise can differ, and indeed on occasion the detailed rules of quantification may not be the same.[122]

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117 It originates in an immensely influential pre-war American law review article: see L. Fuller and W. Perdue, "The Reliance Interest in Contract Damages", 46 Yale L.J. 52 (1936) at 54. That article went on to suggest that the expectation interest had previously been exaggerated in importance vis-à-vis the other two.

118 Examples of this invocation include *Shipping Corp of India v NSB* [1991] 1 Lloyd's Rep. 77 at 80–81 (Steyn J); *Surrey CC v Bredero Homes Ltd* [1993] 1 W.L.R. 1361 at 1369 (Steyn LJ); *Darlington BC v Wiltshier Developments Ltd* [1995] 1 W.L.R. 68 at 80 (Steyn LJ); *Regalian Plc v London Docklands Development Corp* [1995] 1 W.L.R. 212 at 222 (Rattee J); and *White v Jones* [1995] 2 A.C. 207 at 265–269 (Lord Goff).

119 On which see A. Tettenborn, "Consequential Damages in Contract—The Poor Relation?" 42 Loyola of Los Angeles L.Rev. 117 (2009).

120 Illustrated by the fact that matters reducing the amount of claimant's loss are irrelevant in such cases: for instance, benefits received under the contract (*Rowland v Divall* [1923] 2 K.B. 500) or the fact that the claimant made a losing bargain in the first place (*Wilkinson v Lloyd* (1845) 7 Q.B. 27).

121 "[T]he expressions 'expectation damages', 'damages for loss of profits', 'reliance damages' and 'damages for wasted expenditure' are simply manifestations of the central principle enunciated in *Robinson v Harman* rather than discrete and truly alternative measures of damages which a party not in breach may elect to claim": Mason CJ and Dawson J in *Commonwealth of Australia v Amann Aviation Pty Ltd* (1991) 66 A.L.J.R. 123 at 182.

122 In particular, there may be differences in the rules as to remoteness, and in the ability of the defendant to reduce or eliminate his liability by showing that the claimant has not suffered any substantial loss at all. See below, generally A. Tettenborn, "Consequential Damages in Contract-The Poor Relation?" 42 Loyola of Los Angeles L.Rev.117 (2009).

21-040 The first category is "expectation losses": that is, damages aimed at making good any direct gains the claimant would have made had the contract been kept. Secondly, there are "reliance losses": compensation predicated, not on a gain foregone because the contract was broken, but on the claimant having spent money in reliance on its being kept, and hence to that extent being worse off as a result of the breach. And thirdly, there are claims based on consequential losses: that is, on other losses not falling in either of these categories, but which nevertheless follow on from the breach. For example, if machinery is not delivered on time, the industrialist's claim for profits lost as a result of the non-delivery is a consequential claim. Each of these will now be dealt with in more detail.

Expectation losses

21-041 Expectation damages exist to compensate for the value of some benefit the claimant would have got under a contract had it been properly performed. A straightforward example is damages for breach of an executory contract for the sale of goods or other assets. Here the buyer presumptively recovers the amount, if any, by which the market value of the asset exceeds the price[123] (and the seller the converse difference where it is the buyer who breaches[124]). A similar rule applies to services, though such cases do not seem to arise commonly,[125] except in specialised contexts such as time charters.[126] No doubt for this reason, such damages are sometimes known as "loss of bargain" damages. But the idea of expectation loss goes a good

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123 Goods: see Sale of Goods Act 1979 s.51(3) (reproducing the Common Law position). Other assets are governed by the Common Law: *Golden Strait Corp v Nippon Yusen Kubishika Kaisha* [2007] UKHL 12; [2007] 2 A.C. 353 at [79] (Lord Brown). See, e.g., *Bear Stearns Bank Plc v Forum Global Equity Ltd* [2007] EWHC 1576 (Comm) at [197] (securities) and *Deutsche Bank AG v Total Global Steel Ltd* [2012] EWHC 1201 (Comm); [2012] Env. L.R. D7 (EU emissions allowances). Such awards are compensation for the loss of an abstract gain. The fact that no actual cash loss was suffered is irrelevant: see the Australian decision in *Clark v Macourt* [2013] HCA 56; (2013) 304 A.L.R. 220 (high-priced business assets in fact useless: buyer recovers value, even though costs in fact all recouped from customers).

124 Goods: Sale of Goods Act 1979 s.50(3). Other assets not covered by the Sale of Goods Act 1979: *Jamal v Moolla Dawood, Sons & Co* [1916] 1 A.C. 175 (securities) and, more recently, *Deutsche Bank AG v Total Global Steel Ltd* [2012] EWHC 1201 (Comm) (tradeable EU pollution permits)). As with awards to a disappointed buyer, awards of this sort are made in respect of the loss of an abstract gain. See *Glencore Energy UK Ltd v Cirrus Oil Services Ltd* [2014] EWHC 87 (Comm); [2014] 2 Lloyd's Rep. 1 (not within description in contract of awards for loss of profits) and *Glory Wealth Shipping Pte Ltd v Flame SA* [2016] EWHC 293 (Comm) (irrelevant that payment for goods not accepted would have been made to a third party).

125 One such, however, was *Western Web Offset Printers Ltd v Independent Media Ltd* (1995) *Times*, 10 October (failure to accept printing services: claim by printer for price, less value of services refused). See too *Anthracite Rated Investments (Jersey) Ltd v Lehman Brothers Finance SA* [2011] EWHC 1822 (Ch); [2011] 2 Lloyd's Rep. 538 at [119]–[129] (Briggs J).

126 "[T]there is, I consider, a normal measure of recovery in cases of premature wrongful repudiation of a time charter by the owners, and that normal measure is that, if there is at the time of the termination of the charter-party an available market for the chartering in of a substitute vessel, the damages will generally be assessed on the basis of the difference between the contract rate for the balance of the charter-party period and the market rate for the chartering in of a substitute vessel for that period": Robert Goff J in *The Elena D'Amico* [1980] 1 Lloyd's Rep. 75 at 87. See too *The Great Creation* [2014] EWHC 3978 (Comm); [2015] 1 C.L.C. 16 at [16] (Cooke J).

deal further than this. Even where there is no available market the court must, in the event of non-performance, do its best to value the gain the claimant has been deprived of.[127] Again, many claims for breach of warranty are essentially claims for expectation loss, as where the seller of a business warrants that its profits will reach a certain level in the course of the next year, or a seller of shares guarantees their market value at some time in the future. Again, the same goes for the situation where the claimant seeks to recover the cost of paying a third party to do what the defendant ought to have done, for instance, contracted building works that have not been carried out.[128]

21-042 In most cases a claimant, whatever kind of loss he is seeking to recover, will in the nature of things have relied on the relevant term of the contract being observed. Nevertheless, this is not a requirement for recovery of expectation damages. On the contrary: the claimant need not show he even knew of the term involved, or otherwise acted (or failed to act) in reliance on performance being forthcoming.[129] All that he needs to show is that the term was broken. So, for example, there is no reason why the buyer of a car should not be entitled to enforce a promise as to (say) the longevity of the exhaust system, even though the promise was buried deep in an unread warranty agreement and he did not know of its existence until a problem occurred that was covered by it.

21-043 It is sometimes said that the availability of expectation damages, with their concentration on the position "as if the contract had been performed," is what marks off damages in contract from those in tort, which look to the position as if no tort had been committed.[130] At first sight this seems plausible. This is especially the case with damages for inaccurate representations, where as a rule the hypothetical position had the statement been true is relevant in contract (that is, in so far as the claimant proves that the statement was a warranty and sues on that basis), but not otherwise. Imagine that A owns an asset worth £900, which he persuades B to buy for £1,000 by saying (incorrectly) that it has some quality making it worth £1,200. If B can prove a contractual warranty, he recovers £300, the difference between the value of the asset he now has (£900) and his hypothetical position had the statement been true (in which case he would have had something worth £1,200). In contrast, by suing in tort for negligent misrepresentation or deceit he gets £100 only, on the basis that there been no tort he would not have bought it at all and hence would still have his original £1,000.[131] In fact, however, the dichotomy is a false one. In both cases the claimant recovers by reference to his would-be position if the wrong—breach of contract or tort as the case may be—had not been committed. The only reason for the apparent difference is that most contractual duties are positive, whereas most tortious ones are negative. Thus there are cases of breach of

[127] See e.g. the sale cases of *The Ile aux Moines* [1974] 2 Lloyd's Rep. 502 (unusual ship) and *Hughes v Pendragon Sabre Ltd* [2016] EWCA Civ 18; [2016] 1 Lloyd's Rep. 311 (virtually unobtainable Porsche). So too in other situations: see the charter case of *Glory Wealth Shipping Pte Ltd v Korea Line Corp* [2011] EWHC 1819 (Comm); [2011] 2 Lloyd's Rep. 370

[128] As in cases such as *Radford v De Froberville* [1977] 1 W.L.R. 1262.

[129] "If a party wishes to claim relief in respect of a breach of a term of a contract … he need prove no actual reliance"—per Slade LJ in *Harlingdon & Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd* [1991] 1 Q.B. 564 at 584. See too Stuart-Smith LJ at 579.

[130] For straightforward instances, see Ackner J in *André & Cie SA v Ets Michel Blanc & Fils* [1977] 2 Lloyd's Rep. 166 at 181, and Lord Reed in *Morris-Garner v One Step (Support) Ltd* [2018] UKSC 20; [2019] A.C. 649 at [31].

[131] See e.g. *McConnell v Wright* [1903] 1 Ch. 546 at 554 (Collins MR); *Doyle v Olby (Ironmongers) Ltd* [1969] 2 Q.B. 158 at 166 (Lord Denning MR) (both deceit cases).

contract where the would-be position had the statement been true is irrelevant[132]: there are equally cases in tort where a defendant is held to what would normally be referred to as expectation damages.[133]

Reliance losses[134]

21-044 Expectation damages deal with claims for what would have been a direct gain to the claimant from performance of the contract. Reliance damages, by contrast, compensate for losses suffered in a more indirect way, as a result of relying on the contract being kept and then being disappointed in that reliance. Straightforward examples are where an industrialist has invested money (which is now wasted) in buying machinery which in the event does not work[135]; where a lessee pays a premium for a lease and is then wrongfully evicted during the term[136]; or where a professional in breach of contract gives careless advice and a client loses money by relying on it.[137]

21-045 It follows from this, of course, that in order to recover such damages, a showing of reliance is crucial. In so far as the claimant cannot demonstrate that he has changed his position on the basis of the prospect of performance, he must fail. Take, for example, a client who suffers loss after receiving negligent advice from his solicitor. He will nevertheless fail if it is apparent that he would have acted in the same way even if properly advised.[138]

21-046 It is a feature of most claims for reliance loss that the claimant is complaining of being out-of-pocket as a result of the breach: that is, worse off than he was before the contract was concluded (a factor which has caused some commentators to regard such claimants as inherently more deserving than those seeking expectation recovery[139]). Nevertheless, this is not always the case; and the principle of reliance recovery can equally well encompass claims for profits foregone or other opportunity costs. Thus in *Swingcastle Ltd v Alastair Gibson*,[140] a case of negligent misvaluation of mortgage security for a lender, the lender recovered not only the capital lost but also the interest which that capital would have earned if invested

[132] Notably cases of negligent valuations: e.g. *Philips v Ward* [1956] 1 W.L.R. 471 and *Perry v Sydney Phillips* [1982] 1 W.L.R. 1297.

[133] *White v Jones* [1995] 2 A.C. 207 is as good an instance as any.

[134] See generally L. Fuller and W. Perdue, "The Reliance Interest in Contract Damages", 46 Yale LJ 52 (1936–7); P. Jaffey, "A New Version of the Reliance Theory" [1998] NILQ 107. A more sceptical view comes in M. Kelly, "The Phantom Reliance Interest in Contract Damages" [1992] Wis L.Rev. 1755, and D. McLaughlan, "The redundant reliance interest in contract damages" (2011) 127 L.Q.R. 23.

[135] E.g. *Cullinane v British "Rema" Manufacturing Co Ltd* [1954] 2 Q.B. 292.

[136] As in *C&P Haulage Ltd v Middleton* [1983] 1 W.L.R. 1461 and *Grange v Quinn* [2013] EWCA Civ 24; [2013] 1 P. & C.R. 18.

[137] Or, more accurately, relying on the professional to perform his contractual obligation to give careful advice.

[138] *Sykes v Midland Bank Executor & Trustee Co Ltd* [1971] 1 Q.B. 113

[139] This is the thrust of much of L. Fuller and W. Perdue, "The Reliance Interest in Contract Damages", 46 Yale LJ 52 (1936–7), and of P. Atiyah, *Essays on Contract*, 124 ff.

[140] [1991] 2 A.C. 223. Cf. *East v Maurer* [1991] 1 W.L.R. 461, applying a similar rule in tort. Similarly with investment advisers: where their negligence causes a client to lay out funds and lose them, the client may recover for the profits they would have made from later investing those same funds had they still had them available (*JP Morgan Chase Bank v Springwell Navigation Corp* [2006] EWCA Civ 161; [2006] P.N.L.R. 28). But such profits must be proved, and will not be presumed: compare the deceit case of *Mortgage Express v Countrywide Surveyors Ltd* [2016] EWHC 1830 (Ch); [2016] P.N.L.R. 35.