THE DOCTRINE OF FUNDAMENTAL BREACH IN
CONTRACT LAW

by

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STATEMENT

This thesis describes my own original work.
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The doctrine of fundamental breach for which Karsales v. Wallis, Suisse Atlantique and, more recently, Photo Production v. Securicor Transport are key decisions, is one of the most discussed subjects in English contract law. It might be thought that all there is to be said about fundamental breach has already been said. This is not far from the truth if investigation of it merely continues the all too familiar debate whether the doctrine represents a rule of law rather than a rule of construction. On further scrutiny, however, there is still very much amiss in our understanding of fundamental breach. In particular, we do not seem to have really come to grips with what we shall see to be the crucial problem in fundamental breach, namely: when is a performer under a contract liable for his own misperformance notwithstanding the presence of an exception clause prima facie exempting him from liability?

Here I shall try to show that fundamental breach has been the means by which courts have marked out various types of misperformance, mainly those within the control of the performer, for which liability cannot be excused by the incorporation of an exception clause. In other words, even an exception clause does not always imply that a party has necessarily accepted all the risks of a contract, including those of misperformance which the clause attempts to cover. Fuller analysis of the cases shows a differentiated scale of misperformance against which a performer cannot protect himself if they are avoidable or culpable. These indicia of culpability, which bear only a vague resemblance to notions of moral reprehensiveness or fault in tort law, also have immense importance for an understanding of fundamental breach.
No study of fundamental breach would be complete without due consideration of the notions of reasonableness and unconscionability, which have recently come to the fore, in part because of the advent of legislation as s.2:302 of the American Uniform Commercial Code and the English Unfair Contract Terms Act 1977. Even so, the notions of fundamental breach on the one hand and reasonableness and unconscionability on the other, remain, as we shall see, residually distinct.

This thesis deals first with fundamental breach and then with unconscionability. Chapter I puts the contemporary notion of fundamental breach in a historical perspective. Earlier notions are contrasted with it to define better the central problem of the doctrine. Chapter II sketches what we shall call a theory of risks of avoidable misperformance or, more briefly, performance-related risks. This theory, it is submitted, explains the general design and operation of fundamental breach. It will be shown that by the time of Karsales v. Wallis there was already in the law a discernible pattern of differentiated risks the liability for which could not be excused in advance by the use of an exception clause. For this purpose, the two progenitors of the doctrine of fundamental breach are discussed in some detail and its juristic basis explained. In Chapter III, three representative theories, the 'core theory', Coote's theory of the function of exception clauses and Lord Devlin's views of a fundamental term are taken to task. Chapter IV is devoted to a formal turning point in the career of fundamental breach, brought about by the House of Lords' decision in Suisse Atlantique; yet it soon becomes apparent that this decision is not quite the pinnacle of the doctrine it is often thought to be. Chapter V moves to the post-Suisse Atlantique cases which raise extremely difficult questions relating to avoidable
misperformance and culpable breach. An attempt is made to extrapolate from them a subtle pattern of principle revealing different degrees of contractual behaviour and, in particular, misperformances which can be exempted from liability at the one extreme and misperformances which cannot at the other. Chapters VI, VII and VIII concentrate on the relations between fundamental breach and the two other devices of dealing with exception clauses, the notions of reasonableness and unconscionability.
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Chapter I

EARLY NOTIONS OF FUNDAMENTAL BREACH AND
EARLIER EXCEPTION CLAUSES

The early notions of fundamental breach developed independently of exception clauses. They were concerned with when a party might terminate or regard itself as discharged from performance. The general principle being that one cannot terminate or regard itself as discharged from performance of a contract "goes to the root of the contract", or enables on the theory of an "essential obligation" or of a fundamental "condition" rather than a "merely generally "condition" rather than a "merely generally "condition".

In the old case of Glanvill v. Bax End (1), the court held the express contract with total respect for the quality of goods. 11 (1) In the old case of Glanvill v. Bax End (1), the court held the express contract with total respect for the quality of goods.

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1. Early Notions of Fundamental Breach

The early notions of a fundamental breach developed independently of exception clauses. They were concerned with when a party might terminate or repudiate a contract, the general principle being that one cannot terminate or repudiate a contract except where there is either an express provision to this effect or the aggrieved party is discharged of his obligations since the other's breach of contract "goes to the root of the contract", or amounts to the breach of an "essential obligation" or of a fundamental term or of a "condition" rather than a "warranty". Generally a breach was fundamental if it resulted in the collapse of a bargain.

At first the aggrieved party was regarded as having assumed all risks unless otherwise specified. Courts kept strictly to the letter of the contract; they took their role to be that of upholding the express contract with total respect for the sanctity of terms. So in the old case of Chandelor v. Lopus [1], caveat emptor was held to apply rigidly; the seller not having warranted his horse to be "good", there "is no cause of action". Similarly in Paradine v. Jane [2] the parties were left to anticipate and provide for the consequences of every contingency; otherwise they were bound according to the express terms of the contract, the court refusing to fill any gaps. It followed that unforeseen circumstances including force majeure which rendered a performance either substantially wanting to the buyer, or impossible, or highly onerous to the performer could not give a right to repudiate.


It was not appreciated that in the time lapse between the formation and the performance of a contract innumerable new circumstances can arise which the parties cannot really anticipate but which may seriously affect the pattern and extent of risks assumed by each party in the contractual relationship. Nor was it seen that while the parties could make a sufficiently 'certain' contract for the purposes of 'forming' or 'making' a bargain, so as to create a 'binding' bilateral relationship between them (if only to cut off the offeror's right to revoke his offer or promise), this did not suffice to answer the question of what performance was due from the promisor in the circumstances. To cope with these problems raised by the bilateral contract, the courts needed new devices to adapt a contract in the light of supervening realities. As Street has observed, the bilateral contract is "based solely upon consent" only in the sense that its obligatory force is contractual and is not founded on any other legal duty [1].

One such regulatory device came with the introduction of the implied term. By means of an implied term, courts could write into a contract terms which the parties had not agreed on and so adjust their exchange positions. As Lord Ellenborough said in Gardiner v. Gray [2], a landmark case, a purchaser cannot be supposed to buy goods to lay them on a dunghill. In other words, in spite of the sanctity of terms, the courts now began to recognise that an exchange by bargain could not or should not result in a total failure of consideration: that (putting this a little differently) the buyer

---

[1] As were for example, the early real contract or simple debt before it. The Foundations of Legal Liability, Vol.II (reprinted ed., New York: Edward Thompson Co. 1966) chap.I-VI.

must get something for his money.

Another (and for present purposes more important) regulatory device began with the seminal decision in Boone v. Eyre [1]. Here a buyer was held not entitled to refuse payment of the price for a plantation with a stock of negroes even though the seller had not fully complied with the express terms of the sale. The latter had already conveyed the estate but could not, contrary to his covenant, make complete title to all the negroes. The covenant was said to be one of minor importance. It went only to 'part' of the consideration: the buyer had received title to all but a few negroes. The misperformance did not disable the seller from his action.

The distinction is very clear, where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent. If this plea were to be allowed, any one negro not being the property of the plaintiff would bar the action [2].

Quite clearly, the court was striving for a reason to disallow the aggrieved buyer the benefit of default by the seller in this partly executed covenant [3]. The covenants, said the court,


[3] "...if, in the case of Boone v. Eyre, two or three negroes had been accepted, and the equity of redemption not conveyed, we do not apprehend that the plaintiff could have recovered, the whole stipulated price, and left the defendant to recover damages for the non-conveyance of it", per Pollock C.B. in Ellen v. Topp (1851) 6 Exch. 424, at p.442, 155 E.R. 609, at p.616.
"are executed in part, and the defendant ought not to keep the estate because the plaintiff has not a title to a few negroes" [1].

In this view there was evidently no relation between the importance of the stipulation broken and the amount of benefit a party might have obtained up to the time of the breach. **Boone v. Eyre** was primarily concerned with the question of whether a buyer had to pay for a performance even if incomplete. But although the distinction between the whole and part of the consideration in **Boone v. Eyre** provided a flexible calculus as to when a buyer was entitled to refuse to perform his own contractual obligations it was not clear how great or small a 'part' had to be [2].

In **Boone v. Eyre** itself the seller's lack of title in the few negroes could be said without particular difficulty to be only a 'part' of the consideration. If the breach might be adequately compensated by damages, Lord Mansfield had suggested, the breach did not go to the "whole of the consideration", hence the buyer could not repudiate, damages being adequate as a remedy. It was henceforth clear that some contractual terms might require less fulfilment than others and might be adjusted. The gravity of the breach relative to the part performed determined the buyer's right to refuse to perform; or, as it came to be generally said, if the seller had performed a "substantial part of the contract" the buyer could only recover

[1] Per Ashurst J. whose judgment is not reported but can be gleaned from **Campbell v. Jones** (1796) 6 T.R. 570, 101 E.R. 708, at p.710.

[2] In **Bastin v. Bidwell** (1880-81) 18 C.D. 238, Kay J. thought it was "not a very fortunate use of language to say 'where covenants go to the whole consideration on both sides', but the meaning is very clear."
damages [1].

Furthermore, the fact that Boone v. Eyre was a case involving an executed covenant and not an executory simple contract was overlooked, and the part-whole distinction was extended to executory simple contracts. The result was that after Boone v. Eyre an averment of performance was needed only where the mutual stipulations went to the "whole of the consideration"; or, putting this in less procedural language, only where the promisor's breach was fundamental did the other party have the right to repudiate. So in The Duke of St. Alban's v. Shore [2], the buyer could repudiate an agreement to convey land when the seller cut timber on the land before the completion of the conveyance, thereby diminishing the value of the land considerably. What the seller did went not just to a 'part' but to the 'whole' of the consideration, and the buyer was not obliged to pay for an estate which was substantially different from that under the contract.

What went to the 'root' or 'whole' of the consideration differed between executory and executed contracts. In the former the criterion as applied was more rigid, unless there were special situations such as instalment contracts, or special service contracts

[1] Per Pollock C.B. in Ellen v. Topp (1851) 6 Exch. 424, 155 E.R. 609. In Forman v. The Ship "Liddesdale" [1900] A.C. 190, it was said that there must be no material difference in kind between the work, so far as it was executed, and the work contracted for.

[2] (1789) 1 H.Bl. 270, 126 E.R. 158. Even when it was recognised in Graves v. Legg. (1857) 2 H. & N. 211, 157 E.R. 88, that Boone v. Eyre related to an executed covenant and not an executory contract, it was not fully appreciated that Boone v. Eyre was mainly concerned with whether a buyer had to pay for a performance rendered even if incomplete, whereas in executory contracts the question was whether a buyer could reject any performance tendered.
such as those in Bettini v. Gye [1] and Poussard v. Spiers [2]. In Bettini v. Gye temporary illness had made a singer four days late for rehearsals which he had undertaken to attend before the commencement of his engagement. It seemed to have been material in Blackburn J.'s opinion that although the impresario may not as yet have benefitted from the agreement, the late start did not prejudice him either. On the other hand, in reliance on the agreement the singer had incurred detriment by foregoing any possible alternative employment for its duration. Consequently the impresario could not refuse the services of the singer. In Poussard v. Spiers a prima donna was to perform in a new opera for three months. After attending several rehearsals as expected, she fell ill and could not attend the last few rehearsals. The impresario, being uncertain how long her illness might continue, provisionally engaged a substitute who was to receive a douceur if she was not needed. Otherwise she was to be permanently employed for a weekly salary till 25 December. The prima donna continued to be too sick to attend the opening performance and the following three performances. On 4 December she tendered her service which was refused. It was held that the impresario could not be expected to adopt a "ruinous" course as would have been the case if he had to postpone performances for the uncertain duration of the prima donna's serious illness. Nor could he be expected to incur substantial detriment by retaining her services and at the same time employing a substitute by permanent engagement.

[1] (1876) 1 Q.B.D. 183.

The practical considerations underlying the decisions in the two cases have been overshadowed by the attention paid to Blackburn J.'s test, invoked in both cases, of whether the term "[went] to the root of the matter", so that a failure to perform it would render performance of the rest of the contract a thing "different in substance" from that which the aggrieved party had stipulated for. It was subsequently observed that "like most metaphors, [Blackburn J.'s test] is not nearly so clear as it seems" [1].

Concern that the seller should not incur disproportionate loss where he had invested for future performance is well exemplified in the various decisions relating to instalment contracts. In a sale of 667 tons of iron to be shipped in four monthly shipments, which were to be "about equal" it was held that a shipment of twenty one tons at the outset could be rejected by the buyer who could also refuse to accept the rest [2]. But an unsatisfactory delivery in the course of the contract would not entitle the buyer to similar remedies [3], as where a single delivery of one and a half tons of seriously defective flock in a sale of 100 tons did not entitle the buyer to refuse to accept delivery [4].


[4] Maple Flock v. Universal Furniture Products (Wembley), [1934] 1 K.B. 148, at p.157. The gravity or significance of the breach was said to depend on the ratio quantitatively which the breach bore to the contract as a whole and the degree of probability and improbability that such a breach would be repeated.
In the interest of the buyer who had paid and received none of the agreed benefit under a contract, the doctrine of total failure of consideration was developed to give him a quasi-contractual remedy of recovery. Unlike Boone v. Eyre which protected to some extent the seller who had invested in the performance of the contract, total failure of consideration rather protected the buyer who was allowed to repudiate and to recover back his money despite any expenses that might have been incurred by the seller in the purported execution of the contract. This was true even though in most cases the seller's expenses would be insignificant.

At first a buyer had a remedy in money had and received only upon the non-delivery of the consideration. If, however, the goods delivered were so different in kind that they were not to be regarded as a delivery at all, or if they were worthless, a buyer who had paid in advance was allowed to repudiate and to recover the price paid. An action in indebitatus, it was said, was possible if, to use the well known examples, sawdust instead of fish was delivered in a contract for fish [1], or if counters were delivered in a sale of foreign gold coins [2], or if a bar was sold as gold but was in fact brass [3]. In these examples, the courts would permit recovery in the absence of fraud or of any express warranty, and not because of any implied warranty (which was not fully recognised yet). The 'total' failure

was not a literal one [1]. For instance, a buyer who had paid money in excess could recover back the excess when there was not a complete failure of consideration [2].

With these new devices protecting sellers and buyers according to whether the contract was executed or executory, the development of the law followed a course involving the struggle between two opposing ideas - the sanctity of terms on which the strict approach is based, and the adjustment of the exchange relationship of the parties in the event of supervening events including a party's breach, subsequent to the formation of the contract. The notions of fundamental breach embodied the compromises struck between these two ideas: the compromises varying generally with the degree of performance rendered and conversely with the consequences of the breach. These compromises manifested themselves differently in different types of transactions, but basically they found their levels from a common conception of the bilateral contract as an exchange by bargain.

Not that this struggle had uniform results. The theme of conflict and compromise that emerged was at the same time countered by the adoption of the strict approach in many cases, a telling example of which was Bowes v. Shand [3]. A majority of the House of Lords in


that case adopted the strict approach; according to the minority this disregarded the seller's performance and disproportionate loss. The strict approach was also bolstered by the consensus theory of bilateral contracts which amplified the element of 'intention' to the extent of obscuring a key distinction between the issues of the formation of a bilateral contract and its performance. The truth is that 'consent' gave the bilateral contract legal validity but there was no logical necessity for it to reign supreme in the arena of performance.

When courts responded to the need for remedial adjustment of the exchange positions of the parties, their true concerns were often either not wholly conscious or acknowledged, or were deliberately disguised to avoid offending the concepts of sanctity of terms and freedom of contract. These concepts in turn resisted the adjustment principle as it was seen as the epitome of judicial interference and the antinomy of established law.

Had it not been for the gradual shifts in its meaning, the concept of freedom of contract need not be opposed to the adjustment principle. Freedom of contract was originally to ensure freedom of action and not to enshrine the idea that bargains are unalterable [1].

[1] Angelo, A.H., and Ellinger, E.P., explain that a study of the relevant provisions in the Prussian Code (para. 1.3.1), the Code Civil (1108-1122) and the German Code (116 and 145) shows that freedom of contract was originally and primarily to ensure freedom of action and not to consecrate bargains. "Unconscionable Contracts - A Comparative Study" (unpublished manuscript contributed to the Canberra Law Workshop II (28-29 October 1977) 1-50); Wilson, N., "Freedom of Contract and Adhesion Contracts" (1965) 14 Int. Comp. L. Q. 173. German jurisprudence recognises that freedom of contract means: the freedom to enter into a transaction (the Abschlussfreiheit) and the freedom to co-determine the terms (the Gestaltungsfreiheit).
It had an eminently practical purpose. When the awkward and limited typical contracts in the fifteenth and sixteenth centuries had outlived their usefulness, some means of facilitating the ever-increasing types of transactions were necessary. Freedom of contract, encompassing the notion of consensus, provided an elastic instrument for the infinite varieties of dealings by reducing the "ceremony necessary to vouch for the deliberate nature of a transaction" to a minimum [1]. But under the influence of laissez faire ideals it became a manifestation of free trade. Relations between men, it was also asserted, ought to rest on mutual free consent and not on coercion on the part of the state and society [2].

The concordance of two sets of external signs manifesting the intention of the parties became central to the notion of contract, but with a difference. The importance of this idea was shifted from its central significance as the basis of the legal validity of the bilateral contract to the redefined judicial role as one of strict adherence to the letter of the contract. As a result contract became


[2] E.g. Adam Smith's economic laissez faire postulated that if individuals were allowed to pursue their self-interest free from governmental interference they would maximise their own profits and thus the wealth of the society as a whole. Competition of individual self-interests would result in social harmony through the agency of the "invisible hand" and contract was to be instrumental. Similarly, Bentham, James Mill and J.S. Mill preached the absence of restraint. See Pound, R., "Liberty of Contract" (1908) 18 Yale L.J. 454; "...unlimited freedom of making promises was a natural right..."; Viner, J., "The Intellectual History of Laissez Faire" (1960) 3 J.L. & Econ. 45, pp.59-61; Atiyah, P.S., The Rise and Fall of Freedom of Contract, (Oxford: Clarendon Press 1979).
a private matter between the parties in which, it seemed to follow, the courts could only provide for the interpretation of contracts and could not 'rewrite' them or impose their views on the parties. Once there was a manifestation of assent the parties were bound according to the contractual rights and duties specified in the contract whatever might subsequently happen to make nonsense of them. Freedom of contract thus became the "inevitable counterpart of a free enterprise system" in a form quite different from its original. The judicial attitude towards freedom of contract was, for a long time, epitomised by Sir G. Jessel M.R.'s much quoted statement that:

if there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice [1].

2. Frustration of the Venture

If contracts were to be held sacred, what were the legal consequences on the contractual relationship between parties where a performer, because of an unforeseen and unavoidable supervening contingency, could not perform his obligations due under the contract? Where there was a clear case of physical impossibility, he was excused

by law [1]. The more common problem, especially in charterparties, however, involved a temporary impossibility brought about by a force majeure. A shipowner was protected from liability for failure to perform duly only if he had secured for himself an express excuse under the contract, for instance, by including the usual 'exception of perils' clause. His obligations were suspended by virtue of the express exception clause for the duration of the temporary impossibility and he was excused from performing duly. That being all the protection expressly provided for, he could not repudiate the contract. Likewise the charterer could not repudiate either. Both were bound in the absence of express provision to the contrary until such time as the temporary impossibility was over and one party breached the contract by not performing. The parties, it was said in Hadley v. Clarke [2], "must submit to whatever inconvenience may arise therefrom unless they have provided against it by the terms of their contract".

The contract still subsisting, both shipowner and charterer had to perform according to the provisions of the contract once the temporary impossibility was over. Thus a charterer still had to load under a contract for the shipment of fruits after the removal of an embargo even though the season for shipping had long since passed and


[2] (1799) 8 T.R. 259. This case was later disposed of by Metropolitan Water Board v. Dick, Kerr [1918] A.C. 119 (H.L.), at p.127 per Lord Finlay, L.C.
the voyage was rendered useless to him [1]. The shortcomings of such an approach were evident. In no sense could it be said that the purpose of a charterer, who quite clearly needed his fruits to be shipped for a certain market, was to have the service of a shipowner's carrier at a time when there was perhaps neither fruits to ship nor the market for them. Holding him to an arrangement which in changed circumstances was completely different amounted to making him assume all risks of supervening events.

It was gradually recognised that contracts were not agreements to do something simpliciter but were more realistically ventures in respect of which certain types of risks were not within the "realm of the bargain". Protection was thus extended to the charterer on the ground of (what was now called) frustration of the venture. An early application of the idea occurred in Freeman v. Taylor [2] where it was said that if the delay was "so long and unreasonable that, in the ordinary course of mercantile concerns it might be said to have put an end to the whole object [of] the freighter" the charterer could be excused. In that case the shipowner's deviation and resulting delay of six weeks was found to have deprived the charterer of the benefit of the contract and excused his refusal to load as he was obliged to do under the contract. This was a departure from a relic of the rules of independency and dependency which said that an undertaking to arrive for loading at all

[1] Touteng v. Hubbard (1802) 3 B. & P. 291, 127 E.R. 161. The case was decided in the charterer's favour on the ground that a Swedish subject could not recover from a British subject damages incurred as a result of reprisals taken by the British government against the Swedish government. But Lord Alvanely C.J. would clearly not have resolved the problem in different circumstances other than by a strict approach. Hadey v. Clarke, he said, would apply; at p.165.

speed, as was the case here, was independent and would allow a
shipowner to bring an action on the contract. In Tarrabochia v.
Hickie [1] the jury was directed to decide if the "object of the
charter-party and of the voyage therein mentioned was wholly
frustrated by the delay or the alleged unfit condition of the ship".
Only a delay or deviation which "entirely frustrates the object of the
charterer in chartering the ship" could excuse his
non-performance [2].

The ideas germane in Freeman v. Taylor and Tarrabochia v.
Hickie were quite clearly concerned with a different and more
difficult problem than that encountered in Boone v. Eyre. In the
cases of temporary impossibility the issue was not how great or small
a part of the contract has been performed but whether the inordinate
delay was such as to defeat the charterer's object in entering into
the contract. Complicating the issue was the fact that in the
majority of these cases the shipowner was protected by an express
provision from an otherwise actionable breach when he failed to
perform duly. Would such a clause affect any right of the charterer
to be discharged of his obligations?

It became clear in Jackson v. The Union Marine Insurance [3]
that the notion of the frustration of the venture applied equally to
collapses of bargains resulting from a performer's actionable breach
as well as from his excusable failure to perform. In Jackson's case,
the shipowner was to proceed "with all possible dispatch" to Newport

[1] (1856) 1 H. & N. 133, 156 E.R. 1168.

[2] MacAndrew v. Chapple (1866) L.R. 1 C.P. 643, at p.648 "From the
time of Boone v. Eyre, Ritchie v. Atkinson, and Davidson v.
Gwynne, this rule has been applied".

to load a cargo of rails for San Francisco, "dangers and accidents of navigation excepted". The ship was grounded by perils of the sea, a cause within the exception clause, and was damaged with the result that the voyage would have taken eight months longer than the normal time. In the meantime the charterer had abandoned the charter. According to the literal interpretation of the contract, the ship would have arrived in time. Nevertheless, it was held that the delay was so material to the charterer who needed the rails for a railway that he was excused from his performance of the contract after the ship was grounded for six weeks. As the charter was for a definite voyage "there is necessarily an implied condition that the ship shall arrive at Newport in time for it" [1].

The court rejected the shipowner's argument that regardless of whatever contingencies that may arise subsequent to the formation of the contract, he, the shipowner, was still bound to take and had the right to demand the cargo of the shippers [2]. Whether the delay was caused by the shipowner's default or by force majeure, the charterer could still be discharged after the lapse of a reasonable time. The charterer's right of discharge was independent of any express or implied exception clause. The exception clause was an excuse for the shipowner who was to perform, and saved him from an action. It made his non-performance not a breach of contract, but did not operate to take away the right that the charterer would have had, if the non-performance had been a breach of contract, to "retire from


the engagement" [1]. The charterer's remedy is now known to be for a failure of consideration in the executory sense. This was confirmed two years later in Poussard v. Spiers by Blackburn J. who was also a member of the Court of Exchequer Chamber in Jackson's case. He pointed out the "complete analogy" between the two cases, in each of which was such a "failure of consideration" that the aggrieved party was entitled to rescind [2].

Since the charterer's right was an option to repudiate the contract when inordinate delay resulted from a force majeure it followed that he could consider himself still bound to the contract and hold the shipowner to his side of the bargain. But in Geipel v. Smith [3] the modern doctrine of frustration had begun: the shipowner was discharged of his obligations under the contract where its object was frustrated.

On facts similar to Hadley v. Clarke, the court in Geipel v. Smith held that the shipowner was discharged of his obligations under the contract when the object of completing the contract within a

[1] Id., p.145. "[T]here are the cases" said Baron Bramwell, "which hold that, where the shipowner has not merely broken his contract, but so broken it that the condition precedent is not performed, the charterer is discharged:... Why? Not merely because the contract is broken. If it is not condition precedent, what matters is whether it is unperformed with or without excuse? Not arriving with due diligence, or at a day named, is the subject of a cross-action only. But, not arriving in time for the voyage contemplated, but at such a time that it is frustrated, is not only a breach of contract, but discharges the charterer. And so it should, though he has such an excuse that no action lies": at p.147.


reasonable time became impossible. The contract, Blackburn J. explained, was not for a voyage at some indefinite time in the future but contemplated a "commercial speculation within a reasonable time" [1] and a blockade was a 'restraint of princes' [2] which was "likely to continue so long and so to disturb the commerce of merchants, as to defeat and destroy the object of a commercial adventure like this" [3]. The presence of the express exception of 'restraint of princes' suggested that the delay was a "possibility within the contemplation of the contract" [4]. And because the performer's commercial object of the venture was defeated he was entitled not only to a suspension of his obligations but also to have them discharged. To otherwise hold him to the contract promoted deplorable economic waste.

But the notion of the frustration of the venture became obscured mainly as a result of two complications, neither of which had anything to do with its basic thrust, which was to protect the charterer. One was the application of frustration of the venture for the protection of the shipowner. The significance of Geipel v. Smith was not as yet fully appreciated. In Jackson's case itself, it was thought that the shipowner and the charterer not being at fault, both were released from the contract: "if one party may [rescind], so may

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[3] Id., at pp.414-5, per Lush J.
the other" [1]. This line of argument was taken further in Tamplin Steamship v. Anglo-Mexican Petroleum [2].

In that case, a ship was hired on a time charter for five years for the carriage of oil with the usual form of clause excepting "restraint of princes, rulers and peoples". The ship was requisitioned by the Admiralty and altered making her unsuitable for oil when the charter had almost three more years to run. It seemed at the time of the requisition that it could be for the duration of the war, but in fact it ended before the expiry of the original term. The admiralty paid compensation in excess of the hire. It was assumed that if the contract was avoided the shipowner would be entitled to the compensation. Consequently, the shipowner sought to repudiate the contract while the charterer contended that the contract subsisted and he was ready and willing to perform. A majority of the House of Lords was not prepared to allow the shipowner the substantial benefit which he had not bargained for and held that the contract subsisted [3]. It

[1] (1874) L.R. 10 C.P. 125, at p.145. Contra, Cleasby B. supported the earlier cases because they followed a rule that was "certain clear and not influenced by unfair collateral considerations of interest" while the new rule gave "each party the chance of getting out of the charter, according to his interest to do so".


[3] One view that...ran through the opinions of the majority was this: No one was hurt by the continuance of the charter, and if the government relinquished the ship there was no reason why the charter should not be effective for the remaining period of its duration, which might be considerable" and that had the facts been different, that is, had the government taken the ship and had said they would pay nothing...and had the owner sued the charterer for the hire during the requisition the case would have "fallen within the lines of Horlock v. Beal", that is to say, the charterer would not have to pay; per Lord Dunedin in Metropolitan Water Board v. Dick, Kerr [1918] A.C. 119 (H.L.), at p.129.
was clear that had the special facts not been present and had the charterer been sued for the hire instead, the charterer would not have to pay because the venture was frustrated. The dissenting minority, however, held that the contract had fundamentally collapsed: the requisition went to the root of the consideration and "relieve[d] both parties...from their engagements" [1]. The requisition it was explained, created a condition of things to which the charterparty was inapplicable, hence discharging both parties. Essentially the courts were concerned to adjust the risks of unforeseen and unavoidable supervening contingencies between two innocent parties. These risks are in a sense 'apportioned' between them: the performer can plead in defence the principle of impossibility (more specifically, what is now known as frustration), while the payor is protected by the principle of the frustration of the venture. But the courts themselves were not always aware of the implications of these developments. The notion of the frustration of the venture from the charterer's point of view (as a failure of consideration) and from the shipowner's point of view (as a contemplated risk which he was regarded as having assumed but only to an extent short of defeating his commercial object in contracting) became subsumed under a 'new' and independent doctrine where courts looked for the common object of the contract. Such object, when defeated, it was said, ended the contract [2].

The implication that both shipowner and charterer were discharged by the same principle was of course mistaken. The charterer did not have to pay when he obtained nothing or absurdly


[2] E.g. the Coronation and War cases; see the discussions of them by Williams,G.L., in "The Coronation Cases, I" (1941) 4 Modern L.Rev. 241, "The Coronation Cases, II" (1941) 5 Modern L.Rev. 1.
little. "It [was] the further performance of the contract by one
party which formed the consideration for the payment by the other,
which [had] become impossible" [1] and which enabled the charterer to
be discharged. This certainly could not be the reason for relieving
the shipowner who was protected by the principle in Geipel v. Smith.

The other complication was the extension in Taylor v.
Caldwell [2] of the older rule of impossibility under which death of
the performer excused his failure to perform [3]. Taylor v. Caldwell
protected a performer from risks of destruction of the particular
thing he contracted to deliver and excused him from failure to
perform. But the reason given for the performer's excuse was
explained in terms of an implied provision to the effect that he was
not to be liable and that the contract was to terminate. Indisputably
this implied term was "a device by which the rules as to absolute
contracts are reconciled with a special exception which justice
demands" [4]. Unfortunately the implied term in Taylor v. Caldwell
became confused with the implied term mentioned in Jackson's case
which seemed to account for the consequences of the frustration of the
venture in the latter. Impossibility of performance in Taylor v.
Caldwell, frustration in Geipel v. Smith

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K.B. 222, at p.237, and Admiral Shipping v. Weidner, Hopkins


Hall v. Wright (1859) El.B. & El. 746, at p.765, 120 E.R. 688
(sickness which disables performance).

497, (P.C.), at p.510; Scott v. Del Sel [1922] S.C. 592, at
p.596 per Lord Sands "...a pious fiction". See also the
observations of Isaacs J. in Hirsch v. Zinc Corporation [1917] 24
C.L.R. 34 at pp.63-5.
venture in Jackson's case were consequently treated as virtually one principle [1].

3. The New Doctrine of Fundamental Breach

The doctrine of fundamental breach which is the subject of this thesis is completely different from the earlier notions that we have just discussed. Generally speaking, as Lord Diplock put it succinctly in **Hongkong Fir Shipping v. Kawasaki Kisen Kaisha** [2], the problem in every bilateral contract is "in what event will a party [to a contract] be relieved of his undertaking to do that which he has agreed to do but has not yet done". The problem which the doctrine of fundamental breach attempts to resolve is, however, more difficult than those for which **Gardiner v. Gray**, and **Boone v. Eyre** were capital decisions. Fundamental breach seeks to determine when an aggrieved party may still have a remedy against a defaulting performer, despite the presence in the contract of an express exception clause which *prima facie* protects the latter from his own avoidable or culpable (in

[1] E.g., in Tamplin Steamship v. Anglo-Mexican Petroleum [1916] 2 A.C. 397 where all the speeches assumed expressly or implicitly that the principle applied in the cases of frustration was the same principle in **Taylor v. Caldwell**; Lord Loreburn at p.404 accepted Knell v. Henry and then went on to say "when this question arises in regard to commercial contracts, as happened in **Dahl v. Nelson**, **Geipel v. Smith**, and **Jackson v. The Union Marine Insurance**, the principle is the same, and the language used as to 'frustration of the adventure' merely adapts it to the class of cases in hand"; per Lord Parker at p.428; Per Lord Atkinson at pp.406-7, 412; McNair,A.D., "Frustration of Contract by War" (1940) 56 L.Q.Rev. 182; but see McElroy,R.G., and Williams,G.L., *Impossibility of Performance* where failure of consideration (or frustration of the venture) was clearly identified and distinguished from the modern doctrine of frustration and the rule in **Taylor v. Caldwell**.

as much as it is within his control) misperformance, for which he is normally liable. Fundamental breach was thus, one may say, developed almost as a device to control excessive exception clauses. The courts examine the duty of performance in view of an exception clause and find in certain circumstances a fundamental breach which overrides the clause.

In this respect, there is some similarity between fundamental breach and the concept of self-induced frustration. In both the duty of performance comes under scrutiny. In the latter, if the risks of unforeseen and unavoidable supervening contingencies are self-induced, that is they are in some way due to a party's own conduct [1], he cannot regard himself as discharged of his obligations without liability. If his breach is the frustrating event, he is not protected because he is not entitled to take advantage of his own wrong, be it a deliberate choice not to perform or to put performance out of his power. He will also not be protected if his conduct is a contributory cause [2]. For he is considered as not having done enough or not having acted with sufficient industry to give the kind of benefit expected under the contract and therefore ought not to be protected despite the force majeure involved.

Although the degree of fault necessary to give rise to self-induced frustration is uncertain, it seems that all deliberate and negligent acts whether amounting to breaches of contract or not


[2] E.g. The Eugenia [1964] 2 Q.B. 226, where a charterer who took his ship into prohibited waters could not plead frustration when it was in consequence detained.
are sufficient [1]. Thus where a hirer of a trawler (for use with an otter trawl) chose to use the three licences obtained for the other of the five trawlers operated by him with the result that he could not operate the otter trawl with the hired trawler, he was not protected by the principle of frustration. Although the refusal of a fishing licence in respect of a trawler frustrated the object of the charterparty, it was "the act and election of the [charterers] which prevented the [trawler] from being licensed for use with an otter trawl" [2]. Hence the charterparty remained alive and the owners were entitled to the hire.

The similarity between fundamental breach and self-induced frustration is, however, a limited one. Their crucial difference lies in the fact that in cases of fundamental breach a performer is expressly excused from liability for his own breach and the thrust of fundamental breach is to make the performer liable notwithstanding such excuse, whereas in the latter, an issue of frustration, it seems, cannot in the first place arise if the parties have made express

[1] Denmark Productions v. Boscobel Productions [1969] 1 Q.B. 699. In Joseph Constantine v. Imperial Smelting corp. [1942] A.C. 154, at p.179 Lord Russell of Killowen said he wished to guard "against the supposition that every destruction of corpus for which a contractor can be said, to some extent or in some sense, to be responsible, necessarily involves that the resultant frustration is self-induced within the meaning of the phrase". Cf. per Cullen C.J. in Cornish v. Kanematsu (1913) 13 S.R. (N.S.W.) 83, at p.89.

[2] Maritime National Fish v. Ocean Trawlers [1935] A.C. 524 (P.C.), at p.529. The Canadian Court had taken the view that the risk of frustration was taken by the parties as they both knew at the time of contracting that the licence was required. The Privy Council did not dissent from it but decided on the ground stated. Hirji Mulji v. Cheong Yue S.S., [1926] A.C. 497 (P.C.), at p.507 per Lord Sumner; Denmark Productions v. Boscobel Productions [1969] 1 Q.B. 699, at pp.725,736.
provision for the unforeseen supervening contingency [1].

It should also be mentioned that although fundamental breach was developed mainly in cases involving standard form contracts, its operation is independent of the special form of these contracts [2]. The problem which confronts fundamental breach arises from the use of overwide exception clauses which happen to be common in standard form contracts. Judges and lawyers have not quite grasped the fact that it is one thing to use standard form contracts and another to use overwide exception clauses. Consequently they have tended to associate fundamental breach with standard form contracts and to regard the former as a response to the problem peculiar to the latter. In this view, fundamental breach could only be developed at the expense of underrating the role of standard form contracts in an economy that supports mass production.

The perennial criticism of standard form contracts is that the payor who enters into the transaction on unfavourable standard terms has no meaningful choice and hence cannot be said to have


[2] Standard form contracts or adhesion contracts (when they are unilaterally drafted and imposed on the other party) are, to use Bright J.'s criteria, marked by two features: (i) one party has fixed unalterable conditions in advance, and (ii) the other either in ignorance or out of necessity submits to them. The terms may be fair or unfair or they may be some or all of the conditions; "Contracts of Adhesion and Exemption Clauses" (1967) 41 Aust.L.J. p61. In Watkins v. Rymill (1883) 10 Q.B.D. 178, at p.188 per Stephen J., the emphasis is on the unilateral determination of the terms by one party. Similarly, the originator of the term 'adhesion contract', Saleilles, spoke in terms of preformulated stipulations in which the offeror's will is predominant and the conditions are dictated to an undetermined number of persons and not to one individual party (as translated in the opinion of Henningsen v. Bloomfield, 32 N.J. 358 at 390, 161 A 2d 69 (1960)).
entered into a bargain freely. This criticism has little to do with fundamental breach. The fact of the matter is that fundamental breach, as we shall see, is not concerned with an issue of lack of choice and the problem of standard form contracts is a distinctly separate and difficult one.

Much has been said about the standard form contracts which are generally denounced for being "nothing less than a legislative code imposed by the one party on the other" [1]. They, it is said, epitomise the unreality of freedom of contract. But what is often overlooked is that they are products of and are an integral part of modern business. They have indisputable legitimate utility in rational economic planning and the calculation of transaction costs. Mass production relies on specialisation that involves a large number of organs. Owing to their organisational problems, corporations need to exercise control over the fragmented and specialised operations to ensure that the units of production act predictably and in unison. This may be done through standard form contracts which provide a predetermined and uniform means of contracting. They set the pattern for action and regulate the extent to which discretion may be delegated to individual officials. Risks of unlimited liability for untold kinds of contingencies that can flow from modern business may also be brought within some control as they can be isolated and made

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(footnote cont'd)
The Israeli legislative definition of a standard form contract is "a contract all or any of whose terms have been fixed in advance by or on behalf of the person supplying the commodity or service with the object of constituting conditions of many contracts between him and persons undefined as to their number or identity": Standard Contracts Law 5724, 1964, s.1.

calculable by their use [1]. In recent times their use has become more important because producers are increasingly made to bear the consequences of negligence to individual consumers which are immensely difficult to prevent and which are perhaps statistically unavoidable. Frequently their widespread occurrence has been regarded as evidence of unequal economic power and monopolistic trends which, surprisingly, may be the result of a competitive economy. For, as it has been put graphically, the elimination of competition is inherent in the idea of competition and one way of doing so is to absorb it [2].

In view of the unique problem of standard form contracts it may be necessary to adopt a special approach to them. Indeed ample arguments have been advanced for their more enlightened treatment [3].

[1] E.g. in Hollis v. White Sea Timber Trust [1936] 3 All E.R. 895, sellers of timber from a port in the Arctic Circle open for navigation only about 21 days stipulated "this contract is subject to sellers making necessary chartering arrangements for the expedition and sold subject to shipments any goods not to be cancelled". And as Kessler pointed out, what cannot be calculated including the "juridical risk" of judges being influenced by irrational factors, is excluded: "Contracts of Adhesion - Some Thoughts about Freedom of Contract" (1943) 43 Colum.L.Rev. 529. Deutch thinks that standard form contracts cannot be substantially changed without giving up their benefits, Unfair Contracts (Toronto: Lexington Books & Co. 1977) p.39.


[3] E.g. Silberberg,H., "The Meaning of Standard Form Contracts" (1967) 7-8 Rhodesian L.J. 158, suggests a law of standard form contracts with a complete set of rules to deal with them; Gluck,G., "Standard Form Contracts: The Contract Theory Reconsidered" (1979) 28 Int.Comp.L.Q. 72, calls for the reclassification of standard form contracts and the development of appropriate principles based on a doctrine of informed notice. Where the terms are onerous and unexpected (in that they are not usual and within general expectation) actual knowledge or assent should be needed. A party's freedom to go elsewhere for a contract must also be ensured, for example, by anti-trust legislation. (cont'd on next page)
It is now generally agreed that whereas the law relating to standard form contracts needs to be reformed, the undoubted advantages of such contracts should not be foregone. To achieve this, factual investigations into the economic implications of the contracts as well as specific reforms are necessary. Lawyers and judges can at best only make an intelligent guess at them. These tasks are not the concern of this thesis and they are in any event outside its scope.

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Chapter II

TOWARDS A NEW CONCEPTION OF FUNDAMENTAL BREACH
1. The Genesis of Fundamental Breach

Established rapidly in the 1950's, fundamental breach was generally regarded as a new rule introduced by the courts. This, it is submitted, was not the case. Fundamental breach as it was first unequivocally enunciated in Karsales v. Wallis [1] had in fact two progenitors. One is the Gibaud rule which is the result of a major effort by the courts to resolve a problem which arose in bailment contracts. Fundamental breach restated the rationale of the Gibaud rule in sale of goods cases and adapted its rationale to the types of transaction at hand. The other is an idea in Wallis v. Pratt [2] which has been overlooked and which is, ironically, popularly regarded as diametrically opposed to the notion of fundamental breach in Karsales v. Wallis.

This chapter therefore discusses how the Gibaud rule and the idea in Wallis v. Pratt were translated into the notion of fundamental breach. This is a first step to explaining the latter by what we shall call a theory of risks of avoidable misperformances, or more briefly, 'performance-related risks'.

2. The Gibaud Rule

The Gibaud or 'four corners' rule was developed mainly in contracts of services, in particular bailments. Examples were contracts for the carriage of goods by land and sea, contracts for the deposit of goods, contracts for laundering and drycleaning, and for

The essence of the Gibaud rule is that a party to a contract cannot rely on an exception clause where he has not performed within the 'four corners' of the contract. A much cited statement of the rule in Gibaud v. Great Eastern Railway, from which it derived its name, explains that:

if you undertake to do a thing in a certain way, or to keep a thing in a certain place, with certain conditions protecting it, and have broken the contract by not doing the thing contracted for in the way contracted for, or not keeping the article in the place in which you have contracted to keep it, you cannot rely on the conditions which were only intended to protect you if you carried out the contract in the way in which you had contracted to do it [1].

The plaintiff in that case deposited his bicycle with the defendant. Upon the payment of a fee and the receipt of a ticket at the defendant's office cum cloak room, the plaintiff asked if he should bring the bicycle into the cloak room but was told that the defendant's clerk would put it away. The bicycle was then at the open door of the cloak room partly in that room and partly in the public booking hall. It was later inexplicably lost. The defendant sought to rely on a clause which exonerated him from liability where the article deposited was worth more than 5 but has not been so declared and for which no extra fee was paid as required. The plaintiff contended that the contract was to store the bicycle in the cloak room and the defendant having failed to do so could not rely on the

exception clause. The court found that the contract was only to keep the bicycle with reasonable and proper care and not to keep it in the cloak room. It was therefore not a breach of contract to deposit the bicycle in the vestibule. As the loss occurred in the course of performing the contract, the defendant could invoke the exception clause which on interpretation was wide enough to cover the negligence in question and which was also "eminently reasonable" in as much as the remuneration was very small and the loss might be very great [1]. If, however, the bailee had contracted to keep the bicycle in the cloak room his failure to do so would not entitle him to invoke the exception clause in spite of its ambit.

The similarity of the Gibaud rule to the quasi-contractual doctrine of total failure of consideration has prompted at least one commentator to suggest that the former can be seen as an application of the latter [2]. But this is questionable, or only remotely true. In effect, the Gibaud rule introduces into these service contracts a minimum standard of compliance with contract terms to ensure that a performer observes a basic duty of performance of his obligations. This minimum standard is figuratively represented as the 'four corners' of the contract. An exception clause will be overridden, however wide its ambit may be, if the performer 'steps outside' the 'four corners'. In other words, a performer is to this extent prevented from unilaterally increasing supervening risks of misperformance, including risks of the performer's breach, which the other party otherwise bears in the normal course of events. For the area and the chances in which that loss may occur are indefinitely


increased when the performer does not comply with the contract terms when he attempts to perform [1]. A performer, therefore, cannot expressly excuse himself in advance from liability for breach and then not trouble himself with the manner in which he seeks to render performance of his contractual obligations since the other party will not be made to bear the brunt of any increased risk arising from outside the 'four corners'.

It is of course possible for two parties indisputably to enter into a contract for the chance that the other may perform his obligations in which case the very essence of the contract is the total assumption by one party of all risks of non-performance by the other. But in all other cases, "[if] a bailee elects to deal with the property entrusted to him in a way not authorised by the bailor, he takes upon himself the risks of so doing except where the risk is

[1] Lord Wright in Rendall v. Arco (1937) 43 Com.Cas. 1, at p.15 delivered the opinion of the House of Lords in these words:

"The essence of the principle is that damage has been sustained under conditions involving danger other than and therefore different from the conditions which would have operated if the contract had been fulfilled; for the consequences of such conditions the defendant is held liable. The principle thus applies whenever the breach of contract has the consequence of exposing the subject-matter to conditions of risk different from those which would have operated if the contract had not been broken... The defendant must show (if he can) that there must have been the same damage if the contract had not been broken... the mere fact that the risk is changed will be enough to shift the onus on to the defendant."
independent of his acts and inherent in the property itself" [1].
That this was the law had been left in little doubt in Garnett v.
Willan [2] which was decided a hundred years earlier. In that case
where carriers conveyed goods by a means other than that stipulated by
the contract, it was held that an exception clause similar to that in
Gibaud v. Great Eastern Railway could not be relied on. Bayley J.
noted that a carrier was entitled to limit his responsibility to a
reasonable extent since he ought to have a compensation in proportion
to the value of the article entrusted to his care and the consequent
risk which he runs. He could not, however, excuse himself from the
consequence of his own "misfeasance" [3]. Thus, while the exception
clause would be construed to give him the protection he "ought to
receive" it was subject to his not doing anything "by his own
voluntary act, or the act of his servants, to divest himself of the
charge of carrying the goods to the ultimate place of
destination" [4].

3. The 'Four Corners'

The 'four corners' of a contract must necessarily depend on
the nature of the contract in question. Consequently the 'four

p.511.

& Ald. 341, 106 E.R. 1216. Earlier cases cited included
Bodenham v. Bennett, 4 Price. 31, 146 E.R. 384; Birkett v.


[4] Id., at p.1114; Best J. distinguished between negligence and
misfeasance.
corners' is a criterion that takes many forms in a variety of fact-situations. It is proposed to describe here the 'four corners' of the types of contracts to which the rule has been applied so far.

a) Carriage of Goods by Sea

In these cases deviation from the agreed route or where none was stipulated, the customary route, was a prime example of an act outside the 'four corners'. Deviation provided a graphic example of a spatial quality of the 'four corners': 'stepping outside the four corners' was quite obvious.

A grave view was taken of deviation. The amount of damage resulting from it was immaterial. The moment deviation occurred, however inconsequential for practical purposes, the performer was not allowed to rely on an exception clause. The mental state of the performer when deviating was also irrelevant. If "the route be abandoned, whether it was due to oversight, ignorance, accident, or design, equally the agreed transit is departed from, and the privileges the carrier enjoys by contract during that transit cease" [1]. In Hain Steamship v. Tate & Lyle [2] for instance, a ship was chartered to load sugar at two Cuban and one San Domingo ports. The master of the ship was to be informed by telegram of the San Domingo port which was not at the time of the contract determined. Owing to the failure of the Cuban authority to deliver the telegram, the master set off for home after loading at the Cuban ports. When the mistake was discovered and the master was informed by wireless,

[1] L. & N.W. Railway v. Neilson [1922] 2 A.C. 263 (P.C.) at p.269. This was a case of carriage of goods by land which applied the rule in deviation cases.

the ship altered course to San Domingo. In doing so, damage to the ship and cargo was sustained. The House of Lords held the shipowner liable for deviation.

The Gibaud rule thus applied rigidly in cases of deviation. The performer was made responsible for virtually all damage when the ship deviated from the contract or usual route. He had the exceedingly heavy onus to show that had it not been for the deviation the damage or loss would still have occurred (and would have been excused) before he could be protected by an exception clause [1]. He might for instance show that the damage was the result of inherent vice [2].

The reason for the stringent view taken of deviation lies in the historical development of the Gibaud rule which is said to hail from Davis v. Garrett [3], the earliest reported English case of an action by a cargo owner against the shipowner. There, the master of the ship deviated unnecessarily from the usual course, during which a tempest wetted the cargo of lime and set the ship on fire resulting in a total loss. The shipowner argued that there was no necessary proximity of causation between the deviation and the damage caused by the tempest and hence the cargo owner's averment of loss by unnecessary deviation was insufficient and proof of proximity had to be given. The case proceeded on the basis that deviation was a


separate cause of action. Tindal C.J. held that there was a presumption of proximity between causation and damage and it was for the defaulting shipowner to negative it. The defaulting shipowner was responsible for the consequences that flowed from the deviation because he, the wrongdoer could not be allowed to "apportion or qualify his own wrong".

It is possible to interpret Davis v. Garrett to mean that the exception from perils of the sea in that case could not apply because the loss (presumptively) resulted from the deviation and hence was not covered by the clause. But Tindal C.J.'s decision turned on the fact that the loss happened while the wrongful act of the deviation was in operation. This was confirmed by Groves J. in Lilley v. Doubleday who also refuted the argument that Davis v. Garrett was decided on the ground that the shipowner was a common carrier [1]. Moreover, Tindal C.J. had in Davis v. Garrett further illustrated the point with an example uncomplicated by an exception clause: the "same answer might be attempted to an action against a defendant who had, by mistake, forwarded a parcel by the wrong conveyance, and a loss had thereby ensued; and yet the Defendant in that case would undoubtedly be liable" [2].

When similar facts arose in Leduc v. Ward [3] it was held that the ship was on a "voyage different from that contracted for to which the excepted perils clause did not apply". The noticeable shift of emphasis to the nature of deviation suggested that the fact of deviation ipso facto made exception clauses inapplicable. This

contributed to the subsequent view that a shipowner who deviates loses the protection of his exception clause as from the moment the deviation commences whether or not the cargo owner incurs increased risks of non-performance as a consequence. An instructive example is Joseph Thorley v. Orchis Steamship [1]. The contract of affreightment contained a clause excepting the shipowner from liability for loss arising from, inter alia, the negligence of stevedores in loading and unloading the ship. The goods were damaged through the negligence of the stevedores when discharging the ship. The owners of the goods brought an action to recover the amount of the loss so occasioned. Prima facie, the damage was covered by the clause. Earlier, the ship had deviated from the contract route, but it was found on the facts that there was no relation between the damage and the deviation.

The rule in Davis v. Garrett, it was obvious enough, could not provide an answer in the goods owners' favour. The burden of risks that they bore in the normal course of events had not been increased by the deviation. The loss was not caused constructively by the deviation either. The court nevertheless held that the shipowner, by deviating, voluntarily substituted another voyage for that contracted in the bill of lading and consequently "cannot claim the benefit of an exception..., which is only applicable to the voyage mentioned in that contract" [2]. By the deviation, it said, the


[2] [1907] 1 K.B. 660, at p.569, per Cozens-Hardy L.J.
shipowner had rendered the performance of something "fundamentally different" [1]. "The voyage actually carried out was a different voyage from beginning to end and therefore the whole bill of lading was gone" [2].

This twist in Joseph Thorley v. Orchis Steamship was the result of the judges' differing analyses of the "true principle" in Balian v. Jolly [3]. Collins M.R. found that the undertaking not to deviate was a "condition precedent" to the right of the shipowner "to put the contract in suit". Hence it was unnecessary to show the nexus between the loss and the deviation. Cozens-Hardy L.J. on the other hand relied on what he considered was the precursor of Balian v. Jolly, the marine insurance case of Lavabre v. Wilson [4], where Lord Mansfield had said:

The true objection to a deviation is not the increase of the risk. If it were so, it would only be necessary to give an additional premium. It is that the party contracting has voluntarily substituted another voyage for that which has been insured.

The contextual meaning of this passage on which Cozens-Hardy L.J.'s decision hinges, it is submitted, has been misunderstood. In Lavabre v. Wilson the issue was whether the insurance underwriters were discharged from their contractual obligations because the ship deviated. It was held that they were as the deviation was a unilateral alteration of the subject-matter of the contract, namely,

[1] Id., at p.669, per Fletcher Moulton L.J.
[3] Ibid.
the route insured. No exception clause was in issue. Support therefore could not be obtained from the passage cited for the imputation that special consequences flow from the fact of deviation per se in respect of all exception clauses regardless of their bearing on the deviation. Quite clearly Cozens-Hardy L.J. had given the passage an extended meaning in applying it to the facts of Joseph Thorley v. Orchis Steamship. This was fortified when some members of the House of Lords in Hain Steamship v. Tate & Lyle [1] subsequently stated the effect of deviation in similar terms. In this later case too no exception clause was in issue; the question being whether the cargo owners could opt to be discharged of their obligations under the contract for failure of consideration when the ship deviated from the contract route. Lord Atkin held that a deviation was a breach of such a serious character that, however slight, the other party to the contract was entitled to treat it as going to the "root of the contract", and to declare himself as no longer bound by any of its terms. The extremely grave consequence of deviation, he said, was justified by the fact that deviation vitiated the insurance and altered the subject of the contract. Lord Wright stated the "clearly established" law that deviation deprived the shipowner of his right to rely on contractual as well as common law exceptions and abrogated the entire contract [2].


[2] Citing Morrison v. Shaw, Saville and Albion [1915] 2 K.B. 783 (C.A.) and Joseph Thorley v. Orchis Steamship as authorities. The former was, unlike the latter, a straightforward application of Davis v. Garrett.
The substitution of one voyage for another thus became central to the question of whether exception clauses apply. Once there is a deviation, however slight, the exception clause does not apply. The concomitant idea was that deviation displaced the contract. It was said that "where there is a deviation the special contract...ceases to exist" [1]. But the elliptical expressions that the contract, or the exception clause described as the "special contract" "ceases" [2] or "ceases to exist" [3] could not stand in the face of the two House of Lords' decisions to the contrary. In Heyman v. Darwins [4] and Hain Steamship v. Tate & Lyle [5] it was explained that only a right to repudiate was given to the aggrieved party and that right can even be lost by waiver. The tendency has consequently been to regard the deviation cases as a special class of their own.

The idea of displacement, which was in a sense a cryptic but erroneous representation of the Gibaud rule, contributed little to the understanding of the rationale and effect of the rule. It rather succeeded in confounding it. In Woolf v. Collis Removal Service [6], for example, it was insisted that deviation was a form of repudiation which could be accepted or rejected by the aggrieved party whereupon

[7] [1947] 1 K.B. 11; the decision here, however, turned on the fact that an arbitration and not an exception clause was in question.
an exception clause applied according to its ambit. But as Lord Atkin
intimated in *The Cap Palos* [1], the Gibaud rule regulated the manner
in which one performs his contractual obligations by compelling him to
observe a basic degree of compliance with the terms of his promise.
Consequently if he failed to do so he would not be allowed to rely on
an exception clause, even if the aggrieved party insisted that the
other had fulfilled his obligations. In such instances, said Lord
Atkin, it was not a question of the repudiation of a contract to be
accepted by the other party in order to give rise to a claim for
breach [2].

Although deviation did not by definition include, for
instance, delay [3] or unseaworthiness [4], its consequences applied
to analogous situations even in contracts other than contracts for
carriage of goods by sea. Thus in contracts for the carriage of goods
on land, a performer would have stepped outside the 'four corners' of
his contract where the voyage was abandoned or where there was such
unreasonable delay as to constitute a "fundamental departure" from the
course of the agreed transit [5], or where carriage was in a vehicle
other than that stipulated for [6], or where carriage was to a wrong

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(H.L.).

p.8; *Bontex Knitting Works v. St. Johns Garage* [1943] 2 All E.R.
690.

destination [1].

b) Contracts of Storage and Deposit

The essence of the contract by a warehouseman, it has been explained, is that he will store the goods in the contractual place and deliver them on demand to the bailor or to his order [2]. Thus the wrongful or mistaken sale of the bailed goods [3], their consumption [4], their delivery without excuse to the wrong person [5], their storage in a place other than that agreed upon [6], or the permission of access to them by unauthorised third parties [7] are all acts outside the 'four corners' of the contract. But the warehouseman who has observed these duties may be protected by an exception clause even though in one case, when delivered, five out of the eight casks of orange juice left in storage were empty without lids, two were leaking badly and one had dirty water in it [8].

However, it does not follow in every case that the observance of these duties always ensures the bailee of the protection of an exception clause, for they must be carried out with reasonable care. While "mere negligence" or some "momentary piece of

inadvertance" [1] in carrying out the contract may not deprive the bailee of the protection of the exception clause, recklessness may amount to stepping outside the 'four corners'. The reason is that a performer "cannot be allowed to escape from his obligation by saying to himself 'I am not going to trouble about these goods because I am covered by an exempting clause'" [2]. Thus "all these exempting clauses are held nowadays to be subject to the overriding proviso that they avail to exempt a party only when he is carrying out his contract" [3].

c) Contracts of Towage

The failure to exercise care and skill may well be the primary if not the only means by which a performer may be found to have stepped outside the 'four corners' of his contract. The quality of the misperformance is the paramount consideration. Thus in The Cap Palos [4] the performer's misperformances were differentiated qualitatively.

There, the use of insufficient towage power or possibly the improper use of sufficient towage power by the defendants had resulted in the grounding of the plaintiff's schooner in a dangerous area. The

[1] Ibid. In Hartstoke Fruiterers v. L.M.S. Ry. [1943] 1 All E.R. 470, the carrier negligently failed to inform the consignee in accordance with the contract of the arrival of bananas with the result that they were seriously spoilt by the climate. The relevant provision was said to be a "merely ancillary provision not bearing upon the contract of carriage at all", at p.472; cf. Sze Hai Tong Bank v. Rambler Cycle [1959] A.C. 576 (P.C.); Wedderburn, K.W., "Contracts - Exception Clauses - Fundamental Breach - Agents" (1960) 13 Camb.L.J. 11.


defendant's negligence in not making allowance for changes of wind and other considerations which resulted in the grounding of the schooner did not amount to stepping outside the 'four corners' of the contract. This negligence was perhaps regarded as an inadvertent oversight or an excusable exercise of poor judgement. The defendant could consequently invoke and was protected by the exception clause. The negligence, it was said, happened in the course of the actual performance of the contractual duties.

However, the unjustified failure to send assistance to get the schooner to a place of safety and the "unjustified handing over of those obligations to [the Salvage Association] for performance "were defaults to which the exception clause whatever its ambit did not apply [1]. This was so despite the fact that the defendants had received intimations from the insurance underwriters to the effect that the Salvage Association had dispatched tugs to rescue the schooner and that it usually ended up taking charge of a rescue operation without the help of anyone who may have a towage contract with the shipowner. Lord Sterndale M.R. suggested that many things could still happen; the Association's tugs might not arrive, as indeed they did not here, and the defendants ought not to take that risk but should have sent their tugs to the schooner's rescue. Their failure to exercise "reasonable industry" to rescue the schooner from the danger in which they by their own breach had put it was considered analogous to the hypothetical example of their casting off the tow in a storm on a lee shore for the purpose of engaging in a more profitable salvage operation and the tow in consequence being damaged.

[1] Id., at p.468, per Lord Sterndale M.R.
What qualities of negligent conduct would be acceptable subjects of exclusion is not quite clear, but in The Albion [1] the court saw fit to caution against the relaxation of the 'four corners' requirement to include situations of non-compliance with contract terms that do not significantly increase or alter the nature of the risks borne by the aggrieved party in the normal course of events as contemplated under the contract. It was feared that "the words 'fundamental breach' might be read in this context in a wider sense than the decisions justify" [2]. In Bontex Knitting Works v. St. Johns Garage [3] for instance, a delay of an hour in a contract of carriage for two and a half hours deprived the carrier of the exception clause. There Lewis J. spoke only of the delay as a breach of contract, paid little attention to when one would have crossed the imaginary demarcation and thus suggested, perhaps, a wider application of the rule.

d) Contracts of Laundering

In these contracts, launderers "undertake, not to exercise due care in laundering the customer's goods, but to launder them, and if they fail to launder them it is no use their saying, 'We did our best, we exercised due care and took reasonable precautions, and we


[2] Id., at p.1031; see Colverd v. Anglo-Overseas Transport [1961] 2 L.L.R. 352, which Wedderburn, K.W., regards as a "useful corrective" against overemphasising the effect of cases like Bontex Knitting Works v. St. Johns Garage: "Fundamental Breach of Contract - Onus of Proof" (1962) 20 Camb.L.J. 17, at p.18. In Colverd's case the negligence of one of the carriers' drivers in leaving the garage door unlocked resulting in the theft of a batch of watches from one of the lorries stored in the usual manner in the garage was held to be only an "isolated lapse" on the part of the driver which did not go to the root of the contract.

are very sorry if as a result the linen is not properly laundered." [1]. Reasonable industry therefore is not the only relevant consideration in deciding whether a launderer has basically complied with the terms of his promise. Here the spatial dimension of the 'four corners' of a contract is not at all visible and the criterion becomes translated into the "primary obligation" to launder. It is now described as the "hard core of the contract, the real thing to which the contract is directed", and the "essence of the contract" [2]. Consequently the essential service of laundering cannot be sub-contracted without the consent of the customer although, in contrast, an "ancillary service" such as sending the goods back to the customer by post may if necessary be sub-contracted [3]. Similarly the launderer's duty of performance in respect of ancillary tasks is only to act with reasonable care.

4. Sale of Goods

In sale of goods, which is governed by the ordinary law of contract [4], the treatment of exception clauses followed a course


[2] Ibid.


which resulted in a quagmire where the terms of a sale were dealt with as 'things' that could be removed by the use of appropriate words. This is generally regarded as the effect of the key decision of Wallis v. Pratt [1] where, as is well known, common English sainfoin was sold without warranty as to its quality or description. Giant sainfoin, "a thing as distinct in agricultural knowledge from common English sainfoin as in ordinary commerce a silver watch would be distinct from a gold watch" [2], was delivered to and resold by the buyer, who had to compensate the sub-buyers when the error was discovered.

The House of Lords kept strictly to the technical meanings of 'condition' and 'warranty' as essential and less essential terms. It held that the breach in question was of a condition to which the exception clause providing for warranties alone did not extend. This was so even though the breach of a condition had been waived and was from a remedial point of view only a breach of warranty [3].

Wallis v. Pratt is thus thought to have decided that no contractual term is immune from express exception. One only has to find the right linguistic formula, which was, theoretically at least, eminently possible. The application of an exception clause would in every case turn on the exactitude and appropriateness of the express language used.


[2] Id., per Lord Shaw of Dunfermline at p.399; Lords Ashbourne and Alverstone C.J. concurring with Lord Loreburn L.C. to similar effect.

[3] The original condition could not be downgraded to a warranty although the buyer may treat it as such, at p.395, per Lord Loreburn L.C.
But another interpretation of *Wallis v. Pratt*, it is submitted, suggests something quite different. The interpretation rests on a few lines in Lord Loreburn's opinion that:

> There is no doubt that when you are dealing in a commodity the inspection of which does not enable you to distinguish its exact nature, there are risks both on the buyer and on the seller...But if it is desired by a seller to throw the risk of any honest mistake on to the buyer, then he must use apt language..." [1]

Implicitly, the risks of certain qualities of misperformance by a seller may not be passed to the buyer. But where the misperformance involves latent defects (even those which are so gross as to make the goods different in kind) the seller may pass to the buyer the risks of his 'honest mistake'. In the instant case, because the seller had not done so, he bore the risks of his own honest mistake in delivering only giant sainfoin.

The advantage of this latter interpretation is that even if the words used in an exception clause are absolutely clear (having, for example, provided for both 'conditions' and 'warranties') a buyer may still have a remedy if, after taking into consideration all the circumstances, in particular the price agreed to be paid for the sainfoin and the purpose for which the buyer requires them, he is found not to have assumed all risks including the risk of the seller's honest mistake.

But little notice has been taken of Lord Loreburn's idea. The first interpretation of *Wallis v. Pratt* dominated subsequent

developments and was confirmed by the combined effect of Andrews v. Singer [1] and L'Estrange v. Graucob [2]. Dicta in Andrews v. Singer suggested that the implied condition in s.13 of the Sale of Goods Act 1893 [3] could be excluded by express provision and that such an exclusion would excuse the seller from liability in respect of the contract description. In Andrews v. Singer the buyer recovered damages for one of the cars which was not "new" on the ground that the contract description was in an express condition and was not therefore caught by the stipulation that "all conditions, warranties and liabilities implied by common law, statute or otherwise [are] excluded" [4]. Where the seller in this case failed, the seller in L'Estrange v. Graucob succeeded. The otherwise "startling result" that Scrutton L.J. in Andrews v. Singer feared was attained. Thus L'Estrange v. Graucob is said to have "closed the gap" left by Andrews v. Singer [5]. In the sale of "One Six Column Junior Ilam


[4] [1934] 1 K.B. 17, per Scrutton L.J. at p.23 attempted to explain that the obligation to deliver new cars was express for otherwise it "leads to a very startling result".

Automatic Machine", the seller was not liable to the buyer by virtue of an exclusion of "any express or implied condition, statement or warranty...stated herein" when he delivered a machine that would not function.

The decision of L'Estrange v. Graucob, however, is spurious authority for the rule that all contractual terms can be excluded. In the first place, the effect of an exception clause was not raised in the pleadings. Even on the approach adopted by the court it would seem that the description by which the machine was sold being "stated herein" was strictly speaking not caught by the exception clause. Furthermore it failed to distinguish between the basic definition in every contract of sale by description of what was agreed to be sold and any description additional thereto. Evidently the description by which goods are sold determines what was in the first place agreed to be sold. This is a question of the content of a contract that has been agreed on and is a question of fact. It is also a preliminary question which has to be answered regardless of s.13. So that even if s.13 is excluded, a seller is still obliged to deliver an identifiable article; in this case, a cigarette vending machine.

The effect of L'Estrange v. Graucob was thus to convert a question of fact into a question of law [1]. It also gave the impression that it was necessary to determine what was agreed to be sold in sales by description only because of s.13. And when the basic definition of the subject-matter of a sale was duly recognised as an issue independent of s.13, it was thought that s.13 was superfluous. This was of course not necessarily true for s.13 could still refer to

descriptions over and above the basic definition of the subject-matter thereby imposing a higher duty of performance on the part of the seller.

There is a more serious difficulty with L'Estrange v. Graucob. Unless it can be said that the buyer had entered into a different kind of contract, for instance, one of chance, it stripped a contract of its legal force. For it is "illusory to say 'we promise to do a thing but we are not liable if we do not do it": such an agreement is "not in law a contract at all" [1]. In L'Estrange v. Graucob there was indisputably a legally binding contract. But it was not for the mere chance that the seller might deliver to him a cigarette vending machine. Nor did it appear that the buyer had contracted for scrap metal. If the buyer bought an automatic cigarette vending machine it must follow that before the seller could be said to perform the contract he must deliver a machine with the attributes of a cigarette vending machine before he can be considered to have tendered the good sold.

[1] In Firestone Tyre v. Vokins [1951] 1 L.L.R. 32 at p.39, Devlin J. said:

"The lightermen have said: "we will deliver your goods; we promise to deliver your goods at such and such a place, and in the condition in which we receive them; but we are not liable if they are lost or damaged from any cause whatsoever." That is not in law a contract at all. It is illusory to say: "We promise to do a thing, but we are not liable if we do not do it."

See also Henderson v. Stevenson (1875) L.R. 2 H.L. (Sc.) 470; Williams, G.L., "The Doctrine of Repugnancy" (1944) 60 L.Q.Rev. 69, at p.72.
L'Estrange v. Graucob thus rather unjustifiably became the pinnacle of the strict principle, which s.55(1) of the Sale of Goods Act 1893 seemed to have preserved by subjecting rights and liabilities implied under the 1893 Act to terms or provisions in the contract to the contrary [1], although the idea underlying the implied terms in the Act was only to enable the parties to a contract to "provide for their particular wants by express stipulation" [2]. The net effect of L'Estrange v. Graucob was that the condition-warranty dichotomy ceased to have any legal significance since every term could be excluded.

The approach adopted in L'Estrange v. Graucob naturally involved lawyers in a pedantic and irresolute chase after the exactly appropriate words. The pursuit of suitable words of exclusion did not now take account of the requirement that only a risk of honest mistake in cases of latent defects could be shifted, as Lord Loreburn had indicated in Wallis v. Pratt. One can give a few illustrations of the niceties of words that were frequently needed. In the Australian case

[1] S.55(1) provides that any right, duty or liability arising under a contract of sale by implication of law may be negatived or varied by express agreement or course of dealing between both parties or by usage, if such usage be such as to bind both parties to the contract. S.57 of a representative Australian counterpart, the Sale of Goods Act 1923, New South Wales, is identical to s.55(1) of the English Act. S.55(1) maintained the status quo when the act codified the common law of sale. Thus unless there was an express warranty of quality none was implied (except where the goods were made to the buyer's orders there was an implied warranty that it was reasonably fit for the purpose for which it was ordinarily used: Barr v. Gibson (1838) 3 M. & W. 389, 150 E.R. 1196; or for any special purpose communicated: Wallis v. Russell [1902] 2 I.R. 585. See generally Atiyah, P.S., The Sale of Goods, (5th ed.) p.70; Guest, A.O. (ed.), Benjamin's Sale of Goods, p.351.

of Emco Corporation v. Tutt Bryant [1], the buyer of a number of tractors by description alleged that the tractors were not of merchantable quality and in consequence the seller was in breach of the condition implied by s.19(2) of the N.S.W. Sale of Goods Act. A clause in the contract of sale provided that the seller's "obligations under this warranty is [sic] limited to replacing or repairing at our factories...any part or parts returned to us which our examination shall disclose to have been...defective... This warranty is expressly made in lieu of all other warranties expressed or implied and of all other liabilities on our part". In dismissing the appeal, Manning and Moffitt, JJ.A., said: "All other obligations or liabilities on our part are excluded could not cover every obligation and condition of the contract, but the term of the contract which speaks of 'this warranty...' should be construed so that the words 'obligations or liabilities' are appropriate to describe warranties but not appropriate to describe conditions" [2].

Another example of wrangling with words was Beck v. Szymanowski [3]. 2,000 gross six cord sewing cotton thread reels each

[1] [1970] 2 N.S.W.R. 249; Fletcher-Moulton L.J.'s dictum in Wallis v. Pratt that a condition went so directly to the substance of the contract that a failure to perform it was a substantial or total failure of consideration was expressly approved.


[3] [1924] A.C. 43; e.g. in Baldry v. Marshall [1925] 1 K.B. 260, an obligation to deliver a car suited to the plaintiff's requirements was a condition and therefore was not excluded by a clause referring only to guarantees and warranties; Criss v. Alexander (No. 2) (1928) 28 S.R. (N.S.W.) 587 applied Baldry v. Marshall.
5. The New Notion of Fundamental Breach

The treatment of exception clauses as exemplified in

L'Estrange v. Graucob enabled contracts to be eviscerated; in fact the line between a contract and a gamble now became very thin indeed. The weakness of this approach became clearer in a number of sale of goods and hire-purchase cases which rapidly established a notion of fundamental breach. This notion of fundamental breach sought to mark out the circumstances under which an exception clause could not be relied on by a seller to protect himself from his own breach of contract and gave to a buyer the right to rescind in addition to a claim for damages for certain types of avoidable misperformance.

In Pinnock v. Lewis & Peat [1] an admixture of copra cake and castor seeds which was poisonous as cattlefeed was delivered under a contract for copra cake to the buyer and resold by him to sub-buyers who resold it to farmers. Claims were made and compensation paid by the sub-buyers from their respective sellers. In an action by the buyer for damages thus incurred, the sellers sought to rely on a

[1] [1923] 1 K.B. 690.
stipulation that "the goods are not warranted free from defect rendering same unmerchantable, which would not be apparent on reasonable examination". It was known to the seller and within the contemplation of the parties that the copra cake would be used for cattlefeed. Roche J. held that the delivery could not be properly described as copra cake at all and the buyer was entitled to the damages claimed despite the exception clause. The presence of the castor beans was "not a matter which [could] properly be described as a condition. It [was] failure of the goods to comply with the description; it [was] a delivery of goods other than those contracted to be delivered." [1]

Roche J. was not entirely convinced that the 'defect' could not have been detected by reasonable examination of the goods but seemed to have assumed it to be the case. Although Wallis v. Pratt was not considered in Pinnock v. Lewis & Peat, the two decisions when taken together, suggest that only risks of honest mistake may be passed to the buyer where the misperformance is gross.

The sentiments in Pinnock v. Lewis & Peat were made clearer in Smeaton Hanscomb v. Sassoon I. Setty [2]. There the buyer relied on Pinnock v. Lewis & Peat and argued that a seller who had himself committed a breach of condition by not supplying goods of the contract description cannot rely on the exception clause. While he endorsed the principle in Pinnock v. Lewis & Peat, Devlin J. was, however, not prepared to say that all breaches of condition had that effect. Indeed Roche J. himself in Pinnock v. Lewis & Peat did not seem to have intended the buyer's contention to be the case for he stressed


that the misdelivery of the goods sold was not a matter to be properly
described as a breach of condition [1]. Exception clauses, said
Devlin J., cannot apply for the protection of the performer only when
he commits a breach of a fundamental term of the contract:

The fundamental term must be something,
I think, narrower than a condition of
the contract, for it would be limiting
the exceptions too much to say that they
applied only to breaches of warranty.
It is, I think, something which
underlies the whole contract so that, if
it is not complied with, the performance
becomes something totally different from
that which the contract
contemplates [2].

It was decided that the buyer's claim was barred by a time limitation
clause in the contract of sale by description of round mahogany logs
because there was not a breach of a fundamental term, although the
delivery was short and a serious percentage undergrade. Had the goods
delivered been "different in kind" as, for example, pine logs were
different from mahogany logs, the clause could not have been relied
on.

By defining the fundamental term as "narrower than a
condition", Devlin J. was attempting to distinguish between total
failure of consideration and failure of part of an entire
consideration. There was, he said by way of example in 1966 [3], a
clear distinction between a car that is of the wrong colour and one

[1] See also Nichol v. Godts (1854) 10 Exch. 191, 156 E.R. 410;
Wieler v. Schillizzi (1856) 17 C.B. 619, 139 E.R. 1219: where the
exception clause could not be relied on because there was a
failure to deliver the goods he had contracted to deliver.


that has no engine (if the latter can be called a car at all). "In
the latter case there is from the beginning a total failure of
consideration". In the former, the failure of consideration which is
partial becomes total only when the buyer is given the right to reject
the car because of the wrong colour. Implicit in the distinction is
the idea that a seller can excuse himself from liability for the
latter (and less serious) kind of breach. It thus seems that although
total failure of consideration was originally introduced specifically
to enable the recovery of money paid in advance for a consideration
that had failed completely, after Smeaton Hanscomb v. Sassoon I. Setty
it was just as much a defence for an aggrieved party's refusal to
perform his part of the bargain, notwithstanding any express provision
to the contrary, as well as the ground on which he could recover
damages despite the exception clause.

This principle, according to Devlin J., was derived from
Atlantic Shipping and Trading v. Louis Dreyfus [1]. In that case a
claim in respect of damage resulting from the unseaworthiness of the
ship was upheld in spite of a similar time bar clause which deemed the
charterer to have waived his rights to any claim if it was not brought
before the arbitrator within a stipulated time. Lord Sumner explained
that the law imposed on the shipowner liability for any damage which
was due to the ship's unseaworthiness, such that the operation of all
the exceptions from liability were subject to the shipowner providing
a seaworthy ship. Unless this liability imposed by the law was
expressly contracted out of by the parties, it governed both
exceptions to as well as limitations of liability to a certain sum in
satisfaction of the loss, for the latter "equally, though in another

[1] [1922] 2 A.C. 250 (H.L.).
way, limit protanto the shipowners' liability" [1]. Given this
derivation the implication seems to be that the law places on the
seller a comparable duty of performance denoted by the notion of the
fundamental term, the performance of which is the prerequisite of the
operation of any exception clause.

Why was there a need to distinguish between total failure of
consideration and failure of part of an entire consideration? The
reason lies in the several meanings which the term 'condition' has
acquired in its evolution. These meanings as we shall see make a
general contention as that advanced by the buyers correct from one
point of view but seriously misleading from another. This is because
the breach of a condition as an antithesis to a warranty [2] can
result in either a total failure of consideration or a failure of part
of an entire consideration. The reason for this may be traced to the
division in the common law of sales into sales by description and
sales of specific goods. In the nineteenth century [3] the warranty
of merchantable quality which, if breached, gave the buyer a right to
reject (especially where there was no opportunity to inspect the


(1953) 69 L.Q.Rev. 485, notes twelve uses of the term;
Anson, Sr.W.R., "Notes on Terminology in Contract" (1891) 7
L.Q.Rev. 337; Williams, G.L., "Language and the Law" (1945) 61
L.Q.Rev. 71; Corbin, A.L., Contracts Vol.3A (1960) para.638. The
different uses of the word 'condition' is discussed in Wickman v.
Schuler [1972] 2 All E.R. 1173, at pp.1179-82, 1182-6, and

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goods) was implied in what was eventually known as sales by
description but not in sales of specific goods in which property
passed immediately [1]. The only exception as established in Young v.
Cole [2] was where the goods were wholly worthless or different in
kind, that is, where there was a total failure of consideration. But
because Young v. Cole was cited and explained as a breach of
condition, the condition came to be confused with total failure of
consideration and the quasi-contractual action to which it gave
rise [3]. Although the terms 'condition' and 'warranty' were still
used in a haphazard fashion [4], they rapidly gained currency as

1212. Before Street v. Blay, goods warranted to be sound could
be returned to the seller whether they are worthless or inferior.
After it, a buyer could not reject a specific good, once property
had passed, but could sue in damages for breach of warranty.
Where there was no warranty, he could only sue if there was a
total failure of consideration. Under the English Sale of Goods
Act 1893, a buyer could not reject goods for breach of an implied
condition as to quality once title passed to him in the case of
specific goods or once he has accepted the goods in other cases.
This has been amended to the effect that a buyer cannot reject
after acceptance of the goods and acceptance is not until the
buyer has had a reasonable opportunity to examine them:
Misrepresentation Act 1967 (U.K.) s.4. Similar amendments have
been made to the corresponding sale of goods legislations in
Australia; for example, Misrepresentation Act 1971-72 (S.A.)
ss.11, 12; Sale of Goods Ordinance 1975 (A.C.T.) s.39; but see
s.75A Trade Practices Act 1974 (Cwth.) inserted by the Trade
Practices Amendment Act 1977 (Cwth.).


281, at p.283 Williams J. said, "If such a...descriptive
statement was intended to be a substantive part of the contract,
it is to be regarded as a warranty, that is to say a condition,
on the failure or non-performance of which...the other party may,
if he be so minded, repudiate the contract in toto."
important and less important provisions with the former giving rise to a right to reject but not the latter [1]. When the law of sale was codified in the English Sale of Goods Act, 1893, the condition became a specific term of a contract [2]. But only the remedy for its breach was prescribed and its definition was accepted to be that set out in *Wallis v. Pratt*. The consequence was, a breach of condition could result in either of two things - a total failure of consideration or a breach of a specific term which might amount only to a failure of part of a consideration. The latter nonetheless was regarded in the same light as the former and enables an aggrieved party to refuse to perform. S.13 which implies a condition of correspondence with description is a good example of the latter.

Another development had further obscured the two possible consequences of a breach of condition. This was a habit of judges and lawyers to label terms as conditions or warranties, which in turn shifted attention away from the consequences of breach to the nature of specific terms, thus highlighting the element of agreement about them. Conditions became increasingly regarded as 'prescribed' from the outset at the time the contract was formed. The distinction between the warranty and the condition became a linguistic one and a simplistic process of reasoning which starts by classifying a

[1] Unless there was an express condition to that effect: see Stoljar, S.J., "Conditions, Warranties and Description of Quality in Sale of Goods - I" (1952) 15 Modern L.Rev. 425.

[2] See s.11(1)(b). It has been suggested that this rather special sense in which condition is used should be confined to the Act: Treitel, G.H., (1964) 8 J.Soc.Pub.T.L. 12. The Australian provisions are: in the A.C.T., the Sale of Goods Ordinance (No. 15 of 1954), ss.5(1), 16(2) and (3); in N.S.W., the Sale of Goods Act 1923, ss.5(1), 16(2); in Vic., the Goods Act 1958, ss.3(1), 16(2); in Qld., the Sale of Goods Act 1896, ss.3(1), 14(2); in S.A., the Sale of Goods Act 1895-1952, ss.11(2), 60(1); in W.A., the Sale of Goods Act 1895, ss.11(2), 60; in Tas., the Sale of Goods Act 1896, ss.3(1), 16(2).
particular term as a condition or a warranty was adopted. If a term was a condition, a breach of it entitled an aggrieved party to reject the goods. In consequence minor failures to conform to contract descriptions were frequently held to entitle the buyer to reject the goods. In *Re Moore and Landauer* [1], a buyer of tins of fruit required to be packed in cases of thirty tins was (surprisingly, one might say) held entitled to reject the whole consignment on the ground that half the cases contained only twenty-four tins in spite of the fact that the whole quantity ordered was tendered and there was no difference in value between the two packagings. The term as to packaging was part of the condition of 'correspondence with description' and under s. 13 a breach of it entitled the buyer to reject the goods.

A party therefore, in effect, had to perform strictly and exactly. "Substantial compliance" was not sufficient. Thus the delivery of barrel-staves of a thickness different from that specified could not be good performance even though they were still merchantable as barrel-staves and were fit for the purpose for which they were intended to be used [2]. To use the House of Lords's often cited statement "a ton does not mean about a ton or a yard about a yard" [3].

When it was decided in *L'Estrange v. Graucob* that all contractual terms can be excluded by the right verbal formula (as was considered successfully done in that case) the ramifications were

[1] [1921] 2 K.B. 519.


[3] This was subject to the *de minimis* rule. These decisions were of course impeccable applications of the strict principle championed by *Bowes v. Shand* (1877) 2 App.Cas. 455.
subtle but marked. It followed from this that liability for total failure of consideration and failure of part of a consideration (both as breaches of conditions) could be excluded. It also appeared that the right to reject performance for a breach of condition in both senses could be lost under s.11(1)(c) of the Sale of Goods Act, 1893. The two meanings of condition as a contractual duty a breach of which results in a total failure of consideration, and as a specific term within the Sale of Goods Act 1893, were treated as synonymous. The important distinction between a total failure of consideration and failure of part of an entire consideration was also overshadowed.

The terminology of the fundamental term and the fundamental term-condition dichotomy were thus in a sense necessitated by the decision in L'Estrange v. Graucob, that the parties were free to exclude liability for all terms. The legal significance of the condition-warranty dichotomy as a distinction between more and less important terms could not have been developed to deal with the question of when a payor may be discharged from further performance and be entitled to damages in spite of an express exception which prima facie covers the breach.

A task also before Devlin J. in Smeaton Hanscomb v. Sassoon I. Setty was to formulate some means of deciding when a departure from contract descriptions would amount to a total failure of consideration. The difficulty arises when between the extremes of mahogany and pine some purported performance, say an admixture of copra cake and castor seeds which, although not entirely different as pine is different from mahogany, is so seriously defective that it
is poisonous as cattlefeed [1].

In the *Chanter v. Hopkins* [2] type of situation the court directly applied the words of the contract to the facts giving rise to the controversy and could give a particular interpretation that the beans tendered were not within the terms of the contract, without having to formulate any general idea of the genus of peas. Consequently, the buyer was under no duty to accept the beans. But in the kind of controversy before the court in *Pinnock v. Lewis & Peat* or *Smeaton Hanscomb v. Sassoon I. Setty* the court had to have some general conception of the genus of the thing promised. Hence, Devlin J.'s fundamental term "underlies the whole contract so that, if it is not complied with, the performance becomes something totally different from that which the contract contemplates" [3].

Three years later, Denning L.J. in *Karsales v. Wallis* [4]

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established the "doctrine of fundamental breach" which "disentitled" a defaulting party from relying on an exception clause. "[H]owever extensive the exception clause may be, it has no application if there has been a breach of a fundamental term" [1]. He drew together the authorities of Pinnock v. Lewis & Peat (sale of goods), Alexander v. Railway Executive (bailment), Smeaton Hanscomb v. Sassoon I. Setty (sale of goods) and Spurling v. Bradshaw (bailment). These cases, said Lord Denning, were all comprehended by the following general principle that,

No matter how widely [exception clauses] are expressed, [they] only avail the party when he is carrying out his contract in its essential respects [2].

This was so notwithstanding earlier cases which might suggest the contrary. Fundamental breach in contemporary usage refers to this principle "that there are certain breaches of contract which are so totally destructive of the obligations of the party in default that the liability for such a breach cannot be limited or excluded by means of an exemption clause" [3].

It appears that what Lord Denning did in Karsales v. Wallis was to express the Gibaud rule in its most general form, as hitherto enunciated and applied in its numerous forms to the different types of bailment contracts of storage, carriage, laundering and towage, to facilitate its application to contracts generally. This had to a

[1] Id., at p.871 per Parker L.J.
lesser degree already been begun by Devlin J. in Alexander v. Railway Executive [1] who used the notion of fundamental breach to include the Gibaud rule (which had after all been said to be "common" to all classes of cases) and some other unspecified rules. In that case the plaintiff deposited baggage at the railway station subject to, inter alia, the condition that the defendants were not liable for "loss or misdelivery...". Devlin J. categorised the act of the bailee in allowing access to the baggage to an unauthorised person as a 'fundamental breach' and a 'breach of a fundamental term', the effect of which was that unless and until the contract was affirmed the aggrieved party could rescind and the "special terms" could not be relied on by the defaulting bailee. There was a "fundamental breach which [went] to the root of the matter and determine[d] the bailment". "This sort of point has been considered in a number of cases which, themselves on rather different lines, are comprehended within the same principle" [2]. Lilley v. Doubleday [3], North Central Wagon & Finance v. Graham [4] and Bontex Knitting Works v. St. Johns Garage [5] were cited. When the same judge subsequently decided Smeaton Hanscomb v. Sassoon I. Setty, he was certainly not dealing with a 'new' idea.


[2] Id., per Lord Devlin at p.445. Traces of the influences in the development of the Gibaud rule can be seen in its statement here.


The striking similarity between the rationales of the doctrine of fundamental breach and the Gibaud rule also supports our contention that fundamental breach was an extension of the Gibaud rule. Without mincing his words, Lord Denning explained that a party "is not allowed to use [exception clauses] as a cover for misconduct or indifference or to enable him to turn a blind eye to his obligations: They do not avail him when he is guilty of a breach which goes to the root of the contract" [1]. Again in Sze Hai Tong Bank v. Rambler Cycle [2] Lord Denning said that the deliberate disregard of one of the prime obligations of a contract cannot be allowed to "pass unnoticed under the cloak of a general exemption clause". "The self-same distinction runs through all the cases where a fundamental breach has disentitled a party from relying on an exemption clause. In each of them will be found a breach which evinces a deliberate disregard of his bounden obligation."

When adapted to the fact situations of contracts for the sale of goods, the Gibaud rule requires that the goods delivered must not be different in kind; there being an imaginary line outside of which a purported performance results in a fundamental breach which indicates that the seller will not be protected by an exception clause in spite of its ambit. The spatial dimension of the 'four corners' is here translated into substantial compliance. A seller steps outside the 'four corners' of his contract when he delivers something "fundamentally different", or delivers something which amounts to a "radical departure" or a "breach of a fundamental term", or commits a breach which goes to the "root of the contract".

The adaptation of the Gibaud rule through the concept of the fundamental term has not been recognised as a result of several reasons [1]. Although the Gibaud rule was said to be "common to all classes of contract" [2] and was an "overriding proviso" to which all exception clauses were subject, the examples given were contracts of bailment including carriage. Moreover, it was largely developed in the bailment cases and had become a "broad principle of great importance in all contracts of carriage" [3]. This suggested to some observers that it was a rule peculiar to bailments. The deviation cases seemed to support the belief. The unusual but explicable course which the Gibaud rule took in the deviation cases (by which the fact of deviation, however slight, became pivotal) was not completely understood. Hence the Gibaud rule and the deviation cases have often been regarded as a body of authority sui generis [4].

Similarly the treatment of the decision in Alderslade v. Hendon Laundry as a separate and more stringent rule than the Gibaud rule forced thinking along compartmentalised lines and helped to foster the idea that they were specific rules which were and should be

quite separate [1]. Even when the striking similarity between fundamental breach in Karsales v. Wallis, the Gibaud rule and Alderslade v. Hendon Laundry was observed, it was thought that the first was epitomised in two (albeit related) rules, namely, (i) a main purpose rule, that a party cannot exempt himself from a failure to perform the main purpose of the contract, and (ii) a 'four corners' rule, that any damage or liability sought to be covered by the exemption clause must fall within the 'four corners' of the contract and not outside them [2].

Admittedly the rationale and effect of the Gibaud rule were often not clearly articulated or self-evident, particularly when its application to different types of contracts took different forms, which suggested that not one but different approaches were adopted. It was also not helpful that the immediate precursor of the Gibaud rule, Lilley v. Doubleday [3], was not the "best illustration" of the rule it had been said to be. For it does not appear from any of the published reports of the case that it dealt with an exception clause [4].

A major reason why the relationship between fundamental breach and the Gibaud rule is not generally appreciated is that the two doctrines were mainly applied to different types of contracts. The former was developed mainly in sales of goods and hire-purchases. The latter was developed in and applied mainly to bailments. In

bailment contracts involving the carriage of goods by land or sea, the concept of the 'four corners' provided quite a graphic demarcation of the types of risks which the bailee could shift to the bailor by means of an exception clause. Where the bailee in order to provide a state of things had to keep to the contract route to stay within the 'four corners', the Gibaud rule served to police the method of carrying out the contract. In practical terms, a bailee could satisfy the bailor's purpose of entering into the contract (for example, to have his goods safely conveyed) via several methods other than the one stipulated in the contract.

The Gibaud rule protects the bailor by ensuring that any increased risk outside the course of stipulated performance of the contract brought on by the bailee's own avoidable misperformance is not passed to him. More specifically, the bailee is made to assume all risks of contingencies arising when he pursues a course other than that contractually stipulated or customarily expected. But in sales of goods, the possibility of policing the method of performance rarely exists. For in most sales, a seller either does or does not perform by delivering the goods sold, so that the adjustment of the risks borne by the buyer now takes the form of ensuring that he is not compelled by means of an exception clause to pay for different or deficient goods. From the seller's point of view he has to observe a duty to deliver the kind of goods contracted for before an express exception clause can protect him. Consequently, the metaphorical demarcation of the outer limits of permissible conduct in sales of goods cannot refer to the adjustment of increased risks inherent in or attendant on a substitute method employed in the performance of the contract but refers directly to the purported performance itself, that is, the goods as delivered to the buyer.
The problem in sale of goods and hire-purchase was perhaps more similar to that in the laundering and drycleaning contracts where the essence of the contract, it was said, is to launder and not to take care to launder. In sale of goods, except for the risk of honest mistake in respect of latent defects, it seemed that the seller's duty was also to deliver the goods sold and not merely to try to deliver them. But because the several rules were treated as distinct and separate the theme common to them was not grasped.

Confusion has also arisen because the yardstick of 'difference in kind' for adjustment in sales of goods via the fundamental breach idea is the same as that used in the more familiar exercise in *Chanter v. Hopkins* [1] where the court has to decide if the sale of one thing (peas) was performed by the supply of another (beans). As a result it appeared as if the point of *Chanter v. Hopkins* was translated into the concept of the fundamental term and as such the latter was redundant. It also appeared as if the concept of the fundamental term arbitrarily deprived the performer of the protection of the exception clause. This was of course not true as a review of two aspects of the bilateral contract, namely, the formative and performatory aspects, will show.

By the formative aspect of a contract we mean its content or subject-matter which is obtained from the express or implied terms therein and for which we ask what was agreed to be done or sold. If necessary, a question on it can be answered at the very outset. There is next the resulting relationship of the parties with each other at the moment of a fundamental breach. Here we have a performatory question of what legal consequences are to attach according to how a

party performs and in view of an express exception which prima facie protects the performer. Suppose that a seller (S) agrees to sell English sainfoin but excuses himself from all liability if he does not do so. Unless this is a contract of chance, no valid legal contract is formed; the purported contract is illusory as nothing was in fact agreed to be sold. But if in the circumstances and despite the language used, the court finds a contract has in fact been intended and entered into, it has to determine the content of the contract.

Suppose next that S agrees to sell English sainfoin but delivers beans instead. The delivery of the beans is not a performance of the contract for English sainfoin. Here the principle in Chanter v. Hopkins applies squarely and the buyer (B) has an action against S.

If a man offers to buy peas of another, and he sends him beans, he does not perform his contract. But that is not a warranty; there is no warranty that he should sell him peas; the contract is to sell peas, and if he sends him anything else in their stead, it is a non-performance of it [1].

Suppose now as in Wallis v. Pratt that S agrees to sell English sainfoin but excludes liability if giant sainfoin is given instead. B has no action against S for two possible reasons if giant sainfoin is delivered. One reason is that in the circumstances, S has contracted to sell and B to buy English or giant sainfoin in which case the delivery of the giant sainfoin is perfectly within the terms and does not give any ground for complaint. The other reason is that S has validly excused himself from liability for a misdelivery of giant sainfoin. Of course the question remains when S can 'validly' so excuse himself. Let us make two further assumptions to make the

contract considered here better defined: (i) S, instead of excusing himself from all liability, limits it to $X so that the first reason why the buyer has no action does not arise, and (ii) S's failure to deliver the English sainfoin is the result of culpable misperformance and is not, for instance, due to unforeseen, unavoidable supervening events. It is in this last hypothetical situation that fundamental breach has its vital role.

The confusion of the several distinct questions just identified is typical in the statement that the fundamental term is the 'core' of the contract which cannot be excluded, for otherwise one deprives the contract of its "contractual content". The examples commonly, but incorrectly cited, as dealing with the same problem include the "most famous" case of Chanter v. Hopkins and Smeaton Hanscomb v. Sassoon I. Setty [1]. But fundamental breach does not concern a question of contractual content as indeed it cannot, if it is, as the same commentator argues, ultimately dependent on whether there is a total failure of consideration in the performatory sense [2]. Chanter v. Hopkins is likewise not concerned with contractual content but asks the straightforward question of what amounts to performance. At the same time, unlike the notion of the fundamental term in Smeaton Hanscomb v. Sassoon I. Setty, Chanter v. Hopkins is not involved with the question of how a party must have performed before an express exception clause, which prima facie excuses the breach in question, can protect him. It has often been mistakenly assumed from the similarity of the criteria used in Chanter v. Hopkins and Smeaton Hanscomb v. Sassoon I. Setty that the

same issue was raised in both cases.

Finally, a rather straightforward case had quite innocently put a misleading gloss on the Gibaud rule and suggested that it ultimately depended on the intention of the parties as gathered from the express words used. This, to many commentators, distinguished it from fundamental breach which seemed to prohibit exception clauses as a matter of law. In *Glynn v. Margetson* [1] a liberty to deviate clause in a charterparty, which literally entitled a party to go to any port in the world in any order, was construed restrictively in the light of the main purpose of the contract, to permit only calls on ports on the way. "[S]oon as the parties have agreed upon the voyage, and have written that in [the printed form of bill of lading], the definition of the voyage must, as a matter of business, cut down the general words to what is fairly applicable to the voyage which has been agreed upon and defined. Any other construction would make business impossible..." [2] for the parties would not know what to do. This 'main purpose rule' was at times regarded as another statement of the Gibaud rule [3]. More significantly, the Gibaud rule thus became associated with the idea of the 'construction of the contract' and eventually became labelled a 'rule of construction'. It is true that the Gibaud rule as applied in many of the cases bore sentiments of the 'intention of the contract' and its 'construction'. But the Gibaud rule, said Lord Sterndale M.R. in *The Cap Palos*, is "different" from the proposition that wide words should be limited because the construction of the whole clause requires it. As Lord Atkin explained


in the same case, it was "immaterial to discuss" whether it was because the wide words in the exception clause when construed did not extend to cases where one party had ceased to perform the contract, or that the exception clause in its widest sense did not apply where the contract was not being performed at all.

7. A Sketch of a Theory of Risks of Avoidable Misperformances

To make a bad bargain is to sell too cheaply or to buy too dearly, but courts do not, in accordance with established law, review a bargain to ensure that it is adequate. Nor are they now required to do so by Karsales v. Wallis.

Fundamental breach seeks to indicate how a performer must have performed before he can be protected by an exception clause from his own avoidable misperformance. As the law stood when Karsales v. Wallis enunciated the principle, there was already in the cases an intuitively differentiated conception of performance-related risks. Courts examined the quality of the performer's avoidable misperformance where it resulted in the total collapse of the bargain, to decide if an exception clause which was prima facie wide enough to protect him would nevertheless be overridden. So that an exception clause was excessive or overwide only in the sense that it excused the performer whose default was tainted by some degree of culpability and which deprived the other party of his bargain.

A theory of risks of avoidable misperformances or performance-related risks therefore contends that although a contracting party usually accepts certain risks of misperformance where he has agreed to an exception clause, he does not accept all risks which are semantically within the ambit of the clause. This
theory is apt to explain, in particular, the sale of goods and hire-purchase cases in which much confusion has arisen because the two questions, of what was agreed to be sold and the kind of performance that must be given before an exception clause which prima facie excuses the performer can be relied on, have been treated without distinguishing them.

The types of performance-related risks that may be gathered from the cases so far may be summarised as follows. In sale of goods and hire-purchase the sum effect of Lord Loreburn's idea in Wallis v. Pratt, Pinnock v. Lewis & Peat, and Smeaton Hanscomb v. Sassoon I. Setty may be stated in this way: a performer cannot shift risks of his own avoidable misperformance that is 'different in kind' to the buyer. The only exception is the risk of an 'honest mistake' which he may shift to the buyer where the defects are latent. Risks of defects discoverable on examination, where ample opportunity for examination is provided, are on the buyer. For example, a buyer has to bear the risks of the seller's delivery of barrels of unmerchantable glue, which defect he would have discovered if he had looked inside the barrels instead of merely examining the outside [1].

But in all other instances, even where a seller possesses no special skill or on whom the buyer does not rely for expertise, the risks of latent defects are generally regarded as borne by the seller where the buyer is neither any better informed nor is in a position to be. Implicitly the seller is, perhaps by virtue of his trade, made to assume a higher duty of care. The quality of the conduct constituting the breach therefore has a relatively narrow significance. This may be explained by the nature of the obligation involved in sale of goods

and hire-purchase where the contract is for the delivery of things in a certain state rather than, say, for the conduct of some activity.

In bailments on the other hand, the culpability of the avoidable misperformance would seem to have a more extensive relevance. Where a bailee divests himself of his charge of the goods or does anything inconsistent with the title of the owner, the risks of such misperformance cannot be passed to the bailor. Here the quality of his conduct or state of mind is immaterial. For such a misperformance is a complete contradiction of the purpose of the contract. But short of such an inconsistent misperformance, it seems that the risks of outright defiance of an acknowledged duty (for example, in *Sze Hai Tong Bank v. Rambler Cycle*) cannot be imposed on the bailor. In *Hollins v. Davy*, Sachs J. held that a breach must be wilful or deliberate in order to constitute a fundamental breach [1]. Risks of recklessness and indifference to the safety of the goods bailed also warrant similar treatment [2]. Risks of negligence are more difficult [3]. On the one hand although it was thought that


[3] See the discerning discussion by Guest, A.G., in "Fundamental Breach of Contract" (1961) 77 L.Q.Rev. 98, pp.114-115, of whether negligence can amount to a fundamental breach. It anticipates many of the points discussed here. Guest's analysis, however, only seeks to identify the different incidences of fundamental breach in the cases and does not explain fundamental breach on a theoretical basis. See also Clarke, M., "Fundamental Breach of Charter-Party" [1973] Ll.'s M.C.L.Q. 472.
negligent destruction of property warehoused is not sufficiently serious, it was not suggested "that negligence can never go to the root of the contract." [1] On the other hand it was hinted in Hollins v. Davy that an honest error cannot constitute a fundamental breach: "where a person is when doing an act honestly intending to do his best to carry out the intent of the contract and that act is one which, if his beliefs were true, would be proper under the contract, he cannot, merely because he has been deceived into the action, be said to be deliberately breaking the contract in question". It does seem, as Guest points out, that an honest mistake may nevertheless constitute a fundamental breach if the act falls outside the purview of the contract. Therefore if in the same contract for the bailment of a car, the bailee by an honest mistake sells the vehicle or sends it off to the breaker's yard he will be liable notwithstanding an exception clause which prima facie protects him [2]. Contrary views are held on a negligent misdelivery. In Alexander v. Railway Executive and Sze Hai Tong Bank v. Rambler Cycle it was suggested that risks of a misdelivery with the knowledge that it is to the wrong person or in an unauthorised manner may not be passed to the bailor. However, it was said earlier that a mistaken misdelivery of goods to the wrong person, however innocent, was a conversion [3]. "Property rights are protected at the expense of an innocent mistake".

There seems to lurk behind these tentative judicial observations an intuitive conception of different qualities of negligent conduct, so that between wilful default on the one hand and

honest mistake on the other there may be a scale of culpability. This would mean that the prevailing general notion of negligence is now recognised as encompassing a whole spectrum of modes of culpability which need to be distinguished and dealt with accordingly. What is until now undiscriminately regarded as negligence may be, for example, remissness, oversight, lack of circumspection, indifference to avoidable risks, conscious disregard of known risks, carelessness or intentional misconduct or default.

A final word may be said here about the very strict view taken of deviation. The exceedingly heavy burden of proving that had it not been for the deviation the same loss would still have occurred [1] is now, it is submitted, due for revision. The consequences flowing from the deviation should also be taken into account. The compelling historical and commercial reasons in the old days when the hazards of the sea were far more forbidding than what they are today would have lost much of their relevance. And as Lord Devlin argues:

"It may be that when a man is in breach of contract you can justifiably put a heavy burden of proof on him to show that his fault did not materially contribute to the disaster but you need not put upon him the almost impossible burden of showing that if there had been no fault, the goods would inevitably have been destroyed..." [2]

[1] Negligent navigation is not deviation: Rio Tinto v. Seed Shipping (1926) 42 T.L.R. 381, even where the ship was wrecked as a result.

CHAPTER III

THE JURISTIC BASIS OF FUNDAMENTAL BREACH

1. The First Appearance of "Fundamental Breach"

Fundamental breach, as associated in traditional legal literature, was from its inception received unfavourably; reformers were unable to deal with such an "abnormal percentage". It was widely accepted that the nature of fundamental breach began and ended with the adoption of terminology (2), the expression "fundamental breach" and expression borrowed from civil ranscripts (3) not having any contemporary legal significance in nineteenth-century law.

When it seemed to follow that any breach going beyond a "normal" breach, it was usually referred to as "fundamental".

2. In 1961, F. C. Napper was among the early ones recognizing this principle. His work, "Fundamental Breach in Contract: An Analysis of Contract Law in the twentieth century" (4), is a thorough and illuminating fundamental breach in the ordinary sense of contract. The effort was not to set fundamental breach in the historical perspective but to "illustrate" the applications of the principles of "fundamental breach of contract" (5), L. L. B. Nov. 36.

3. In 1963, C. A. L. G. M. (5), the expression "fundamental breach" seemed to have been adopted by this time. Lord Morris and Wright had described breach as a "fundamental" breach if either breach of contract resulted in a Fundamental breach of contract. Although no single clause must be breached, Lord Morris stated the law about the effect of breach by specifying clauses which according to him was "clearly established" that the breach of contract depriving the defendant party of the advantages of all exception clauses and derogating the contract.


1. The First Reception of Karsales v. Wallis

Fundamental breach as enunciated in Karsales v. Wallis [1] was from its inception received unfavourably. Judges as well as commentators were hostile to what was seen as a 'new' rule of "doubtful parentage". It was widely accepted that the history of fundamental breach began and ended with the adoption of a terminology [2]; the expression 'fundamental breach' was apparently borrowed from Hain Steamship v. Tate & Lyle [3] and given its contemporary legal significance in Alexander v. Railway Executive [4], or at the latest in Smeaton Hanscomb v. Sassoon I. Setty [5]. In this view, it seemed to follow that fundamental breach was the product of judicial creativity and was superimposed on established law in response to social developments of the time [6].


[3] [1936] 2 All E.R. 597 (H.L.). The expression 'fundamental breach' seems to have been introduced by this case. Lords Atkin and Wright had described deviation in a contract for the carriage of goods by sea as a 'fundamental breach' while Lords Wright and Maugham had referred to the requirement that a vessel follow the contract route as a 'fundamental condition of the contract'. Although no exception clause was in question, Lord Wright stated the law about the effect of deviation on exception clauses which according to him was 'clearly established' - that is, that deviation deprived the defaulting party of the advantage of all exception clauses and abrogated the contract.


From a sociological point of view the development of fundamental breach represented a modification of judicial attitude towards the role of the courts. It was suggested that the courts now regarded contracts as situations from which rescue was sought and not as things constructed by the parties [1]. Or, they were concerned with the objective function of contracts as the ultima ratio of economic facts in respect of which fundamental breach was used to ensure "minimum adequate remedies" [2].

But these views only confirmed the opinion that fundamental breach was inconsistent with the strict approach and the sanctity of terms: on the face of it fundamental breach disregarded the express words of exception. The theme of adjusting the exchange relationship between contracting parties was not as yet fully appreciated.

As expected, many problems resulted when fundamental breach was applied in the teeth of accepted law which assumes that every term of a contract is capable of exclusion. These problems have been amply discussed in other writings; it therefore suffices to present here a brief account of them [3].

a) The Fundamental Term

The fundamental term-condition dichotomy was the most perplexing problem. It seemed that their distinction was quite
impossible. As the fundamental term was "narrower than a condition" [1] it was regarded as a "species of condition" [2], albeit a more crucial one. It followed from this that the familiar condition- warranty dichotomy was replaced by a three-tiered gradation consisting of, in descending order, the fundamental term, the condition and the warranty [3]. Whereas the condition-warranty dichotomy served to determine when an aggrieved party might regard

(footnote cont'd)


himself as discharged from his obligations, the fundamental term-condition dichotomy presumably indicated when an exception clause could not be relied on. But the definitions given of the fundamental term and the condition were quite indistinguishable. The fundamental term underlay the whole contract so that, if it was not complied with, the performance became something totally different from that which the contract contemplated [1]. Whereas, the condition is an essential obligation "which went so directly to the substance of the contract, or, in other words, was so essential to its very nature that [its] non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all" [2]. The problem that faced the courts was summed up in the criticism that it is a bewildering task to accomodate the imposing array of judicial synonyms (as the 'foundation', 'substratum', 'essence', 'root') alongside something which is more of the essence than the essence [3].


But because from the time of Wallis v. Pratt it was accepted that liability for a breach of condition might be excluded while the very crux of the fundamental term is that liability for its breach cannot be excused, the distinction, however exacting, had to be made. The results were unconvincing distinctions on a plane of artificial gradations. No assistance could be obtained from the loose use of terminology that was rampant in the cases. For example, Holroyd Pearce L.J. in Yeoman Credit v. Apps [1] (a case on fundamental breach) decided there was an implied warranty of fitness in a hire-purchase contract, but referred indiscriminately to a "warranty, condition, or undertaking", an "implied condition", a "fundamental term" and a "fundamental condition", the breach of which disentitled a performer from relying on the exception clause [2].

Even if the distinction could be made, the unassailable fundamental term could not, it seemed, stand in the light of L'Estrange v. Graucob which was generally regarded as having confirmed that every term could be excluded. Indeed Atkin L.J. seemed to put this beyond doubt when he said in The Cap Palos [3] that a contractor may exclude liability for his failure to perform "including even


wilful default" with the use of "very clear words". It has been argued that since L'Estrange v. Graucob was the only authority to this effect, as soon as it is explained on some other grounds, the field was open before Smeaton Hanscomb v. Sassoon I. Setty for courts to hold that conditions as well as fundamental terms could not be excluded [1]. But this argument does not meet the more basic difficulty, namely, that the concepts of sanctity of terms and freedom of contract and the strict approach make the fundamental term unpalatable.

It was just as difficult to determine what was the fundamental term with little more than a definition which is not particularly illuminating. The fundamental term had no identifiable feature. The tendency was consequently to categorise contractual stipulations in advance. Stipulations which have been held to amount to fundamental terms in some cases acquired a 'fundamental' quality: once a fundamental term always a fundamental term. The cores of contracts became equated with individual stipulations. A comparison of Karsales v. Wallis [2] with two subsequent applications of it provides a good example. In the first case, it was explained that the thing delivered was not the thing contracted for [3] and there had been a breach of a fundamental term. The delivery of the 'car' which was incapable of locomotion and was thoroughly unroadworthy was, one might say, analogous to the delivery of peas in a contract for beans or pine for mahogany, and hence was a performance different in kind.


[3] Id., at p.871, per Parker L.J.; Birkett L.J., who thought that there was a fundamental breach used similar language, at p.870.
only that the facts of Karsales v. Wallis were in a sense less extreme. But in Yeoman Credit v. Apps the court had deduced from Karsales v. Wallis the fundamental term that a car should be roadworthy. From this it seemed to follow (and was in fact so decided) that there is a fundamental term of roadworthiness. Therefore the delivery of a car capable of locomotion but made unroadworthy by a defective back axle (which would cost 40-50 pounds to repair) was a breach of the fundamental term of roadworthiness.

The search for the fundamental term frequently boiled down to quibbles over whether a particular stipulation or some other was the fundamental term, which if breached, gave rise to a fundamental breach. On occasion it was difficult to justify the resultant fundamental term so identified and its legal consequences. In Charterhouse Credit v. Tolly [1] and Yeoman Credit v. Apps [2] for instance the argument was over whether the fitness for purpose term or the correspondence with description term was the fundamental term. In the first case Ormerod L.J. thought it was the fitness for purpose term [3] while Upjohn L.J. disagreed, naming the term regarding correspondence with description instead [4]. In the course of the case, a gloss was put on the fact that the two terms were not mutually exclusive, a point which would have hinted at the artificiality of the

[4] Id., at p.441; see generally Montrose’s able discussion of the fitness for purpose term and the correspondence with description term in the three cases of Charterhouse Credit v. Tolly, Yeoman Credit v. Apps, and Astley Industrial Trust v. Grimley in (1964) 22 Camb.L.J. 60.
approach had it been heeded. Depending on the nature of the
transaction one or the other could be fundamental.

And what of the conditions in the 1893 Sale of Goods Act?
Were they or could they be fundamental terms? If they were would they
still be subject to s.11(1)(c) which stipulates the circumstances in
which the right to repudiate for their breach is lost [1]? These were
questions which were unanswered.

b) Fundamental Terms and Fundamental Breaches

It was not clear if a fundamental breach was synonymous with
the breach of a fundamental term. When Lord Denning formulated the
doctrine in Karsales v. Wallis, fundamental breach was a generic
concept of which breach of a fundamental term was only a species [2].
But subsequent judicial usage of the two was not always consistent and
at times suggested otherwise. Thus while Upjohn L.J. appears to have
treated them as a unified concept in Astley Industrial Trust v.
Grimley [3], it is difficult to say the same of Holroyd Pearce L.J.'s

repudiate can be lost, cf. Reynolds, F.M.B., "Warranty, Condition
and Fundamental Term" (1963) 79 L.Q.Rev. 534.

[2] [1956] 2 All E.R. 866, p.869; "The principle is sometimes said
to be that the party cannot rely on an exempting clause when he
delivers something "different in kind" from that contracted for,
or has broken a "fundamental term", or a "fundamental contractual
obligation". However, I think that these are all comprehended by
the general principle that a breach which goes to the root of the
contract disentitles the party from relying on the exempting
clause."

[3] [1963] 2 All E.R. 33, at p.46. "This implied stipulation is a
fundamental implied term and breach of it at once gives the hirer
the right, if he desires to do so, to treat the contract as
repudiated. Furthermore, being a fundamental term the lender
cannot by clauses of exclusion or exception, however widely
phrased, exclude liability for this fundamental term for the
simple reason that the law will not permit one of the contracting
parties to escape liability for failure to deliver that which he
has contracted to lend by delivery of something which is
essentially different."
treatment of them in *Yeoman Credit* v. *Apps* [1].

No concerted effort was made by the judges to consider the relation between the two expressions. In *Yeoman Credit* v. *Apps* a fundamental breach was used to mean a "total breach" which, as derived from *Pollock v. Macrae* [2], entitles an aggrieved party to be discharged of his obligations under the contract. This could mean that fundamental breach may be different from the breach of a fundamental term, the former being what is commonly known as a repudiatory breach. But any distinction between a breach of a fundamental term and a fundamental breach seemed vacuous since both were determined by identical tests, namely, whether a breach "goes to the root of the contract" [3].

Commentators too could not agree. For example, Wedderburn, Grunfeld and Hughes appear to have accepted fundamental breach and fundamental term as a unified concept [4]. So did Guest, according to whom the statements of fundamental breach in its various forms could be summarised in two general rules [5]. In a diametrically opposite

[1] [1961] 2 All E.R. 281, at p.289; in *Charterhouse Credit* v. *Tolly* [1963] 2 All E.R. 432, at p.444, both expressions were used without distinction.


[5] A main purpose rule that a party cannot exempt himself from failure to perform the main purpose of the contract and a 'four-corners' rule that any damage or liability sought to be covered by the exception clause must fall within the 'four-corners' of the contract and not outside. "Fundamental Breach of Contract" (1961) 77 L.Q.Rev. 98, cf. his note to *Hollins* v. *Davy* where there is a suggestion that fundamental breach and breach of a fundamental term may be different: "Negligence and Fundamental Breach" (1963) 26 Modern L.Rev. 301.
fashion Coote sought to show that the notions of fundamental breach and fundamental term were unjustified derivations from multiple heterogeneous rules of interpretation specifically applicable to other areas of the law [1]. Conflicting as the analyses were, each could gather sufficient support from the language of the cases which used the notions with varying shades of meaning.

Attempts to bring the diverse rules or at least versions of the rules within a more structured analysis could not agree on the appropriateness of one or the other expression for the reason that the language of the cases was so varied. For instance, Reynolds argued for a single concept of fundamental breach dependent on the events arising out of the breach and the manner of such breach. The idea of a fundamental term, according to him, was too intractable to merit its retention and in any case, and what mattered was the seriousness of the breach. An exception clause cannot apply in the event of fundamental breach because if that happens the performance is not that contracted for, hence the clause which deals with performance cannot apply [2]. Montrose, however, explained that they were distinct concepts related to basically different policies. The fundamental term, he suggested, depends on actual agreement as to the obligations to be performed such that in upholding it a court pursues an autonomous policy based on the laissez faire philosophy of freedom to


[2] In Hain Steamship v. Tate & Lyle (1936) 2 All E.R. 597 (H.L.), Lord Wright explains at p.608 that the fundamental reason is that the adventure had been changed and a contract entered into on the basis of the original adventure is inapplicable to the new adventure.
contract as one wishes [1]. An exception clause does not apply because the content of the clause when construed does not include the situation of the breach of a fundamental term. Fundamental breach on the other hand is dependent on judicial evaluation of the character and effect of breach. An exception clause does not apply because of a public policy which deems it unjust to require the innocent party to perform his part of the contract [2].

c) Miscellaneous Problems

Loose threads too began to show in the fabric of the law on discharge by breach as a result of the developments. It was said that a breach of a fundamental term gave the other party a right to rescind the contract and unless and until he affirmed with full knowledge, an exception clause could not be relied on by the defaulting performer [3]. The judges in the very case which was supposedly the authority for this proposition were not in complete agreement on the issue. So it was also held that unless a party elected to treat the contract as repudiated it subsisted, because it would otherwise enable the defaulting performer to terminate the contract unilaterally [4]. Inconsistent and inadequate terminology did not alleviate the confusion. For instance, an aggrieved party, it was incongruously

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[1] "Some Problems about Fundamental Terms" (1964) 22 Camb.L.J. 60, at p.67; there is no need to enquire into the quantum or substantiality of a breach of a fundamental term. One asks merely whether there was conformity with the original term.

[2] See also Spurling v. Bradshaw [1956] 2 All E.R. 121, at p.124, "Just as a party who is guilty of a radical breach is disentitled from insisting on the further performance by the other, so also he is disentitled from relying on an exempting clause."


said, could affirm or approbate a contract after a fundamental breach results in something substantially or totally different from that contracted for. To take Upjohn L.J.'s example in Charterhouse Credit v. Tolly [1], where a party delivers "three fine Suffolk punches" under a contract of hire for a tractor, such a delivery strictly speaking cannot be said to be affirmed as performance of the original contract. If the other takes a fancy to the punches and keeps them, there is a separate transaction (if the lender can be said to have offered them) the terms of which are perhaps to be inferred from the original contract.

In Karsales v. Wallis [2] Lord Denning suggested that one ought to look at the contract apart from the exception clause to see what are the terms, express or implied, which impose an obligation on the party. This statement had as much opposition (if not more) as it had support from other cases. In Calico Printers' Association v. Barclays Bank [3], for instance, Scrutton L.J. said explicitly that "You do not take part of the document and consider it by itself; you are to construe the whole document."

2. The State of the Law Before 1966

Although fundamental breach as enunciated in Karsales v. Wallis was not unanimously accepted it was widely applied for a good

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ten years before its denunciation by the House of Lords. Opinion was divided on its acceptability mainly, as we have seen, on two related grounds. The first was the perceived 'newness' of the doctrine and the seeming lack of historical support which led many to conclude that it was purely and simply a rule created and imposed by the judges in their foray against the widespread use of wide exception clauses particularly in standard form contracts at the turn of the twentieth century. The second and seemingly insuperable ground was that fundamental breach infringed the cherished concept of freedom of contract and its corollary of judicial non-interference with contracts.

The implications of fundamental breach were not as yet completely clear. Its sundry problems raised doubts even as to its suitability and efficacy as a "judicial strategem against the inexorable operation" of exception clauses. In Australia, the doctrine failed to gain currency because the High Court of Australia refused to apply it as a result of the difficulties inherent in its exposition. In The Council of the City of Sydney v. West [1], Barwick C.J. and Taylor J. in their joint judgment expressed difficulty in understanding precisely what was meant by the expression 'fundamental term' as well as the illustration of fundamental breach in Spurling v. Bradshaw. The case had been decided by the Full Court of New South Wales on the basis of fundamental breach and the appeal to the High Court was dismissed by a majority. None of the judges was, however, prepared to decide the dispute on the basis of fundamental breach [2].


3. Search for the Juristic Basis

Many attempts were made to put fundamental breach on a sound theoretical basis. A singularly ambitious effort was also made to show that this cannot be done. Of the former the more prominent was the idea that there is a 'core' in every contract [1]. Variations of it speak of the 'substratum' [2], the 'main purpose' [3], 'central obligation' or 'essence' [4] of the contract. The latter is Coote's theory of the true juristic function of exception clauses. How these attempts affect our explanation that fundamental breach adjusts performance-related risks must now be considered.

Briefly, the core theory asserts that in every contract there is necessarily a 'core' which cannot be excluded, since otherwise the contract will be self-contradictory and a nullity [5]. To find the 'core' one must consider the purpose of the contract on an objective basis in the light of the contract itself and what each party may reasonably be supposed to know about the other's needs. In every contract there is a point in the scale of detailed descriptions at which the contract may be said to be based and that point may be

regarded as the core" [1]. In other words, the fundamental term marked the limit beyond which a purported performance, say, a delivery of goods sold would be so different in kind that it was possible to regard such goods as different in genus [2].

The main error of the core theory is its failure to appreciate that fundamental breach deals with a performatory question and not with a formative one [3]. It is not here disputed that every contract must be absolute in respect of the 'things' to be performed. Hence to the extent that every contract must have some content it may be said that there is an "unexcludable core" as otherwise the purported contract is illusory and not a valid contract at all. In this sense the theory has the "support of logic" which it claims. But the theory does not truly explain why exception clauses cannot apply when there is a fundamental failure to perform. It is, for example, by no means self-evident why the court cannot "logically" uphold a clause that limits the performer's liability to a certain sum of money. It seems to have been assumed that by demonstrating every contract must have content, so every contractual relationship is conditioned on a certain performance (i.e., performance of the core) before liability for failure to do so can be restricted.

[^1]: (1956) 19 Modern L.Rev. 26, at pp.34-35.


[^3]: Indeed it was suggested that it may have relevance to mistake in the formation of contracts; Melville, L.W., "The Core of a Contract" (1956) 19 Modern L.Rev. 26.
Perhaps the real justification of the 'core' theory is the assumption made that the basis of contract is the achievement of purpose [1]. However, such assumption was only mentioned cursorily and the right of the courts to so assume was claimed on the bare ground that they already considered such purpose in matters of illegality and remoteness of damage.

The 'core' idea may possibly provide a utilitarian criterion for a fundamental breach even if it does not explain it. However, its utility in this respect is also very limited. In the first place it requires difficult abstract enquiries into essence and attributes, or into immutable and subsidiary terms. Apart from insisting that there is a minimum standard of performance in contracts which cannot be excluded, it does not, as does our theory of performance-related risks indicate more specifically what the minimum may be or how it may be ascertained in a scale of different transactions. The criterion of a 'core' also seems to be more suited for sale of goods and hire-purchase cases than, for instance, contracts of services.


The basic assertion of Coote's theory is that a promise which, by the use of an exception clause, is made at all times wholly unenforceable cannot give rise to a contractual obligation. For an exception clause which makes purported contractual rights wholly unenforceable is in effect preventing those rights from coming into existence in the first place. This is because there is no legal right


if there is no legal liability. The basic assertion is supported by analogies drawn from other contexts which suggest that the parties to a contract cannot voluntarily create an unenforceable 'duty' at common law. Any such 'duty' can only be brought about ab extra by statute.

Exception clauses affect rights conferred by a valid contractual promise. These are a substantive "primary right" to performance of the contractual promise, a substantive "sanctioning right" to pecuniary compensation by the other who breaches his obligation, and a "procedural right" of enforcement of the sanctioning right. Thus exception clauses are substantive or procedural according to the rights they affect. Most of them, Coote suggests, place substantive limitations on the rights to which they apply and accordingly help to delimit and define those rights.

All exception clauses therefore fall into one of two categories according to their true juristic function, both of which affect the rights concerned from their inception. There are the exception clauses which directly or indirectly determine the content of a contractual promise. Coote refers to them as 'Type A' exception clauses. They generally affect substantive rights. But even an exception clause which affects a procedural right can be of the Type A variety if it renders that right wholly unenforceable because it in effect prevents the corresponding obligation from coming into existence. The significance of a Type A clause is that an alleged breach may turn out to be no breach at all, there being no obligation which could have been breached. The other category comprises exception clauses which qualify 'primary' or 'secondary' rights without preventing the accrual of any particular primary right. These are the 'Type B' exception clauses which merely qualify rights that do accrue.
In most cases, according to Coote, exception clauses are of the Type A variety, defining the rights or promises to which they apply. Where they do affect the accrual of obligations they obviously cannot be regarded merely as defences or shields to claims for damages for breaches of existing obligations.

A consequence of the juristic function of Type A clauses is that exception clauses must be considered with the rest of the contract at the stage when a court determines what obligations were intended and in fact created, and how much of what transpired between the parties has become part of the contract. Thus to look at the contract, as suggested in Karsales v. Wallis, "apart from the exempting clauses and see what are the terms, express or implied, which impose an obligation on the party" [1] is unsound. This is Coote's first and principal criticism of fundamental breach in Karsales v. Wallis. That is, it wrongly assumes that all exception clauses are only defences or shields to claims for damages thereby perpetuating the fallacy implicit in Istros v. Dahlstroem [2], namely, that one may voluntarily create an unenforceable duty. The compelling conclusion which Coote draws from this is that fundamental breach in Karsales v. Wallis is a rule of law imposed by the judges without regard for the intentions of the parties as evinced in the express exceptions for the purpose of checking what they regard as exhorbitant exception clauses.


Such a rule of law is the subject of his second criticism of *Karsalea v. Wallis*. There are two aspects. One is that from a historical point of view, fundamental breach has been spuriously and unjustifiably derived from heterogeneous streams of authorities. Examples include those concerned with the Gibaud rule, the 'main objects' of contracts (which he explains are only criteria against which the contract is interpreted), total failure of consideration, deviation, and unseaworthiness. The special effects of some of these rules, he says, are peculiar to the specific types of contracts to which they apply and should not be extended beyond them. Thus deviation, he suggests, is a "unique" kind of breach; and the unusual effects of unseaworthiness are the result of the particular stratification of a carrier's liability. In any case they are 'rules of interpretation' based on the contractual intention of the parties. The other aspect is the widely held opinion that a rule of law which discounts expressed or implied contractual intentions is contrary to the strict approach and ought not be allowed to undermine the concepts of freedom of contract and sanctity of terms.

Cootes's case on exception clauses starts from the premise that the courts' traditional role is to uphold the 'primacy' of contracts: they are to uphold the intentions of the parties as gathered from the words. This means that in view of their true juristic function exception clauses must be interpreted together with the rest of the contract and according to the ordinary rules of interpretation. Putting this differently, courts are to take contracts at face value and to subject them only to the rules hitherto developed to guide or assist interpretation or to fill gaps. The point of the Type A and Type B distinction is therefore that the existing rules of construction are more likely to affect the Type A
clauses than the Type B ones. There is consequently no room for a concept of fundamental breach. Indeed, as his argument goes, it was precisely the mistaken assumption that exception clauses are only defences for the performer which made the evolution of the notion of fundamental breach inevitable. Had the true juristic function of exception clauses been appreciated or understood, no such notion of fundamental breach would have evolved and there would not have been, as there is not now, the need for it either. Thus he also concludes that even if fundamental breach is a rule of interpretation it is unnecessary since it is already the rule that only by the clearest words can terms implied by law and prima facie conditions be excluded [1].

But in his article, "The Rise and Fall of Fundamental Breach" in 1967 subsequent to his book, Coote concedes that judicial control of exception clauses may also be desirable in order to "protect the weak from cynical and harmful exploitation" [2]. This is a fundamental concession to the bargaining relationship between the parties to a contract. It is also a compromise of the strict principle: interpretation must now take into account the relative positions of the parties in a bargain.

The concession is, however, a limited one as he insists that the law must not be perverse and become an arm of public law. Since, according to him, exception clauses are primarily economic, no arbitrary rule, that does not discriminate between cases where exception clauses are aimed at defeating reasonable expectations and those which are attempts to allocate risks, should be allowed to bar


their operation. Where interference is desirable, an approach based on the true juristic function of exception clauses, together with the "very potent and more soundly based [but unspecified] alternative means" already available in contract law provides an adequate and effective means of control minus the conceptual and practical difficulties of the doctrine of fundamental breach as laid down in Karsales v. Wallis [1].

The conclusion that fundamental breach is unnecessary as well as the contention that an approach based on the true juristic function of exception clauses provides an adequate means of controlling exception clauses are, as we shall shortly see, open to question. Before embarking on a discussion of them it is proposed to look more closely at the limits of Coote's theory on its own terms.


The theory that exception clauses define and limit rights and liabilities is not new. Nor is it now open to dispute. But the importance of the juristic function, it is submitted, has been overrated. At the same time the context in which it has relevance has been inadequately considered. It is also questionable if exception clauses are mostly substantive; that is, that they prevent


[2] See also the book review by Treitel, G.H., (1964) 8 J.Soc.Pub.T.L. 12; Wright, M., in "Exclusion Clauses Rationale and Effect" (1972) 122 New L.J. 490, finds it "unacceptable" and attempts to show that Coote's argument that the obligations of the contract are those which the exclusion clause does not delete, is "not a valid one". Moreover, according to Wright, the "only purpose" of an exception clause is to prevent the enforcement of rights and duties under a contract.
obligations from accruing.

The juristic function, we are told, is only one of the factors to be considered when determining the obligations of the parties. Whether the juristic function of a Type A clause prevails to prevent an obligation from accruing or whether 'the other considerations' supersede it, such that, despite the juristic function, the obligation in question accrues, cannot be determined in vacuo. The question, Coote says, "can only be answered by reference to the particular contract interpreted as a whole in the light of the surrounding circumstances".

The limits of the theory are quite clear. It does not elucidate how a judge should rate the juristic function with the other considerations. Nor does it indicate what those other considerations are. How would the juristic function feature in, say, Karsales v. Wallis? There the hire-purchase agreement stipulated that 'no condition or warranty that the vehicle is roadworthy or as to its age, condition or fitness for any purpose is given by the owner or implied...'. The Buick car had upon inspection by the hirer been found to be in excellent condition. When delivered it was in a "deplorable condition", incapable of locomotion and barely resemble the car which the hirer had inspected. Various parts of the car had been removed or replaced with defective or old ones.

If the juristic function of the clause was to prevail, the owners would be under, no obligation in respect of all that was stipulated in the clause. D. Jenkins, for example, thought that this was the effect of the clause but did not suggest what the plaintiff did promise to do. Subsequently he commented that if the deficiencies of the object tendered had been less flagrantly manifest so that though unroadworthy it was still a car, the result of the case would
probably have been different [1]. Does this not presume that the
hire-purchase was of a car, and a car with the usual attributes? And
is this not contrary to what he thought was the effect of the clause?
If not, why does the clause not prevent the accrual of the obligation
when the breach was less flagrant as it did in the first instance?

Even if the juristic function overrode all other
considerations the contract was not necessarily illusory. But it
would mean that the contract was for the hire-purchase of a wreck for
which the hirer may have use as scrap metal, or that the contract was
one for a chance that the car may indeed be a car. Either of these
two mutually exclusive interpretations is tenable. But in the light
of the 'intent of the transaction' (or what is sometimes called the
contemplation of the contract as distinguished from the parties'
individual understanding) [2], in this case the hire-purchase of a
car, the juristic function of the exception clause cannot prevail.
The contract is for a car which therefore must have at least the
ordinary attributes of a car. Here the delivery must indeed be that
of the specific Buick car in the same condition at the time of its
inspection. The exception clause therefore does not define the
contractual duties of the owner but rather attempts to exclude his
liability for breach of specific, though wide, aspects of his duty
under the contract. In which case the effect of the exception clause
remains quite a separate issue. It becomes clear from the foregoing
that a distinction, which Coote doubts, between exception clauses
which define contractual duties and exception clauses which exclude

pp.263-266.

London Assurance Corporation (1918) A.C. 101, at p.112.
liability for specific aspects of contractual duty, is valid [1].

In a sense then, one looks, as Lord Denning said in

*Karsales v. Wallis*, at the contract without the exception clause if

only to determine the 'intent of the transaction'. It is precisely in

relation to this intent that various considerations including the

juristic function may be weighted, the nature of the exception clause
determined, and the content of what has been agreed on arrived at.

The intent of the transaction would therefore be a very first

consideration in the court's task of interpretation of a contract. In

*Karsales v. Wallis* itself Lord Denning referred to, inter alia,

*Spurling v. Bradshaw* where he had considered the contract in toto.

This is clear from his observation in the latter case that if the

exception clause was taken literally, there would be no contract. It

is submitted, that one ought not to put undue literal emphasis on Lord

Denning's statement in *Karsales v. Wallis* (to the effect that one

looks at the contract apart from the exception clauses). Admittedly

such a pointed statement is awkward as well as misleading. But in the

majority of cases the intent of the transaction is very much a part of

the ratiocination although it is determined implicitly and

inconspicuously by the courts.

Because of its very nature it would seem that the concept of

the true juristic function is likely to be superseded in most cases by

other considerations. The case against its emphasis is compelling.

distinguishes at p.711, three types of protective conditions:

(i) those which limit or reduce what would otherwise be the

defendant's duty, (ii) those which exclude liability for breach

of specific aspects of that duty, and (iii) those which limit the

extent to which the defendant is bound to indemnify the other in

respect of consequences of breach of that duty; see Coote, B.,
"Discharge for Breach and Exception Clauses since Harbutt's

It must not be overrated as undue weight may be placed on matters of form which will in turn facilitate the evisceration of the contract. Emphasis will be shifted to linguistic formulations and their Hohfeldian or Austinian meanings rather than to the contract as a viable commercial transaction [1]. Adherence to the legalistic phraseology of a contract will not produce commercially satisfactory results especially since laymen can hardly be expected to understand legal formalism. How easily a court may be led to overemphasise matters of form is indicated in Munro Brice v. War Risks Association [2]. There Bailhache J. used a distinction between two types of exception clauses similar to Coote's Types A and B clauses for the purpose of determining the onus of proof. He admitted the distinction was very much a matter of form. A promise with exceptions could generally be turned into a qualified promise by a mere alteration in phraseology [3].

The implication of the exception clause form itself may militate against the importance of the juristic function. As Coote notes, the use of an exception clause suggests a wider initial promise followed by an exception which can be either an excuse (defence function) or, equally plausible, a negation of certain parts of the promise. As the logic of the juristic function only operates from

[1] As Holmes said, "the most important element of decision is not any technical, or even any general principle of contract, but a consideration of the nature of the particular transaction as a practical matter". ..."the immediate legal effect of what the promisor does is, that he takes the risk of the event, within certain defined limits, as between himself and the promisee"... The Common Law (1881, 1968 reprint).

[2] [1918] 2 K.B. 78.

certain premises to the correct conclusion and is incapable of selecting the premises it does not indicate that it should be preferred to the defence function. On the contrary a court may be persuaded to think less of the juristic function of an exception clause because its form tends to mislead a party into thinking he has more rights than is actually the case by restricting rights apparently conferred by other parts of the contract [1].

If the 'juristic function' is the only relevant consideration then it will be possible to conclude with Coote that in a contract for the sale of a specific motor-car described as a 1948 model an exception clause that 'the vendor shall not be liable for any error of description whatever' negates a promise to deliver a 1948 model, in the same way as if the clause had stated that 'the vendor gives no undertaking whatever, contractual or otherwise, that the car is a 1948 model and the statement that it is a 1948 model is intended to be only a mere representation not forming part of the contract'. But in the light of the intent of the transaction and the circumstances of the case, it may be more easily concluded that the first exception clause is a mere defence or excuse not affecting the seller's obligation to sell a 1948 model. Such a conclusion will not be 'absurd' if the juristic function is justifiably superseded by other considerations.

In practice so far, judges have not noticeably attached too much importance to the juristic function. Coote himself foresaw that the future development of the law was unlikely to follow an approach based on it. In a wider context there is no particular evidence of judicial fervour for legalistic technicalities that may suggest a more

receptive attitude towards the juristic function in future. Judicial rhetoric to the effect that surely the parties could not have intended the technical effect of a clause, and the fundamental postulate of common law, that the parties to a contract are deemed to be reasonable men, diminish the importance of the 'juristic function' of exception clauses. As Llewellyn has put it succinctly, in a contract "what has been assented to, specifically, are the few dickered terms and the broad type of transaction and a blanket assent (not a specific assent) to any not unreasonable or indecent term the seller may have made on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms" [1]. On this view, it is difficult to imagine that parties to a contract would intend to assent to the use of juristic technicalities to attain such an end. Besides if contract law is to reflect the commercial practices of businessmen it must not constitute an increased source of risk by diverging from lay expectations and understanding. Modern trends in other aspects of the law are not inclined to overestimate juristic technicalities. For example, there is as represented in Hongkong Fir Shipping v. Kawasaki Kisen Kaisha a discernible trend away from the technical nomenclature of 'warranty' and 'condition' [2]. There the effect of a breach was said to depend on the seriousness of the event that flowed from the breach and not on the traditional a priori classification of the term breached. This approach was taken further in Schuler v. Wickman [3], and in Hansa Nord [4] where the House of Lords and the

Court of Appeal respectively held that even if a stipulation is expressly described in the contract as a condition, this is not necessarily determinative of its effect. In the last analysis the appropriateness of a remedy for the breach in question determines if a broken term is a condition [1]. Further, in Reardon Smith Line v. Sanko Steamship [2] the House of Lords indicated that the nineteenth century sale of goods cases should nowadays be regarded as excessively technical and were due for re-examination.

The most contentious claim of Coote's theory in relation to fundamental breach is that once the true juristic function of exception clauses is accepted there is no room for fundamental breach. The reason is that fundamental breach deals with an issue that does not arise if courts acknowledged the juristic function of exception clauses. By Coote's reckoning, exception clauses in most cases prevent rights from accruing in the first place and would consequently remove the need to ask if a breach is fundamental at all. Coote


The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they should make that intention abundantly clear.

Lord Morris and Lord Simon thought that it would otherwise be 'absurd' and 'fantastic' respectively at pp.255-6, 265; Lord Kilbrandon was concerned over the 'unreasonable results' and 'grotesque consequences' if the contrary was the case, p.272; cf. Lord Wilberforce (dissenting) at p.263, argued that it was not the court's concern that a trivial breach would enable a party to terminate because "the parties, in calling this term a condition, have presumably put their own value on the importance of the breach".

further contends that if any control of exception clauses is for whatever reason desirable, an approach based on the juristic function is capable of ensuring adequate control without the disadvantages of fundamental breach in *Karsales v. Wallis*. We shall consider each point in turn.

We have already seen, that a distinction may be made between a formative question of the validity and content of a contract and a 'performatory' question of the relationship between the parties in the event of a fundamental breach. Coote's preoccupation with the former is evident in his argument that had the 'juristic function' of exception clauses been acknowledged by the courts, no such doctrine as fundamental breach would have evolved for it 'would have been apparent that no exception clause can wholly exclude liability for breach of either warranty or condition'. It is also evident in his criticism of the notions of fundamental breach and 'difference in kind' in *Smeaton Hanscomb v. Sassoon I. Setty*.

According to Coote, when a court assumes that a Type A exception clause (i.e. one which prevents an obligation from accruing) is a mere defence or excuse, it gives to an apparent promise a substance which it does not have. In addition, it finds itself still confronted with the problem of an all-embracing exception clause. In order to limit the exception clause the court then resorts to the difficult concept of 'difference in kind' which prescribes that an exception clause cannot be relied on by the performer if the performance rendered was 'different in kind'. This reasoning, Coote argues, is artificial and can be avoided by an approach based on the juristic function of exception clauses. The agreement, he says, may be found to be not a contract at all if the exception clause is so wide as to negate all contractual obligation. Or if the court decides
that the agreement is contractual "then a fortiori an ascertained subject-matter is something that the exemption clause cannot be allowed to exclude. Particularly where the contract is for a sale by description, the courts would...[be] obliged, to restrict the literal meaning of the words used in order to leave some element of contractual definition" [1]. The irreducible content of the contract is consequently determined without the difficult concept of difference in kind and by a means which ought to give greater flexibility. Consequently the question of whether a Type A exception clause can enable a seller to deliver goods different from those contracted for does not arise at all. It follows too that a Type B exception clause is not affected as it does not prevent the accrual of obligations. There is, Coote says, nothing to suggest that the unexcludable minimum is less than that arrived at by the concept of 'difference in kind'.

It is true that when an exception clause purports to qualify a promise qua promise so as to render the contract illusory, it is a question of ascertaining from all the circumstances including the juristic function whether the parties did in fact enter into contractual relations. If the court finds that they did despite the juristic meaning of the exception clause, the next task is to determine the content of the contract or the substance of the promises. Insofar as the validity of the contract is concerned, it is only necessary that two sets of promises are given for each other. However, in order to support each other, the promises must have a certain content. But as adequate consideration is not a prerequisite of a valid contract, the promises need only have some content. So far, the issue is still one of the validity of a contract. To this

issue the notions of fundamental breach and 'difference in kind' are not relevant.

Strictly speaking, to determine whether a valid contract exists the courts need only find that the promises have some content. But since a dispute almost invariably comes before a court after an alleged breach, a question posed is whether an aggrieved party may rescind or is entitled to damages. In order to decide that, the entire content and consideration of the contract must be ascertained, for any right to rescind must be decided in the context of the entire consideration. Here too, the concepts of fundamental breach and 'difference in kind' are not necessary to ascertain the entire content and consideration of the contract just as they are not concerned with the validity of contracts.

Fundamental breach and the concept of 'difference in kind' in Smeaton Hansecomb v. Sassoon I. Setty are instead concerned with any qualification by the performer of liability for avoidable misperformances of that which he has promised to perform. It marks out the circumstances under which a performer will, despite an exception clause which prima facie protects him, be made liable for his default. The issue is subsequent to and different from the issue of what obligations the parties have undertaken. The obvious fact is that fundamental breach is important where, despite the juristic function of exception clauses, it is found that an exception clause does not prevent obligations from accruing but protects a performer from misperformances of certain aspects of his duty. The concept of 'difference in kind' which the courts have developed therefore denotes the limit beyond which a contract becomes illusory: not in the sense of an illusory promise to perform or a potestative condition but in the extended sense of not taking care to do that which he has promised
to do.

Coote's argument somewhat misses the thrust of fundamental breach and he errs in thinking that in answering the question of the validity and content of the contract he has somehow also answered the subsequent question of what kind of performance must be given. This is not an uncommon mistake. As a consequence, the problem has generally been wrongly regarded as one of 'construction'. The truth of the matter is that the problem of fundamental breach strikes at the very basis of the institution of the bilateral contract and sets out the limits of the extent to which a performer may protect himself from the outset with a wide exception clause and then unilaterally increase the payor's normal share of performance-related risks.

The main advantage of an approach based on the juristic function of exception clauses, according to Coote, is that it can "concentrate the forces at the [judge's] disposal" where a court might wish to limit the effect of a particular exception clause. If, after weighing all the circumstances including the exception clause, the court should decide that, despite the presence of the exception, a particular term was intended to have effect, it will for that very reason be able to hold that the exception clause cannot apply. The "overall contractual intentions can be combined with the restrictive rules of interpretation to temper and confine the words of the exception clause".

We have already noted the ambiguity surrounding the task of weighing the juristic function and other unspecified considerations to decide what obligations have accrued in the ordinary case. This ambiguity is not now alleviated. On the contrary the juristic function is perhaps made more precarious in its operation. For the suggestion seems to be that for the purposes of controlling an
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exception clause the importance of the juristic function ought to be played down. This in turn means that ultimately what really matters are the reasons for which courts will exercise any desired control. And the juristic function is no more than a convenient means to attain the goals of control. The significant advantage claimed for Coote's approach therefore amounts to (in theory at least) a supposedly more acceptable reason (that it was the 'parties' intention) for judicial interference. Presumably the court can say it was the contractual intention of the parties that an exception clause was not to apply, thus avoiding the need to justify its interference. Presumably too, a court, which decides for whatever reason that judicial control of an exception clause is desirable, can more easily interfere with and adjust the contractual relationship at the stage when it determines the obligations said to be undertaken. It will give the appearance of neat conceptual synthesis with the traditional view of Anglo-Australian contract law as a systematised or homogeneous law based on the consensus of the parties. It will probably allow the court more room to manoeuvre the control of such clauses than would be the case if the conclusion was arrived at by some fixed principle of law.

Checking excessive exception clauses through the juristic function has a serious weakness. As it resolves the problem at the stage when the content of the contract is determined, it emphasises the language used. Eventually one is forced into the pursuit of the 'right' or 'appropriate' words typified in Andrews v. Singer and L'Estrange v. Graucob. A theory of performance-related risks, by contrast, can take into consideration a whole scale of different kinds of misperformances together with all the circumstances of the case from both the seller's and the buyer's points of view. Indeed even a
theory of the true juristic function is not free from a concept of performance-related risks. It was observed in The Angelia v. Iino Kaiun Kaisha [1], a case which is often cited to support Coote's theory, that in deciding whether the juristic function prevails an important consideration is whether the events in which an exception clause operates are beyond the control of the performer. If they are, the clause is likely to be regarded as a provision defining the contractual duty rather than one excluding liability. Thus in Renton v. Palmyra Trading Corporation [2] Jenkins L.J., in allowing a provision for a substitute performance, said that "the distinction is between a power given to one of the parties which, if construed literally, would in effect enable that party to nullify the contract at will, and a special provision stating what the rights and obligations of the parties are to be in the event of obstacles beyond the control of either arising to prevent or impede the performance of the contract in accordance with its primary terms".

Taken on its own terms, Coote's approach has several other limitations. A theory of the juristic function of exception clauses alone does not indicate two essential things, namely, when and how an exception clause should be controlled. The sum of Coote's proposition seems to be that judges must uphold the primacy of a contract, but if in the circumstances control is desirable they can exercise such control more freely with whatever expertise they may chance to possess


[2] [1956] 1 Q.B. 462, at p.502, quoted in [1957] A.C. 149 (H.L.), at p.164. A contract for the shipment of timber from Canada to London contained a clause which provided that 'the Master may discharge the cargo at...any other convenient port' if strikes prevented discharge at the named ports.
in the matter of the distribution of loss or whatever else they see as the goal of control. The wisdom of such a proposition is dubious. First, how control will proceed turns on the questionable skill of individual judges to achieve such an end via an approach which is likely to depend too much on the language used. Unless it can be said that judges are somehow imbued with a consistent conception of the goal of intervention which both reflects and evolves with changing and accepted social and/or economic values, this must surely be a serious weakness in the theory. Even if the goals are understood, as Mr Justice C.H. Bright confessed in his discussion of adhesion contracts, "judges, particularly judges long removed from fields of commerce, are [not] always well fitted to decide what is 'fair' or 'unfair'" [1].

Second, it would mean that the 'true' reasons for control are deliberately disguised or buried under a bulwark of linguistic technicalities. Third, these ramifications are in any event inconsistent with Coote's condemnation of arbitrary judicial interference. Quite clearly to avoid such a state of affairs there ought to be some policy or policies in accordance to which Coote's approach may be wielded by judges in the control of exception clauses.

Fourth, to the extent that Coote's approach based on the 'juristic function' admits judicial control of exception clauses, predictability and certainty in the law depend not on the juristic function of exception clauses or the contractual intention as evidenced in the contract, but on the circumstances in which or the reasons for which a court will interfere. Fifth, and ironically, to the extent that the court does and will interfere, the importance of the 'juristic function' of exception clauses is diminished.

Finally, any judicial control of exception clauses based on Coote's approach may in practice prove to be very circumscribed. For its operation is limited to only Type A clauses since Type B clauses do not affect the accrual of obligations. A very obvious way to avoid the judicial probe is of course to use a Type B clause; instead of excluding his liability, a performer can limit it substantially. A possible answer is, as he suggests, to regard a Type B clause as prima facie having no effect in limiting claims based on a failure by the seller to deliver goods of the contract description on the ground that it contains 'general words' of exclusion. That being the case, the 'general words' should be interpreted as not affecting recovery for (for instance) negligence or for breaches of the more important implied-by-law terms [1]. But this rather cosmetic suggestion does not really meet the case. For ultimately the court cannot go beyond a clear prescription to the contrary by the language in context. Indeed this very limitation highlights the essentially semantic nature of Coote's approach. Thus a performer can by limiting his liability to a derisory sum effectively minimise his commitment to perform.

It is of course arguable that implicit in Coote's first premise, namely, that courts must uphold the primacy of contracts, is a policy for the control of exception clauses. It would follow from this that any judicial control that operates through the juristic function of exception clauses and tampers with obligations which the parties on the face of the contract have undertaken, is only justifiable where the contract is concluded in consequence of some objectionable circumstance which may be said to affect the element of agreement. Examples foreseeably include the existence of oppressive

practices and the abuse of bargaining power in the procurement of contracts. The justification would presumably be along this line: that freedom of contract and sanctity of terms to be meaningful must connote some choice. For it is only in circumstances similar to those just mentioned that the primacy of contract is not undermined. Apart from these, control will be theoretically inconsistent with the primacy of contract. Coote's approach would therefore be directed at a completely different problem from that which fundamental breach attempts to resolve. It leaves untouched precisely the task of determining the types of risks of avoidable misperformance which a performer may impose on the other party.

6. Lord Devlin's Explanation of the Fundamental Term

In marked contrast to Coote's theory is an explanation by the first proponent of fundamental breach, Lord Devlin. His keen, if at times cryptic, analysis in his article "The Treatment of Breach of Contract" [1] is more aligned with our theory of performance-related risks.

To begin with, fundamental breach is correctly identified as a notion dealing with a performatory question. According to Lord Devlin, when, upon the consideration of the whole contract and not one particular term, however important, a performer's breach amounts to a frustrating event or one which destroys the whole purpose of the contract, and brings about a total failure of consideration, he cannot rely on an exception clause which prima facie protects him. The precise implication of this statement is, however, not completely

clear and a little probing is necessary.

If it is meant that fundamental breach is merely another reference to the quasi-contractual remedy of total failure of consideration, two difficulties arise. First, although total failure of consideration enables an aggrieved party to be discharged of his obligations and to recover back any money paid without having to rely on the contract and, hence, unaffected by any exception clause, it does not (as does fundamental breach) enable him to recover damages on the contract where an exception clause prima facie protects the performer [1]. Second, in the case of total failure of consideration it is immaterial that a performer has incurred detriment in attempting to perform his part of the contract [2] so long as the aggrieved party has not received any part of the particular benefit expected by way of performance of the contract. This, however, is not the case with

[1] The claim of a party who has paid money under a contract, to get the money back, on the ground that the consideration for which he paid it has totally failed, is not based on any provision contained in the contract, but arises because, in the circumstances that have happened, the law gives a remedy in quasi-contract to the party who has not got that for which he bargained. It is a claim to recover money to which the defendant has no further right because in the circumstances that have happened the money must be regarded as received to the plaintiff's use.


fundamental breach. An aggrieved party who has received part of the benefit under the contract has been able to recover back money paid [1].

The explanation that suggests itself is that when he spoke of 'total failure of consideration' Lord Devlin meant the idea of the total collapse of a bargain which gives rise to a remedy for total failure of consideration. Fundamental breach, he explains, is "just another way of speaking of the destruction of the basis of the contract" [2]. It also "slips into place...beside or alongside frustration". Implicitly, there is also a total collapse of a bargain or total failure of consideration in situations of frustration caused by unforeseen supervening events. In other words, Lord Devlin suggests that there is a common criterion involving facts which gives rise to situations of frustration and fundamental breach. Such a common criterion can be indicated by referring to "frustration of the purpose of the contract" which will accordingly cut across the various criteria such as 'total loss of consideration', 'destruction of the basis', 'loss of the main purpose', 'radical and fundamental change of circumstances' and offer one common yardstick for when an aggrieved party can be discharged of his obligations. A frustrating event is one which destroys the whole purpose of the contract or, in more familiar terms, one which brings about a total loss of the consideration. In which case, as Devlin puts it, the difference between fundamental breach and frustration may be expressed as one between the cause of the frustrating event or a difference between "risk and fault". Similar sentiments can be found in some of the

cases. For instance, fundamental breach was defined as a situation brought about through the fault of one party which has a frustrating effect and which makes the contract in its original form at any rate impossible of performance [1]; or a breach which if brought about without fault would cause the dissolution of the contract by frustration [2].

Indeed it is on this basis that Lord Devlin advocates common denominations in contract law. The "foundation of the contract", he explains, is the same for every sort of breach, actual or anticipatory and for every way in which the contract can be ended, whether by breach or by any other sort of dissolution. Consequently 'one idea' - the frustration of the purpose of the contract - ought to underlie the numerous metaphorical expressions of when an aggrieved party can refuse to perform for both repudiation and dissolution.

The idea of a common yardstick in the "frustration of the purpose of the contract" has several advantages. First, as a substitute for the expression 'total failure of consideration', it avoids any confusion with the quasi-contractual remedy. It is also welcome because the term 'consideration' itself has a dual meaning as


both promise and performance and the expression 'failure of consideration' can mean a nudum pactum or a failure to perform [1].

Second, as a sharper antithesis to a failure of part of a consideration, which also entitles an aggrieved party to be discharged of his obligations, 'frustration of the purpose' helps to prevent the two degrees of failure of consideration from being obfuscated. Third, as a uniform yardstick for the right not to perform in situations of both dissolution and repudiation it implies that the fact of breach is not crucial to the right of discharge. This is a welcome step towards clarifying the law on discharge by breach for failure of consideration [2]. Generally failure of consideration is used as a

[1] The dual meaning of consideration is used in this explanation:

when one is considering the law of failure of consideration and of the quasi-contractual right to recover money on that ground, it is, generally speaking, not the promise which is referred to as the consideration, but the performance of the promise.

the Fibrosa case [1943] A.C. 32, at p.48 (H.L.) per Viscount Simon L.C., contra Chandler v. Webster [1904] 1 K.B. 493 (C.A.) where it was thought that the test was whether there was ever a contract.

[2] Discussions of the law on 'discharge by breach' have often misplaced attention on the immaterial fact of breach perhaps mainly because breach was the most common circumstance in which the question arose (as Diplock L.J. explained in Hongkong Fir Shipping v. Kawasaki Kisen Kaisha). Thus it has been explained that a performer is by reason of his own default disabled by the law from enforcing the contract against the other party. The contract having ceased to be enforceable by the party in default, it ipso facto ceases to be a legal obligation on the other party who is consequently discharged from his obligation by such default: Morison, Rescission of Contracts (1916) p.69. This explanation has been rejected by the House of Lords in Hain Steamship v. Tate & Lyle [1936] 2 All E.R. 597 (H.L.), and Heyman v. Darwins [1942] A.C. 356, where in order to prevent a wrongdoer from unilaterally bringing the contract to an end and forcing the other party to rescind against his wishes, rescission was left to the election of the aggrieved party in cases of breach. The limits of these safeguards are quite clear.

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reason why a party's promise ought not to be enforced i.e.
because the party has not received the thing for which he bargained.

It concerns the legal operation of the contract and is a rule applicable to the performance of a contract. As soon as it has "become impossible" for a party to render substantial performance there is a failure of consideration and the aggrieved party may properly be said to be discharged. Underlying the notion of discharge for failure of consideration is the judicial conception that when the certainty of effecting the expected exchange of performance that arises from a bilateral contract is so affected that an aggrieved party ought not to be bound to the contract, such party is relieved of his obligations de futuro [1]. There must always come a time after which performance would be too late and the promisor would be discharged. The fact of breach is immaterial and is only relevant to the remedy of damages.

Although a common yardstick for both frustration and fundamental breach has its obvious advantages, it should not be overlooked that the thrusts of the two principles are essentially divergent. Frustration excuses a performer from liability for what would otherwise be a breach of contract caused by unavoidable and

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(footnote cont'd)

A party can nonetheless force the termination of a contract by a breach so grave that it leaves no real room for the election of remedies by the aggrieved party. The House of Lords could have but did not explain the basis of discharge by breach for failure of consideration resulting in the subsequent preoccupation with the elective nature of rescission for breach.

[1] As Corbin puts it "breach or no breach, it is better to say that the fact operating as a discharge is substantial failure of the agreed equivalent" generally called a failure of consideration, Vol.6, para.1253, Vol.3A, para.728. It is not regarded as a 'square deal' or in accordance with prevailing notions of justice that one should have to render the promised performance when he has not and is not going to receive the performance promised in return. Williston, Contracts, Vol.6, para.812-817, uses failure of consideration in the 'generic' sense to cover every case where the promise exchanged for value does not take place.
unforeseen supervening contingencies. Fundamental breach seeks to make a performer liable for certain qualities of his own avoidable supervening misperformance by overriding their express excuse from liability.

The fundamental term which is the co-relative of fundamental breach, according to Lord Devlin, explains why an exception clause cannot apply for the protection of the performer. Described as the 'hardcore' of the contract, the fundamental term exists notionally at least in every contract. It is not any particular stipulation of the contract. Its essence, he explains, is illustrated in the Coronation cases where every individual condition could be performed and both sides could still carry out their obligations exactly, but the main purpose of the contract was frustrated and the "basis of the contract" removed. Unlike a condition which only relates to the main purpose of the contract and "goes to the root of the consideration", the fundamental term "goes to the root of the consideration" and a breach of it "destroys the substance of the adventure".

Exception clauses (which we have so far used as a general reference) are divided by Lord Devlin into (i) those which provide for the occurrence of force majeure, (ii) those which qualify any obligations which naturally fall on a party under the contract, and (iii) those covering liabilities, benefits and other ancillary advantages which a party may seek to obtain under the contract (for example, liberty to deviate in voyage charterparties, time limitations and limitations of the amount of damages). Ancillary benefit clauses, Lord Devlin insists, cannot be relied on because there is no reason why a party should have to perform while the other has the advantage of such ancillary benefit. Exceptions of liability from force majeure are "just and reasonable" because the basis of contract is due
diligence.

The fundamental term cannot be excluded since any exclusion of it would destroy the contract. This explanation is a little cryptic and may suggest that otherwise the contract will be emptied of its content and rendered illusory. However, that this is not Lord Devlin's intention is sufficiently clear from his insistence that the co-relative concepts of fundamental breach and fundamental term are not concerned with the qualification of a promise qua promise but are concerned with the performance of the thing promised. The fundamental term is not concerned with whether there is in existence a binding contract where the prerequisite of mutual promises does not permit the complete exclusion of a promise qua promise. It is relevant and important where the qualification is of the promise to do a particular thing. Where there is a promise at all, he explains, it must be a promise to do something: that something is what may be described as the basis of the contract or the fundamental term. "Just as the courts will hold that a qualification cannot be allowed to annihilate a promise altogether they will also hold that they cannot be allowed to change the character of the promise fundamentally". This is not a self-evident explanation. The suggestion, not as yet completely grasped, seems to be that the basis of a contract is a conception of some interest that derives from the mutual expectation of performance in relation to which courts will adjust the exchange positions of the parties. Williston, for instance, thinks that such a mutual expectation of performance has been recognised as characteristic of bilateral contracts since
Kingston v. Preston [1]. Hence an express exception clause which
prima facie provides for the very breach in question may nonetheless
be overridden.

In effect, the notion of fundamental breach as explained by
Lord Devlin adjusts performance-related risks. The adjustment,
however, is very basic. It subjects the performer to a minimum
standard of exchange upon the failure of which the exception clause
cannot apply. Lord Devlin suggests as a criterion for the minimum
standard facts resulting in the total collapse of a bargain. Cases
which do not on their facts satisfy the finding of a fundamental
breach are to be regarded as undesirable extensions of the principle.
Fundamental breach, according to this reckoning, therefore operates
simply: it distinguishes between performance-related risks and
unforeseen and unavoidable supervening ones and shifts the former to
the performer whenever the essential bargain fails.

Apart from the broad distinction between performance-related
risks and unforeseen supervening risks, there is no further conception
of different types of performance-related risks or different qualities
of performance and conversely different qualities of breach. Since no
consideration is given to the manner of breach, even a very minor
culpable misperformance can deprive a defaulting performer of a clause
which provides for even an ancillary benefit so long as it results in
a total collapse of the bargain. Correspondingly, it seems to
disregard the range of uses and the often legitimate purposes of

[1] It is his view that since Kingston v. Preston [1773] 2 Doug.684,
"parties to a contract are not interested in a mere exchange of
promises but that normally their real object is to secure an
agreed exchange of reciprocal promised performances", Vol.6 (3rd.
ed.) at p.812; Llewellyn expresses similar sentiments in "What
Price Contract? An Essay in Perspective" (1931) 40 Yale L.J.
exception clauses and subjects them to an unsophisticated treatment pivoted exclusively on the consequences flowing from the breach. Once there is a fundamental breach, even an exception clause which limits the performer's liability quantitatively cannot be relied on, even if, say, the performer was only momentarily remiss in his performance of the contract.

7. Conclusion

The daunting problem for commentators theorising on the juristic basis of fundamental breach has been the presupposition that contract law has developed, or in any event should develop, in a manner consistent with the strict principle as represented by the concepts of freedom of contract and judicial non-interference. Every rule, it was sometimes thought, is or should be subservient to freedom of contract and in accordance with the strict principle. This, as we have seen, was to overrate considerably freedom of contract and the strict principle. In consequence of these attitudes towards freedom of contract and judicial non-interference, the idea emerging from the confusion surrounding fundamental breach was discomforting, namely, that exception clauses were not to apply because of a rule that overrides the express intention of the parties as evinced in such clauses. Controversy over it raged and came to a head in Suisse Atlantique which is the formal turning point in the career of fundamental breach. By insisting that fundamental breach is a 'rule of construction' dependent on the contractual intention of the parties, Suisse Atlantique was prima facie a powerful reaffirmation of the strict principle, freedom of contract and judicial non-interference. It was welcomed for putting an end to an
'inelegant' 'rule of law' and keeping the 'elementary rules' of contract law intact. It is to this development that we must turn our attention. In the next chapter we shall consider closely the ramifications of 'the rule of construction' as there enunciated. A careful reconsideration of the effect and significance of *Suisse Atlantique* is essential, for it, in a curious fashion, oversimplified the substance of fundamental breach and at the same time complicated its subsequent development.
CHAPTER IV

FUNDAMENTAL BREACH AS A RULE OF CONSTRUCTION
1. Introductory

Suisse Atlantique [1] is perhaps the most celebrated case on fundamental breach that has been decided by an English court. Until 1980, it was the only decision of the House of Lords on the subject. It is significant because opinions on it are divided. To most commentators it offers a basic distinction between a 'rule of law' and a 'rule of construction'. However, it is submitted that Suisse Atlantique is too easily overrated in its doctrinal importance mainly because the promised distinction between a 'rule of law' and a 'rule of construction' turns out in the end to be of decidedly less importance than it first appears. As we shall see, there lurks in the 'rule of construction' much of a 'rule of law', while the rule of law has much 'construction' in it. The distinction between them is ultimately one of linguistic expression because the results arrived at in practice are the same. Moreover, it is not known what kind of criteria are to be used to determine when an exception clause will be overridden. The general (and perhaps too) widespread impression is that it is for the courts to decide fundamental breach on a case by case basis without any general principle on which they can act.

Accepting that there were such notions as 'fundamental breach' and 'fundamental term' the House of Lords in Suisse Atlantique said unanimously that fundamental breach is a 'rule of construction' and not a 'rule of law'. That is, in every case it is a matter of construing the intention of the parties to ascertain if an exception

clause applies to a fundamental breach; such a clause not being ipso
facto inapplicable.

Subsequent discussion of the 'rule of construction'
enunciated in Suisse Atlantique has assumed that its meaning and
operation are consistent in the speeches of the House of Lords and
that the several statements of it merely affirm the concepts of
sanctity of terms and judicial non-interference in different ways.
But analysis shows that this is not the case. The judicial statements
imply quite different things. Though these statements all seem to
affirm that they are based on one uniform idea, the "contractual
intention of the parties", the fact of the matter is that the several
versions of fundamental breach as a 'rule of construction' depart in
varying degrees from the strict principle based on the sanctity of
terms which requires exception clauses to be upheld according to their
express words. Depending on the emphasis that each places on the
determinants of an intention, one 'rule of construction' may well
operate, in effect, more in the fashion of a 'rule of law' than
another. Hence the antithesis between the 'rule of law' and 'rule of
construction', as will be seen shortly, is not as marked as it seems.
Even the question of whether fundamental breach is a 'rule of law' or
'rule of construction' is a curious one. If an exception clause is
found on its construction to cover the alleged breach there is in fact
no breach of contract. It is only in respect of an existing
fundamental breach that one speaks of its consequences in the light of
an exception clause which prima facie excuses the performer from
liability and asks if and when an exception clause will be overridden.
The whole debate on whether fundamental breach is a 'rule of law' or
'rule of construction' is therefore somewhat misplaced.
2. Facts and Issues

In *Suisse Atlantique* the charterers chartered a vessel from the owners under a two-year consecutive voyage charter for the carriage of coal, the vessel to return in ballast between each journey. The owners were to sail and proceed "with all possible dispatch" and earn freight from the voyages made. Fixed periods of laytime were provided within which the charterers were to load and discharge the vessel and demurrage was payable at the rate of $1,000 a day for delay in loading and discharging. The owners in return were to pay $500 per day for earlier discharge of loading. As a result of delays by the charterers in loading and discharging beyond the laytime the number of voyages that could be made if the loading and discharging had been within the laytime was reduced. It was suggested that the subsequent fall in market freight to below the charter freight or the diminished profitability of the charterers' coal trade accounted for the charterers' deliberate delay in loading and discharging for every voyage performed other than the first. The owners' case therefore was that as a result of the charterers' wilful intention to limit the number of voyages the venture was made so much less profitable to them by the loss of voyages that the charterparty was fundamentally breached and they, the owners, were entitled to damages for the loss apart from any demurrage. The owners claimed that they were entitled to a minimum number of voyages compatible with compliance with the laytime. By their calculation six more voyages than the eight made by the end of the two years could have been completed if the charterers had loaded and discharged within the laydays stipulated or a further nine if they had loaded and discharged the vessel with reasonable dispatch. The loss of cargo or freight in
these circumstances, the argument continues, was not and was not intended to be compensated for under the demurrage clause. For the demurrage clause was only concerned with delay in loading and discharging. In other words, the owners' case was that they had not assumed all the performance-related risks of the charterers' delay howsoever caused and however excessive and were protected from the risks of the charterers deliberately making a "startling difference" to the profits of the charterparty. From the charterers' point of view this amounted to a contention that they must be made to observe certain standards of performance which at the least precluded them from deliberately causing the owners to lose freight by the kind of delay in question. Alternatively, the owners argued, in a consecutive voyage charter the charterers had contractual rights to compel them to carry further cargoes under the charterparty and they had corresponding rights, there being an express or implied obligation on the charterer to allow a plurality of voyages. Hence the claim was not for breach of the laytime provision simpliciter but for the breach of a separate obligation derived from the charterparty as a whole to permit the owners to load on the number of voyages performable given compliance with the laytime.

At the arbitration, a consultative case stated the following question for the court: whether the shipowners were entitled to recover subject to giving credit for the demurrage received, any damages suffered by them (i) by reason of the charterers having failed to load and discharge the vessel within the laydays whereby the charterparty was (if so proved) rendered less profitable to the appellants by consequent loss of voyages; (ii) upon the assumption that such loss of profitability resulted from the charterers having deliberately (i.e., with the wilful intention of limiting the number
of contractual voyages) failed to load and/or discharge the vessel (a) with such ordinary dispatch as the circumstances permitted, or (b) within the laydays.

The House of Lords, however, slighted the questions as posed and dismissed the owners' appeal on the narrow grounds that the owners had no contractual right which could be implied by construction to a certain number of voyages, and that the demurrage clause was not an exception clause *stricto sensu* but an agreed damages clause which did not come within the fundamental breach doctrine whatever the latter's ambit [1]. The lengthy deliberation on fundamental breach concentrated on bringing home the point that fundamental breach is only a 'rule of construction' even though the owners did not, in basing their case on fundamental breach, contend that it was a 'rule of law', but had on the contrary admitted that it was a 'rule of construction' [2].

Generally speaking, there are two possible biases to a 'rule of construction'. One is, as we shall see shortly, to be found in Lord Reid's opinion and in which the sanctity of terms is paramount. The other is more in tune with how Lord Denning in particular has subsequently understood it, namely, the construction of contracts according to a reasonable rule in which flexibility can prevail. More technically speaking, there are at least three formulations of the 'rule of construction' in *Suisse Atlantique* which coincide broadly with the opinions of Lords Reid, Upjohn and Wilberforce respectively and may be briefly stated as follows:

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[1] Lord Upjohn thought that the distinction between exception clauses and agreed damage clauses was sufficient to dispose of the appeal; [1967] 1 A.C. 361, at p.421.

(i) an exception clause must not be literally interpreted if that would lead to an "absurdity or defeat the main purpose of the contract", or if "for other reasons" it needs to be controlled;

(ii) there is a strong rebuttable presumption that the parties are not contemplating breach of a fundamental term; and

(iii) an exception clause cannot be taken to refer to a 'total breach', that is, a performance which is totally different from that contemplated by the parties.

a) The 'Rule of Construction' in Lord Reid's Opinion

This 'rule of construction' seeks to restore the strict principle and the sanctity of terms as the elementary rules of contract law. Its premise is that there is no reason why one cannot make provision for something not contemplated or foreseen if sufficiently clear words are used [1]. It follows that in every case it is a matter of "pure construction" of the exception clause as illustrated in Wallis v. Pratt [2] and Pollock v. Macrae [3]. Whether an exception clause applies depends on whether its words are sufficiently wide and clear to cover the breach, however fundamental. Theoretically at least, the right linguistic formula, which he admits is not impossible [4], can excuse the performer of all liability for unforeseen supervening risks as well as all performance-related ones. In Pollock v. Macrae for instance, under a contract to build and install a set of motor marine engines, a provision that the builders


were to replace any part faulty through bad material or workmanship but that they were not to be liable for direct or consequential damages arising therefrom, could only excuse damage flowing from the insufficiency of parts and not where there had been a "total breach of contract by failing to supply the article truly contracted for".

The rights and liabilities of the parties and the scope of the exception clause are ascertainable at the time the contract is made. Implicitly they are to be enforced whatever contingencies may subsequently arise. The rights of the parties are fixed at the time the contract is formed and thereafter relentlessly implemented. By the same reasoning it ought not to make any difference to the application of an exception clause whether the breach is very serious or deliberately culpable.

The primary concern of Lord Reid's 'rule of construction' is to uphold the contract as entered into. It follows that the suitable lexicon to be consulted is the natural and ordinary meaning of the words used which truly reflects the result that draftsmen seek to attain, and which is the meaning which is so clear that it is the one and only 'true' meaning in relation to the issues in dispute. It also follows that a construction approach such as Lord Reid's which adheres strictly to the sanctity of terms neither takes into account wider social issues nor extra-legal priorities. This is not to say that construction is an exercise in the interpretation of words in vacuo because the interpretation of words must certainly be in a context of facts and with a view to its legal consequence. For example, it is acceptable to give due attention to commercial usage and practice. Nevertheless, it is essentially a process of holding parties to their bargains as evidenced by the words of the contract. Theoretically, the intention of the parties is gathered from a reading of the
contract, from the written and/or spoken words used. The parties
cannot give evidence of what they had in mind, except for purposes of
rectification, and no extrinsic aid may be resorted to for purposes of
interpretation. The court's role is confined to making some sense of
any linguistic shortcoming in the expressions used with the aid of
established canons of construction. The 'rule of construction' here
is therefore truly to aid interpretation by supplementing a contract
according to its true purpose and meaning. The common or main purpose
of the contract or the intent of the transaction is construed from the
necessarily different purposes of the parties only as a guide to the
interpretation of language and to fill gaps. As for instance, vague
and meaningless but important terms need to be given a reasonable
interpretation consistent with the main purpose of the contract [1].

Exception clause clauses can therefore only be contained to
the extent of the stringency of existing canons of construction. They
must, to begin with, be construed contra proferentem. Their limits
must be determined where they are so wide that when construed
literally with the rest of the contract they would result in an

Kelly C.B.; Baumwoll Manufacturing von Scheibler v. Gilchrist
[1893] A.C. 8; Dudgeon v. Pembroke (1877) 2 App.Cas. 284. Where
words are so wide that a literal interpretation of them would
make a contract illusory or absurd they are cut down with
reference to the main purpose: e.g. Glynn v. Margetson [1893]
A.C. 351 (H.L.); and where printed and written clauses are
inconsistent, the one repugnant to the main purpose is discarded:
Glynn v. Margetson [1893] A.C. 351 (H.L.); see also Walker v.
Giles (1848) 6 C.B. 662, 702, 136 E.R. 1407, where different
parts are inconsistent, effect is given to that which carries
into effect the real intention of the parties. Contra the old
rule under Doe D. Leicester v. Biggs (1809) 2 Taunt. 109, 113,
127 E.R. 1017; where two clauses are repugnant, the earlier is
Or, as where a party covenants to pay money or to do any other
act "immediately" or "on demand" he has a reasonable time to do
the act, according to the nature of the thing to be done:
Massey v. Sladen (1868) L.R. 4 Ex. 13; Toms v. Wilson (1862) 4
"absurdity" or would defeat the "main object of the contract", or where "for other reasons" they cannot be applied literally. For these purposes, it is reasonable to suppose that neither party had in contemplation a breach which went to the root of the contract. Outside of these the courts have no authority to interfere with the express intention of the parties as manifested. Consequently, as it was "impossible to hold that [the words of the demurrage clause in Suisse Atlantique were] not wide enough to apply to the circumstances of the present case, whether or not there was a fundamental breach" the "only question" was "whether there is any reason for limiting [its] scope". There was none as the natural meaning of the clause did not lead to an absurdity or defeat the main object of the contract [1].

Pushed to its logical conclusion Lord Reid's rule of construction is incompatible with a working notion of fundamental breach which indicates when an exception clause which prima facie covers it will be overridden despite its ambit. For the question central to the notion of fundamental breach is whether a performer may excuse himself from the outset of all performance-related risks by an exception clause. Lord Reid's 'rule of construction' totally ignores the fact that what fundamental breach now tries to do is to emphasise the breach of promise notwithstanding the exception clause. His definition of a fundamental breach as no more than the "well-known" type of breach which entitles the innocent party to repudiate robs fundamental breach of its significance [2]. As another way of

referring to discharging breaches, it is circular and hence hardly illuminating. The error of this definition is that it overlooks the fact that even in Lord Reid's 'rule of construction', a notion of fundamental breach more serious than a discharging breach still has a role to play since it may well necessitate the use of a more stringent canon of construction than if the breach had been less serious. Fundamental breach as defined by Lord Reid now may range from repudiatory conduct evincing an intention no longer to be bound, to serious breach through to totally different performances. It also embraces several grounds for discharge by breach presumably including breach of condition, failure of consideration, failure of a promissory condition precedent, non-performance of a dependent covenant, anticipatory breach, self-induced frustration or self-induced impossibility and repudiation.

But it is oversimplifying matters to accept Lord Reid's 'rule of construction' as the adumbration of the concepts of sanctity of terms, freedom of contract and, consistently with them, a rule of judicial non-interference with the parties' intention. For to do so leads to a substantially false antithesis between the ideas of a 'rule of construction' and a 'rule of law'. The strict principle for which the 'rule of construction' stands and the intention of the parties with which it is concerned are, in their contemporary contexts, several shades different in their meanings from those at earlier stages of contract law. They are, for instance, markedly different from the strict principle, the sanctity of terms and the contractual intention in the nineteenth century and represented in, say Paradine v. Jane [1], when the strict principle dominated legal theory.

and courts kept very strictly to the grammatical meaning of words used.

To begin with, Lord Reid conceded that if the charterers had acted fraudulently or in "bad faith" and had not merely detained the vessel with the "wilful intention" to deprive the owners of the opportunity to earn freight by the loss of voyages, the demurrage clause would not protect them [1]. This means that some performance-related risks engendered by certain qualities of voluntary conduct on the part of the performer are regarded not to have been assumed by the other party. From the performer's point of view he is subject to the observance of a certain, however basic, standard of conduct in the performance of his obligation.

Second, even if the words of an exception clause are clear enough to exclude every liability on the part of the performer (short of rendering the contract illusory) it is doubtful if it will or can be upheld where there is a fundamental breach in view of the overall policy that militates against exception clauses and especially in view of the reasonable supposition that the exception clause is not intended to apply to a breach which goes to the root of the contract. In addition the ambiguity of when the main purpose of a contract may be defeated and the "other reasons" that warrant the control of exception clause leave a wide berth for the ingenuity of the courts. Certainly the 'defeat of the main purpose' of the contract and 'other reasons' may be read ejusdem generis with 'absurdity' so that an exception clause will be denied or modified only for the resolution of any linguistic conflict with the parties' main undertakings in the contract. In which case the court goes through the rudiments of

construction by ascertaining the intention of the parties from, presumably, the "plain, ordinary and popular" meaning of the words used on the presumption that they mean what they had said and construes the exception clause contra proferentem where there is ambiguity [2] or where other rules of construction fail [3]. But in real terms this neat picture is only remotely true, for the 'canons of construction' in Anglo-Australian law are not merely supplements to interpretation. Certainly the contra proferentem rule (at least as originally conceived) and those rules of construction that are variations on the theme of ambiguity, and the canons of construction


[3] Lindus v. Melrose (1858) 3 H. & N. 177, 182, 157 E.R. 434; John Lee v. Railway Executive [1949] 2 All E.R. 581, at p.583, per Evershed M.R.; Hargreave v. Smees (1829) 6 Bing. 244, 248, 130 E.R. 1274; Alexander v. Railway Executive [1951] 2 All E.R. 442, at p.447, per Devlin J. "No principle is more firmly settled than that, when one is construing exceptions to the general liability of a carrier or a bailee, those exceptions are to be construed strictly, so that if a word is capable of bearing two meanings, the narrower meaning should be adopted".
which resolve conflicts between the main purpose of a contract and the literal wording of a term facilitate the understanding of poorly drafted contracts. So where a word is capable of two meanings, the one unfavourable to the proferens is adopted because it is assumed that such was his intention as otherwise he would have excluded that meaning by more explicit drafting. Or, where there is genuine inconsistency with the positive parts, an exception clause can be ignored or modified to the extent of its repugnancy. But there are in the law also canons of construction which although so called are in fact different in nature. A good example is the Gibaud rule which extends the spirit of contra proferentem in order to adjust bargains which become lop-sided in the light of subsequent contingencies related to the performer's conduct [1].

The upshot is that even on Lord Reid's terms the sharp antithesis between a 'rule of law' and a 'rule of construction' is substantially false. Indeed even Lord Reid anticipated that henceforth courts would not always abide by the strict principle and the sanctity of terms. He suggests that judicial interference is necessary in certain circumstances and that courts should consider whether the exception is "fair in all the circumstances or is harsh and unconscionable or whether it was freely agreed by the customer": in contracts of adhesion at least, judicial control of exception clauses is desirable.

b) The 'Rule of Construction' in Lord Upjohn's Opinion

A distinction which has no parallel in Lord Reid's 'rule of construction' is made here between breach of a fundamental term and a discharging breach. The concept of the fundamental term restores to some extent the significance of the notion of fundamental breach for it is used specifically to denote the "occasions when a party cannot be permitted to rely on [an exception] clause" despite its apparent ambit:

Just as a party may waive a clause inserted solely for his own benefit so per contra there are occasions when a party cannot be permitted to rely on such a clause. [1]

By Lord Upjohn's definition, 'fundamental breach' is simply a convenient "shorthand" reference to all breaches sufficiently serious to entitle the innocent party to rescind the contract. Hence in accordance with the "ordinary law of contract" the aggrieved party is entitled to repudiate and claim "damages at large" if he elects so to do or to affirm the contract notwithstanding the breach and be subject to all the terms of the contract. But in this broad class of discharging breaches, there are the breaches of fundamental terms which give the aggrieved payor additional rights or protection to the extent that a "firmer line" is adopted in respect of them. That is, unlike the ordinary discharging breach an exception clause does not apply to relieve the performer of his breach even if the contract is affirmed and continues in force [2]. This, he explains, is because

the basic premise of the fundamental term is a presumption that both parties intend a contract to be at least fundamentally performed. The expectation in bilateral contracts of an exchange of performances and not just of promises is consequently highlighted.

In pursuance of the "firmer line" towards breaches of fundamental terms, a robust use is made of the "well-known canon of construction, that wide words which taken in isolation would bear one meaning must be so construed as to give business efficacy to the contract and the presumed intention of the parties, upon the footing that both parties are intending to carry out the contract fundamentally" [1]. It is indeed a robust use of the canon of construction, for under it a court can modify the literal meaning of words used to the extent that it is repugnant to the main object of the contract [2], as well as deny a performer of the protection of an exception from liability when the loss occurs outside the 'four corners' of the contract [3]. Here the extension of the idea behind the Gibaud rule, if not the Gibaud rule itself, is apparent. For, the court now, via the concept of the fundamental term, engages in the regulation of performance-related risks by protecting the payor against the assumption of all performance-related risks that are semantically within a clause.

[1] Ibid.


Strong as the presumption of intended fundamental performance may be, it is rebuttable by "clear and unambiguous language". Hence the concept of the fundamental term is said to be part of a 'rule of construction'. How effectively exception clauses may be drafted to protect the performer will depend on what a fundamental term is and the burden of rebuttal. A fundamental term according to Lord Upjohn is a condition which goes to the root of the contract by virtue of express or implied agreement or the operation of the general law, a breach of which may at once and without further reference to the facts and circumstances be regarded by the aggrieved payor as a discharging breach. Examples of fundamental terms include the duty to keep to the contract or customary route in carriage by land and sea [1] and the housing of goods in the stipulated place in contracts of storage [2]. The indeterminate criteria of 'clear and unambiguous language' leave much to the discretion of the judges. Moreover, when a court works from a presumption of fundamental performance, a successful rebuttal by the performer may be tantamount to showing that the aggrieved payor had assumed all performance-related risks such that what he in fact contracted for was the chance that the performer would honour his agreement and convey to him the benefit under the contract. This, it is obvious enough, is an onerous task. The finding in respect of the demurrage clause in Suisse Atlantique (which was assumed to be a limited liability clause) provides no indication of what it takes successfully to rebut the


presumption where a fundamental term is breached. The clause seems to have been regarded by Lord Upjohn as sufficiently clear to cover the fundamental breach in question (which by his definition is merely a discharging breach), but the fact that such breach was not a breach of a fundamental term was a "very material fact" [1]. The possibility of rebuttal, therefore, may well work out to be perfunctory and placative, primarily serving to align the concept of the fundamental term with the elementary rules of sanctity of terms and judicial non-interference by insisting that it is a matter of the parties' intention, in which case such intention is of more theoretical than practical significance. It also continues the assumed antithesis between a 'rule of law' and a 'rule of construction'. In effect, to use the parties' expectation of fundamental performance as the basic premise permits an effective, if oblique, way of introducing some standard of performance by regulating performance-related risks arising subsequently to the contract.

c) The 'Rule of Construction' in Lord Wilberforce's Opinion

Coming rather closer to the crux of the notion of fundamental breach is Lord Wilberforce's 'rule of construction'. Unlike Lord Reid who virtually emptied the concept of fundamental breach of its significance, Lord Wilberforce restores to it its primary value. Fundamental breach, according to Lord Wilberforce, is a narrower concept than a 'repudiatory breach'. The former refers

[1] According to him there was no breach of a fundamental term because there was no additional duty to load within the laytime. It is also clear that the main purpose of the contract which is a fundamental term of the contract was not breached because Charterhouse Credit v. Tolly [1963] 2 All E.R. 432 (C.A.) was said to be inapplicable because it dealt with a fundamental term which was not the case in Suisse Atlantique, at p.438.
only to performances "totally different from that which the contract contemplates" [1]. The latter is a serious breach that at least entitles a party to refuse performance or further performance under the contract and not merely to damages. The distinction, he rightly explains, is crucial because the former relates to the question of whether an exception clause applies in respect of a particular breach whereas the latter relates to the different question of whether one party is entitled to refuse to further perform his own obligations. Generally a fundamental breach which is sufficiently serious to fall outside the exception clause is also sufficiently serious to give a right to discharge for breach. However, by the terms of the clause a breach, which apart from an exception clause would be a discharging breach, may be reduced in effect or made not a breach at all. The conception of fundamental breach, he affirms, is "well recognised and comprehensible", albeit only as a 'rule of construction' [2].

In every case, according to Lord Wilberforce, notwithstanding its prima facie ambit, the application of the exception clause depends on the contractual intention of the parties which is ascertained from the words and their relationship to the commercial purpose or other purposes according to the type of contract [3]. But where there is a fundamental breach an exception clause "cannot be taken to refer" to it. Although Lord Wilberforce suggests that an exception clause must, ex hypothesi, reflect the contemplation of the parties that a breach of contract may be

[3] Ibid.
committed, "the question remains open in any case whether there is a
limit to the type of breach which they have in mind" [1]. In other
words the payor is not regarded as having assumed all risks that are
semantically within the clause. This idea is similar to that which
underlies the stringent presumption in Lord Upjohn's concept of a
fundamental term.

There is a subtle but important difference in Lords
Wilberforce's and Upjohn's 'rules of construction' from that of Lord
Reid's. It is that in the former the contractual intention is not
obtained from the natural and ordinary meaning of the words used but
is construed in the wider context of a 'presumed intention' [2]. The
concept of the 'presumed intention' acknowledges that there is no
agreement on a term but that this is only because the parties had not
contemplated it. So the court finds a presumed intention that the
parties as reasonable men would have agreed to a fair and reasonable
solution if they had envisaged the situation that has arisen. The

[1] Id., at p.432.

[2] Id., at p.434; he made a similar observation in
Reardon Smith Line v. Yngvar Hansen-Tangen [1976] 1 W.L.R. 989,
at p.995 that:

When one speaks of the intention of the parties to the contract, one is
speaking objectively - the parties cannot themselves give direct evidence
of what their intention was - and what must be ascertained is what is to be
taken as the intention which reasonable people would have had if placed in the
situation of the parties. Similarly when one is speaking of aim, or object,
or commercial purpose, one is speaking objectively of what reasonable persons
would have in mind in the situation of the parties.

See also Photo Production v. Securicor Transport [1978] 1 W.L.R.
856 (C.A.).
true effect of this is revealed by Lord Radcliffe in

*Davis Contractors v. Fareham U.D.C. [1].*

The 'reasonable man', Lord Radcliffe explains, is "no more
than the anthropomorphic conception of justice, [which] is and must be
the court itself" [2]. The "judge finds in himself the criterion of
what is reasonable" [3]. In other words, via the concept of 'presumed
intention' and the 'rule of construction' the court remedies the
discrepancy between the terms of the contract and the supposed
expectations of reasonable men. This constitutes an incursion into
the traditional insistence that a court is not authorised to interfere
with a contract for such a purpose [4]. Nonetheless, courts have not
been altogether ready to admit to it and prefer to insist that it is

not because the court in its discretion thinks
it is just and reasonable to qualify the terms
of the contract, but because on its true
construction it does not apply in that
situation...(the) result is arrived at by
putting a just construction upon the contract
in accordance with an "implication...from the
presumed common intention of the parties..."

If the decisions in "frustration" cases are
regarded as illustrations of the power and
duty of a court to put the proper construction
on the agreement made between the parties,
having regard to the terms in which that
agreement is expressed, and to the
circumstances in which it was made, including
any necessary implication, such decisions are
seen to be examples of the general judicial
function of interpreting a contract when there
is disagreement as to its effect [5].

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A.C. 133 (H.L.), at p.175.

London and District Cinemas [1952] A.C. 166 (H.L.), at
pp.185-186.
Thus the cases of sale of goods and hire-purchase where articles different from that contracted for were supplied, were explained by Lord Wilberforce on the ground that the parties could hardly have been supposed to contemplate such a misperformance, or to have provided against it "without destroying the whole contractual substratum". Hence the exception clauses could be said, "without difficulty", not to apply [1].

To determine a fundamental breach one looks "individually at the nature of the contract, the character of the breach and its effect upon future performance and expectation and makes a judicial estimation of the final result" [2]. Examples of fundamental breaches include the tender of goods of a different kind (as in Chanter v. Hopkins [3]), or the 'cheese and chalk' example in U.G.S. Finance v. National Mortgage Bank of Greece [4] and a misperformance serious enough to be regarded as such (e.g. the admixture of copra cake and castor seeds in Pinnock v. Lewis & Peat and the 'car' in Karsales v. Wallis). The substratum in these cases, where the performer is to deliver something identifiable under the contract, seems to describe some content of the exchange which must normally be performed if the performer is to be protected from liability for his own breach by an exception clause including one which confers ancillary benefits. This suggests that the substratum is not a prima facie inference that can be displaced. It is, therefore, not at all self-evident how an "intention to the contrary" may be shown. It is of course possible

for a party to show that an aleatory contract was intended or that the other had contracted for the chance that he may perform. But this is to assert a different kind of contract and does not alter the fact that these apart, the substratum must be performed.

3. Ambiguity in the 'Rule of Construction'

Fundamental breach as a 'rule of construction' in Suisse Atlantique is perplexingly ambiguous. The pre-Suisse Atlantique cases supposedly decided by a 'rule of law' are regarded as correct decisions for the wrong reason. They can, however, insists the House of Lords, be explained on the ground that the breaches in question were not covered by the exception clauses when properly construed. Not overruled and still acceptable decisions for different reasons, these cases must now be regarded as illustrations of the 'rule of construction'. As Treitel puts it, "[t]his explanation of the previous decisions on this point in Suisse Atlantique itself makes it very hard to say just when an exemption clause will be held to apply to a fundamental breach" [1].

There is a more basic difficulty with the rule of construction. It was not even unequivocally established that the effect of the fundamental breach on an exception clause is completely a matter of construction. Vestiges of ideas inconsistent with the primacy of the parties' intentions were in fact retained. Thus the ability of the performer to rely on an exception clause was at times dependent on the payor's election to repudiate or to affirm the contract in spite of the fundamental breach. If, said Lord Reid, an

aggrieved payor chooses to treat the fundamental breach as a
repudiation and bring the contract to an end, "the whole contract has
ceased to exist, including the [exception] clause" which cannot then
be relied on in an action for loss which may be suffered by the
innocent party after the contract has "ceased to exist" [1].

Prima facie the import of this statement is curious. It
seems that an exception clause is ineffective, from the moment the
repudiation is accepted, in respect of all that may be subsequent to
such acceptance; although the clause continues to apply according to
its meaning to that which precedes the acceptance of the repudiation.
A fuller explanation which suggests itself and which was in fact
advanced is the idea that a contract as an entity is terminated in
toto or affirmed in toto. But this is unlikely because Lord Reid
himself dismissed the idea as too simplistic. Alternatively, it is
said, he meant to assert the dependency of promises such that a party
who commits a fundamental breach cannot enforce a promise by the other
to forego rights which would otherwise arise [2]. There is, however,
spurious support for this explanation which in any event is wrong [3].
Exception clauses are not promises but may be conditions defining
facts and events over which the performer may not have personal
control, or they may be exceptions from what the performer himself
promises to undertake.


380. Others have chosen to excuse the peculiarity on the ground
that Lord Reid was not delivering a fully considered opinion on
an unargued point: e.g. Baker,J.H., "Suisse Atlantique
Confounded" (1970) 33 Modern L.Rev. 441.

[3] Coote,B., "Discharge for Breach and Exception Clauses since
The expression that the contract "cease[s] to exist" is to say the least, misleading. Thus some commentators have asked quite literally on what a party sues if the contract has ceased to exist [1]. More importantly, it masks the whole point of Heyman v. Darwins [2] that "executive obligations" are to be distinguished from arbitration clauses and by parity of reasoning they are to be distinguished from exception clauses. In other words only promises are discharged by breach - or more specifically promises still executory on both sides are discharged. Any right based on prior breach or performance, therefore, survives because a contract is not avoided ab initio [3]. This means that both obligations and exceptions continue to be available as a remedial measure of the rights of both parties, though the same obligations and exceptions


[2] [1942] A.C. 356 (H.L.), per Lord Macmillan; Corbin, Contracts, 5A - Part 7 para.1228, one cannot discharge a contract as a document or as the acts of the parties but one or more of the legal relations of the parties has been terminated; Hirji Mulji v. Cheong Yue S.S. [1926] A.C. 497 (P.C.) (a case on frustration); Trebilcock, M.J., "Effect of Rescission of Contract on Exception Clauses" (1967) 3 Adelaide L.Rev. 105. In C. Czarnikow v. Koufog [1966] 2 W.L.R. 1397, 1416, Diplock L.J. divided the obligations into primary and secondary ones. The primary obligations are terminated in the event of an accepted repudiation. The collateral or secondary obligations, e.g. to arbitrate, continue: see also Wade, H.W.R., "The Principle of Impossibility in Contract" (1940) 56 L.Q.Rev. 519, 526, for a criticism of the alternative promise theory and the consensual basis of the obligation to pay damages.

qualifying them cease to be binding de futuro [1]. As Dixon J. said in a well-known Australian case, rights not divested or discharged which have already been unconditionally acquired and those arising from the partial execution of the contract together with causes of action which have accrued from its breach continue unaffected [2].

A more obtrusive implication arising from Lord Reid's statement is this: an exception clause cannot be relied on in a claim for "loss of profit which would have accrued if the contract had run its full term" because it is extinguished together with the contract which terminates upon a discharge by breach. It is, to begin with, contrary to the explanation in Hirji Mulji v. Cheong Yue S.S. [3] that


[3] The contract survives for the purposes of assessing damages or determining the rights and liabilities in respect of any past breach. Only future performances of the parties' contractual obligations are affected: Hirji Mulji v. Cheong Yue S.S. [1926] A.C. 497. It is also contrary to the following explanations: (i) Contractual obligations are divided into primary and secondary obligations, the latter arises from non-performance of the former by one of the parties: C. Czarnikow v. Koufos [1966] 2 W.L.R. 1397, at p.1416, per Lord Diplock L.J. (ii) Discharge for breach terminates a contract and all the obligations of the parties under the contract come to an end and are replaced by obligations to pay damages which are to be assessed by reference to the "old obligations": Air Services v. Rolloswin Investments [1973] A.C. 331 (H.L.). This suggests a theory of literal termination but there is no indication of how the "old obligations" are to be assessed. If they are to be assessed from the contract as a whole, there is effectively no literal termination. In Moschi v. Lep Air Services [1973] A.C. 331 (H.L.), at p.507 it was said that it is generally true that if the innocent party elects to treat the contract as repudiated, the primary obligations of the parties under the contract come to an end and are replaced by secondary ones which have to be assessed by reference to what the parties undertook or promised to do. See also Shea, A.M., "Discharge from Performance of Contracts by Failure of Condition" (1979) 42 Modern L.Rev. 623.
the literal termination of a contract is not a consequence of discharge by breach. Even on the assumption that the contract literally terminates, the fallacy of the implication is evident [1]. The chronological occurrences of breach, acceptance of repudiation and termination make it quite clear that termination cannot explain why an exception clause does not cover the loss of profits flowing from a cause of action that arises upon acceptance of the repudiation. And an exception clause like any other clause applies at the moment the cause of action accrues. Moreover, the notion of termination always succeeds breach such that the argument stands even if the contract ends eodem instanti that it is broken.

The import of Lord Reid's statement, therefore, is not arrived at from an interpretation of the language of the clause together with the rest of the contract or from the operation of a discharge by breach. On the contrary, it suggests a prohibition of reliance on an exception clause in certain circumstances, that is, in claims for losses subsequent to the acceptance of repudiation. If the idea of a 'rule of law' connotes a conclusion arrived at without

[1] Some of the explanations advanced include the following: a contract as a result of frustration or election to disaffirm, ends at the moment the frustrating event occurs or the election is made. Until then, the contract remains valid and binding and all its terms continue to operate between the parties as agreed: Baker, J.H., "Suisse Atlantique Confounded" (1970) 33 Modern L.Rev. 441; when a party repudiates a contract by breach the other is "entitled to accept the repudiation and to treat the contract as at an end from the date of repudiation". This makes the effects of termination retrospective to the date of the breach: Hain Steamship v. Tate & Lyle [1936] 2 All E.R. 597, at p.614; a discharge by breach only truncates i.e. it notionally takes the parties direct from the point of termination to the point where completion is due. In doing so, it gives the innocent party an immediate right of action and by removing any further possibility of completion of the defaulting party's performance it prevents his enforcing the obligations of the party injured: Coote, B., "The Effect of Discharge by Breach on Exception Clauses" (1970) 28 Camb.L.J. 221.
regard for the contractual intention of the parties, Lord Reid's statement operates to the extent of the prohibition as such a rule.

Lord Upjohn added to the confusion. According to him the 'ordinary law of contract' provides that the application of an exception clause is dependent on the election of the innocent party to accept the repudiation or to 'affirm' the contract. If the innocent party accepts the repudiation thereby terminating the contract "none of its terms survive and damages for breach of the contract are at large" [1].

The expression 'damages at large' is ambiguous. It may suggest that an exception clause cannot apply at all once repudiation is accepted. No specific explanation was, however, offered. If the reason is that a literal termination of a contract occurring upon acceptance of repudiation renders an exception clause inapplicable, it is open to the same criticisms discussed in the preceding paragraphs. Moreover, it is incorrect to regard a literal termination as within the 'ordinary law of contract'. And the case of Hain Steamship v. Tate & Lyle [2] which was referred to does not support any such implication. For what was emphasised as being the ordinary law of contract in that case was the fact that a fundamental breach does not automatically terminate a contract as frustration does, but as in the ordinary law of contract gives the innocent party an option to affirm or to repudiate his obligations. The rationale, it was explained, is

[1] [1967] 1 A.C. 361, at p.419. It has been suggested that Lord Upjohn's conclusion was derived from "the fallacy which logicians call the denial of the antecedent", i.e. if affirmation of a contract is an affirmation of all its terms it does not follow that disaffirmation dissolves all its terms retrospectively as if the contract has never been made: Baker, J.H., "Suisse Atlantique Confounded" (1970) 33 Modern L.Rev. 441.

that a defaulting party should not be able to end a contract unilaterally by breach. A hint of literal termination may lie in Lord Atkin's remark that once a party "elects to treat the contract as at an end, he is not bound by the promise to pay any more than by his other promises". But here again, exception clauses are not promises. Besides, the application of an exception clause was not even in issue in Hain Steamship v. Tate & Lyle.

To Lord Upjohn the converse is also true. That is, if a contract is affirmed [1] "all its terms must remain in full force and effect for the benefit of both parties during the remainder of the period of performance", and that the application of the exception clause depends on its construction. Such construction, however, becomes relevant only after the aggrieved payor has affirmed the contract. This explanation seems to involve (a) the continuation of all terms (including exception clauses) by virtue of the fact of affirmation, followed by (b) the construction of such clauses to determine their ambit. Thus Lord Upjohn thought that the court in Charterhouse Credit v. Tolly [2] was wrong in holding that the exception clause was inapplicable despite the affirmation but considered it right on the ground that the clause did not on its true construction cover the breach [3]. For the same reason he concluded

[1] Affirmation was deduced from the fact that with full knowledge of the breach the owners did not repudiate or from the mere fact of failure to repudiate. Alternatively the owners' conduct and their election to continue with the contract in the knowledge that the demurrage clause would continue amounted to affirmation. See Dugdale, T., and Lowe, N., "The Construction of Exclusion Clauses upon Affirmation of a Fundamental Breach" (1979) 17 Alberta L. Rev. 423.


on the facts of *Suisse Atlantique* that "as...the [shipowners] have expressly affirmed the contract they cannot escape from the consequences of the demurrage clause [which is assumed to be an exception clause] unless as a matter of construction of that clause, they can show that it has no application to the events of this case".

All the terms continue because "it is not possible even for the innocent party to make a new contract between the parties without the concurrence of the other". This view that one must either affirm or rescind the whole contract was expressly rejected by Lord Reid as "too simple". Whether an exception clause applies is a matter of its construction and has nothing to do with affirmation. The clause does not change its meaning: if as a matter of construction it never applied it does not apply after election to affirm the contract.

Nor is that all. Each member of the House of Lords in *Suisse Atlantique*, in spite of their different versions of fundamental breach as a 'rule of construction', endorsed a statement of fundamental breach in terms of the presumed intention of the reasonable man. In *U.G.S. Finance v. National Mortgage Bank of Greece* Pearson L.J. said:

> there is a rule of construction that normally an exception or exclusion clause or similar provision in a contract should be construed as not applying to a situation created by a fundamental breach of the contract. This is not an independent rule of law imposed by the Court on the parties willy-nilly in disregard of their contractual intention. On the contrary it is a rule of construction based on the presumed intention of the contracting parties. It involves the implication of a term to give to the contract that business efficacy which the parties as reasonable men must have intended it to have. This rule of construction is not new in principle but it has become prominent in recent years.
in consequence of the tendency to have standard forms of contract containing exceptions [sic] clauses drawn in extravagantly wide terms, which would produce absurd results if applied literally [1].

The ambiguity arises because in the notions of the 'presumed intention', 'implied term', 'business efficacy', and the 'reasonable man' employed by Pearson L.J. as the logical form for fundamental breach as a 'rule of construction', are considerations quite foreign to a 'rule of construction', especially Lord Reid's. For instance, as the concept of the reasonable man's presumed intention introduces an extrinsic standard to the performer's obligation the nature of the 'business efficacy' goes beyond that which courts have been traditionally entitled to promote:

the law can enforce co-operation only in a limited degree - to the extent that it is necessary to make the contract workable. For any higher degree of co-operation the parties must rely on the desire that both of them usually have that the business should get done [2].

Similarly the 'implied term' used by Pearson L.J. has undergone subtle but significant change. The implied term established by The Moorcock [3], which dominated legal theory since the nineteenth


[2] Mona Oil Equipment v. Rhodesia Railways [1949] 2 All E.R. 1014, at p. 1018 per Devlin J. at the same time acknowledging that "It is, no doubt, true that every business contract depends for its smooth working on co-operation...".


(cont'd next page)
century, was a term implied in fact and not in law. That is, the
term was supposedly one which the two minds had agreed to although
they had not expressed it. There is a meeting of minds such that if
an "officious bystander" has directed their attention to it they would
have testily said "Yes, of course" [1]. The implication was
consequently 'necessary'. It was believed that this was the only
acceptable basis for an implied term. A court could not imply a term
because it considered such a term reasonable as this would offend the
consensus theory of contract. Pearson L.J.'s implied term is quite
clearly not one implied out of necessity but implied because it was
considered reasonable [2].

(footnote cont'd)

Reigate v. Union Manufacturing (Ramsbottom) [1918] 1 K.B. 592, a
term will not be implied merely because the court thinks it would
have been reasonable to have inserted it in the contract;
Russell v. Norfolk (Duke of) [1949] 1 All E.R. 109, a term will
not be implied...to make the carrying out of the contract more
convenient; French v. Leeston Shipping [1922] 1 A.C. 451, at
p.455, a term will not be implied where the contract is effective
without the proposed term; Shirlaw v. Southern Foundries [1939]
2 K.B. 206, at p.227; Broome v.
Pardess Co-op. Society of Orange Growers [1939] 3 All E.R. 978
(Hilbery J. citing Branson J. In Livock v. Pearson (1928) 33
Com.Cas. 188); McElroy and Williams,
Impossibility of Performance, chap.9; Lord Upjohn in
Suisse Atlantique said he could "find nothing in the contract
which imposes upon the charterers as a matter of construction or
as a matter of necessary implication an obligation to undertake
any additional requirement of loading with the laydays for
breach" (emphasis added), at p.417.


(1968) 31 Modern L.Rev. 390, shows that the implied term is often
used for purposes other than "business necessity"; in
W.L.R. 122 (C.A.), at p.133, Lord Denning said "And, if they
[implied terms] are necessary to do justice, I think we should
introduce them. It is a legitimate way of getting around the bad
interpretation of the past". In Lister v. Romford [1957] A.C.
555, at p.576, Lord Simonds recognised that the implication of
terms is based on considerations wider than those usually
acknowledged. See also Rivoli Hats v. Gooch [1953] 1 W.L.R.
1190; Corbin,A.L., "Conditions in the Law of Contracts" (1919)
28 Yale L.J. 739; Luecke,H.K., "Ad Hoc Implications in Written
Contracts" (1973-76) 5 Adelaide L.Rev. 32; Roberts,O.T.,
It appears from the foregoing that the concept of contractual intention itself involves a supposition of clarity and certainty which is largely false. In Schuler v. Wickman [1] we are given an idea of how intention may be arbitrarily attributed by the courts:

If it is correct to say, as I think it is, that where there are problems of the construction of an agreement the intention of the parties to it may be collected from the terms of their agreement and from the subject-matter to which it relates, then I doubt whether, save insofar as guidance on principle is found, it is not of much value (although it may be of much interest) to consider how courts have interpreted various differing contracts.

By a process of 'construction' the courts have to determine a spectrum of contractual intentions with different shades of meaning. What, it has to ask, did the parties to a contract intend, impliedly intend but did not express, or would have intended had they envisaged the events that subsequently led to the dispute?

4. A Key Question Undecided

A major drawback of Suisse Atlantique in its exposition of fundamental breach was of course its inability to elucidate the question of what is meant by a fundamental breach itself. Three members of the House based their decisions on the ground that the demurrage clause was not an exception clause thus dispensing with the need to decide if there was on the facts a fundamental breach.

Lord Wilberforce having found the demurrage clause to be one
"which fixed, by mutual agreement, the amount of damages to be paid to
the owners of the vessel if "longer detained"..." [1] saw no reason
why it should be limited to breaches short of deliberate breaches or
those which frustrate the commercial purpose of the contract when the
contract had been affirmed in spite of the alleged breach. Lord
Hodson, on a very similar line, referred to
Scrutton on Charterparties, and confirmed that a demurrage clause
applies in consequence of the affirmation [2]. The question, he
noted, is left open where the contract is repudiated. However, Lord
Wilberforce seemed to think that a demurrage clause will apply equally
in such a situation. Lord Upjohn was content with the ruling that a
demurrage clause does not come within the principle of fundamental
breach whatever the latter's scope may be. Lord Reid's use of
'fundamental breach' to denote discharging breaches generally, was
incapable of entertaining the question.

The references to demurrage clauses in previous cases, it is
submitted, do not quite meet the case as those clauses were never
brought to the courts' scrutiny because of an alleged fundamental
breach. So that the question was in fact raised for the first time
whether a fundamental breach can override a demurrage clause (as an
agreed damages clause) given the fact that the charterer had failed
the shipowner by nearly half of what the latter expected of him under
the charterparty.

For what it is worth, Lord Wilberforce said that there is no "universal solvent" and each case must be looked at individually. Although the House did not explain it in this manner, it can be gleaned from the opinions that two types of performance-related risks cannot generally be passed to the buyer. Where the "contractual substratum" of a contract is gone (for example, in the sale of goods cases where the consideration fails totally) an exception clause cannot apply to protect a seller. Secondly, the risks of an avoidable gross misperformance amounting to virtually a non-performance cannot generally be passed to the buyer. But whether a third type of performance-related risk which arises from the facts of Suisse Atlantique itself, can be imposed on a shipowner remains undebated and undecided: can a performer who has performed only about half of what he would ordinarily have had to perform be protected by an exception clause where he deliberately (that is, with a wilful intention) holds back performance for his own reasons which, however, may diminish the profitability of the shipowner's contract? Can a shipowner be regarded as having assumed such performance-related risks when he agreed to a demurrage clause?

Although this question was specifically posed by the case stated by the arbitrator and was indeed the key issue of the case, the House avoided it. Lord Wilberforce only said that there is a fundamental breach when the contractual substratum collapses and that a deliberate breach without more is not sufficient to constitute a fundamental breach. The deliberate breach is only a factor to be considered in deciding whether there is a fundamental breach. The precise issue of deliberately withholding about half the expected performance was not considered. Lord Reid perhaps vaguely indicated that the charterer could be protected unless he had acted fraudulently
or in bad faith. This is, however, unsatisfactory for two reasons. One is that the instances of fraud and bad faith were only cursorily mentioned. Even that mention was not particularly in the context of a deliberate (wilful) misperformance of about half the consideration. The other reason is that the distinction between bad faith and the wilful default in question is hazy. Lord Upjohn seems to think that there was only a discharging breach (or in his terms a fundamental breach) in *Suisse Atlantique* and may be said to have thought that the shipowner assumed the risks of the charterer's wilful breach. But it is clear from his opinion that his conclusion was not arrived at after due deliberation on the question as posed. The extent of the breach seems to have been his predominant if not his sole consideration.

There are at least two arguments against the actual decision of *Suisse Atlantique*. First, if as we have seen the performer in *The Cap Palos* could not shift the risks of his negligent misperformance, which led to the destruction of the schooner, to the other party then *a fortiori*, the shipowner here ought not to be regarded as having assumed the risks of the charterer's wilful misperformance which was by no means of minor consequence. In *Suisse Atlantique* the delay was indisputably contrived to defeat the shipowner's venture: the charterer had only loaded and discharged the ship for the first voyage within the laytime. Delay for the rest of the voyages was systematically calculated virtually to enable the charterer to escape the full rigours of a contract, which because of subsequent extraneous events turns out to be unfavourable to them.

Second, a demurrage clause is not an ordinary exception clause but is an agreed damages clause not unlike the common penalty clause in building contracts. In including such clauses, parties to a contract anticipate that contingencies may arise which hamper performance of
the contract and agree to a pre-estimation of the damages or compensation that each will get. The demurrage clause is certainly concerned with the more usual kinds of delay that may occur. For instance, the charterers may not be able to load within the laytime because of strikes by their employees or by persons from other quarters which affect the general business of loading and unloading. Perhaps even a purposeful delay may be contemplated. But if the charterers delay loading and unloading in order to reduce the number of voyages otherwise possible within the two years so that they, the charterers, will not have to pay the charterparty freight which, as a result of a subsequent drop in the market freight, renders their bargain a bad one, the demurrage clause cannot be said to provide for it. What the charterers do here is not dissimilar to the example given of the performer in the The Cap Palos who abandons the boat, which he has contracted to tow, on a lee shore in order to pursue a more profitable engagement with another party. The charterers in Suisse Atlantique are effectively licensed to use the demurrage clause to remedy a bad bargain by actively and wilfully forcing the shipowners to bear the loss of their calculated misperformance.

It appears that the House of Lords was perturbed by the difficulty of assessing what the shipowners were entitled to under the charterparty as well as how grave the delays were. There was little assistance to be obtained from decided cases because the hybrid consecutive voyage charter was novel. As the owners were claiming for payment for the greatest number of voyages which could have been made had there been no delay, they had the difficult task of showing when, if at all, the accumulated delay was such as would entitle them to sue for damages at large for the loss they had suffered. Indeed it is precisely in an involved case of this kind that the quality of the
performer's conduct in misperforming may be of particular significance. This was not at all appreciated by the House of Lords. The difficult question of how many voyages the shipowner was entitled to was naturally quite irresolvable. The consecutive voyage charter did not specify any number of voyages to be performed but merely provided that the owners should sail with dispatch and the charterers should load and discharge within the laytime beyond which demurrage was payable. The owners' argument that they had a right to a minimum number of voyages ascertainable at the end of the two year period compatible with compliance with laytime had many problems [1]. It would be hard for the charterers to know when they were in breach especially in view of other express exceptions from liability in the charter. Both parties would have to perform until the end of the two years. The minimum number of voyages can only be ascertained ex hypothesi with difficulty as the duration for a voyage is uncertain and variable, being subject to the vagaries of weather and other factors not within the owners' control. If, delay, when aggregated, amounting to the loss of one voyage, is at once regarded as outside the scope of the demurrage clause, such a clause would have a very restricted and "precarious" operation. On a disaggregated basis, the delay may well be precisely what the demurrage clause was intended for. The perplexing problem is not diminished here by the fact that the delay amounted to one third of total time (i.e., 154 out of 511 days). For how much of such delay is in excess of that which is reasonably anticipated by the demurrage clause? How many voyages of uncertain duration may be said to have been lost in consequence?

[1] These are well discussed by Mocatta J. in the court of first instance, [1965] 1 LL.L.R. 166.
performer's conduct in misperforming may be of particular significance. This was not at all appreciated by the House of Lords. The difficult question of how many voyages the shipowner was entitled to was naturally quite irresolvable. The consecutive voyage charter did not specify any number of voyages to be performed but merely provided that the owners should sail with dispatch and the charterers should load and discharge within the laytime beyond which demurrage was payable. The owners' argument that they had a right to a minimum number of voyages ascertainable at the end of the two year period compatible with compliance with laytime had many problems [1]. It would be hard for the charterers to know when they were in breach especially in view of other express exceptions from liability in the charter. Both parties would have to perform until the end of the two years. The minimum number of voyages can only be ascertained ex hypothesi with difficulty as the duration for a voyage is uncertain and variable, being subject to the vagaries of weather and other factors not within the owners' control. If, delay, when aggregated, amounting to the loss of one voyage, is at once regarded as outside the scope of the demurrage clause, such a clause would have a very restricted and "precarious" operation. On a disaggregated basis, the delay may well be precisely what the demurrage clause was intended for. The perplexing problem is not diminished here by the fact that the delay amounted to one third of total time (i.e., 154 out of 511 days). For how much of such delay is in excess of that which is reasonably anticipated by the demurrage clause? How many voyages of uncertain duration may be said to have been lost in consequence?

In these circumstances it was not surprising that Mocatta J. in the court of first instance, cautiously resorted to "safe" analogies [1]. He held that there was only one material obligation to load and discharge within the laydays and only one loss, and denied that an implied term was necessary to give business efficacy to the charter since the owners could have protected themselves with freight rates per day. This reasoning, as the owners rightly pointed out, can be used against every term that has ever been implied and destroys the basis of implied terms. Leaving the parties to their own devices, Mocatta J. added that the "extreme view of one voyage only being performed does not...strengthen" the owner's arguments. This suggests that the charterers can detain the ship for an unlimited period of time and pay demurrage while the owners, it would appear, have to perform all voyages prescribed by the charterers for the whole two years. The difficulty of this approach is only too clear. It would be difficult to assert performance of even a consecutive voyage charterparty. Moreover, the arrangement that demurrage is payable by the charterers for delay in loading and discharge and that compensation is payable to the charterers for earlier discharge and loading suggests at least the desire to minimise delays and maximise voyages.

5. The Significance of Suisse Atlantique: a Dubious Turning Point

The 'rule of construction' in Suisse Atlantique is not simply an application of the contra proferentem rule but is treated by the House of Lords as a special principle applied to fundamental

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A serious drawback of the case is that the essential issue discussed in the preceding section was not deliberated on. In the first place the House did not quite grasp the question posed. Nor did it appreciate the significance of the facts of Suisse Atlantique, which highlight a specific type of performance-related risks - the risks of wilful misperformance were calculated to and did in fact diminish the shipowners' profitability under the contract by half. There also seemed to be a reluctance to specify in detail what kind of performance should be given in service contracts of this kind. This was unfortunate because a finding on the issue would have had significant ramifications for the many other similar actions involving charterparties said to be pending in the courts. The decision of Suisse Atlantique shows how easily essential questions are overlooked when there is no proper theory of fundamental breach. But the legacy of the 'rule of construction' seems to leave the courts with greater freedom to avoid or uphold certain results they intuitively wish to press.

The protracted discussion of fundamental breach as a 'rule of law' or 'rule of construction' dealt only superficially with these issues. As various commentators have pointed out, it is difficult to distinguish between fundamental breach as a 'rule of law' and fundamental breach as a 'rule of construction' [1] and "support on either side can be found for all controversial points" [2]. The law "continues to be something of a morass" [3].

It was assumed that judges understood implicitly and intuitively the purport of fundamental breach based on the overused epithets of 'contractual intention', 'presumed intention' and 'implied intention' of the parties [1]. This was of course not true. Fundamental breach is not a self-revelatory concept and the criteria by which a court determines when it is intended to override an exception clause are quite nondescript. Courts that have to apply the 'rule of construction' are therefore confronted with the absence of a uniform conception of a fundamental breach, a lack of indicia on what amounts to a fundamental breach, an admission in Suisse Atlantique itself that the 'rule of construction' is incapable of solving the complex problems of exception clauses, and the suggestion that judicial control of exception clauses in some (unspecified) circumstances is desirable.

All this suggests a further question. Why did the House of Lords go to such lengths to reject fundamental breach as a 'rule of law' and to insist that it is a 'rule of construction', not simply as an application of the contra proferentem rule but as a special principle applicable to fundamental breaches? The House of Lords was bothered by several factors. Viscount Dilhorne in particular was worried by the restriction of freedom of contract that was seen to result from a substantive 'rule of law' [2]. The general impression

[1] Far too many important questions in the contract law are said to depend on the contractual intention of the parties. Examples include whether a statement is a term of a contract; whether a term is a more or less important part of the contract (e.g. the difficulty of interpreting the intention of the parties to ascertain the relative importance of terms is regretted in P v. P [1957] N.Z.L.R. 854, at p.857); and the ambit and meaning of terms.

from the opinions is that a 'rule of construction' has the advantage of a 'rational form' consonant with a view of a systematised law based on freedom of contract [1]. According to Lord Reid there is a need for judicial control of exception clauses in contracts of adhesion and in other types of contract which he did not identify. But fundamental breach as a 'rule of law' was too indiscriminate in its application. Being, he thought, exclusively pivoted on the seriousness of the breach it was uncompromisingly rigid and could not take into consideration adequately the social and economic contexts of exception clauses which are qualitatively different in their commercial functions. A 'rule of construction' on the other hand, if not the complete answer, would at least ensure a certain flexibility for judicial manoeuvre. It also seems to have appeared to the House of Lords that it was preferable to refrain from further judicial involvement with an acknowledged problem for which no generally accepted solution as part of the systematised law of contract was in sight. A return to 'construction' and the traditional role of courts to uphold contracts is in a sense a last resort to enable courts to tread on familiar ground while awaiting "urgent legislative action" [2]. Thus the criticism of fundamental breach as a 'rule of

[1] Cf. Llewellyn, K.N., "What Price Contract: an Essay in Perspective" (1931) 40 Yale L.J. "doctrinal synthesis tends to distort all vision of the underlying reality. For doctrinal synthesis is and must always be in conceptual terms, in cases, in supposed uniformities, inclusive, exclusive"; Kessler, F., "Contracts of Adhesion - Some Thoughts about Freedom of Contract" (1943) 43 Colum.L.Rev. 629, at pp.638-639, stresses that the law is not a closed and harmonious system as it is often represented to be.

[2] [1967] 1 A.C. 361, at p.406. In England the Law Commissions have been set up under the Law Commissions Act 1965 (U.K.) and machinery for review of the law was already established.
law' shifted from its origin and justification, to its nature, and finally to its inadequacy as a solution of the multi-dimensional problems of exception clauses.

In practice the great debate over the 'rule of law' and 'rule of construction' which culminated in Suisse Atlantique effectively made little difference to the courts' treatment of exception clauses. The "general trend of subsequent cases has been to reach, as a matter of construction, much the same results that were formerly reached under the substantive doctrine" [1]. One can discern a readiness on the part of some judges to arrive at fair solutions between the parties. As has been rightly observed, there is in a broader context, an "unmistakeable tendency" on the part of the courts to "favour the weaker party and to extend the boundaries of what was contractually relevant in fairly liberal fashion" in order to comply with different expectations in different business contracts [2].


"whether this result [of striking down the clause is obtained by applying the doctrine of fundamental breach as a matter of contractual construction or as an independent principle of law, it is clear that the phenomenon is alive and prospering in the law of this Province". Heffron v. Imperial Peking (1974) 46 D.L.R. (3d) 642 (Ont.C.A.) at p.651.


Not surprisingly the 'rule of construction' often proved to be "more artificial than the 'rule of law' [1]. So pervasive was the "judicial distortion of the English language" that the House of Lords in 1980 deplored the strained constructions in the cases which, it recognised, were rapidly finding their way into the law reports [2]. Case law was often embroiled in rationalisations in which it was difficult to discern a coherent legal policy [3]. This in part stemmed from the fact that the former theoretically gives effect to the contractual intention of the parties and is consequently, at least in principle, very much subject to the conceptual constraints of freedom of contract. When courts were confronted with clearer and more explicit drafting it became increasingly difficult for them to disregard its enclaves and to disallow exorbitant exception clauses by 'construing' their language. Moreover, in order not to offend the considerable body of rules which has grown from the seemingly inviolable concept of freedom of contract, the courts had to resort to


"the reports are full of cases in which what would appear to be very strained constructions have been placed upon exclusion clauses, mainly in...consumer contracts and contracts of adhesion."

intricate manoeuvres which obviously had their inherent limitations.

For instance, courts often rationalised away extra legal considerations, or denied their influence [1]. These covert practices were resorted to in spite of the fact that freedom of contract was in practice stealthily eroded [2]. For the courts after Suisse Atlantique were often caught in an unenviable situation where they could not openly deal with extra legal considerations, if only because they are tradition-bound not to interfere with contracts made. Yet when they were prepared to do so they were restricted in respect of the types of consideration to which they have access. For instance they can only take into account the factual background known to the parties at the time of the contract and its commercial purpose. While they must look beyond the language and see what the "factual matrix" was with reference to which the words were used, and the object, appearing from these circumstances, which the party using them had in view [3], they cannot consider the negotiations leading to the

[1] For instance Donovan J. in Kenyon v. Baxter Hoare [1971] 2 All E.R. 708, denied rather weakly that the parties' equal bargaining position was relevant after he had pointed out that they were in fact equal, that the quality of performance should be seen as a function of the price charged and that in any event the parties had actual knowledge of the conditions of performance; at p.720.


contract [1]. The conduct of the parties subsequent to the contract cannot be considered as an aid to the construction of the contract [2]. At the same time they also had to guard against jeopardising the advantage of flexibility which a 'rule of construction' is said to have without striking down what they see as perfectly legitimate clauses.

Although Suisse Atlantique is constantly referred to, it is by no means the pinnacle in the development of fundamental breach which it is often considered to be. It really stands in a class of its own because it involves a specific kind of performance-related risk.

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Chapter V

NEGLIGENCE MISPERSFORMANCE AMOUNTING TO

FUNDAMENTAL BREACH
1. **Post Suisse Atlantique Developments of Fundamental Breach**

From what we have been saying in chapter IV it should come as no surprise that fundamental breach was not settled or easy to apply. *Suisse Atlantique* left the courts with a broad preference for a rule of construction, an expedience which was developed in the subsequent cases. In applying the rule of construction some of the courts leaned towards the type of construction in which the sanctity of terms predominated while others adopted the more flexible approach of construing the contract and all the circumstances in a reasonable context. The latter was by far favoured by the courts. This is not to say that this direction which the post-*Suisse Atlantique* developments took was well understood or appreciated.

Just a year after *Suisse Atlantique* the court in *Anglo-Continental Holidays v. Typaldos Line* [1] applied fundamental breach as a rule of construction and explained that:

"No matter how wide the terms of the clause, the court will limit and modify it to the extent necessary to enable effect to be given to the main object and intent of the contract."

Perhaps the most controversial application of fundamental breach in the post-*Suisse Atlantique* era was the Court of Appeal decision of the *Harbutt's Plasticine case* [2]. There Lord Denning gave a clear


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exposition of an exercise in construction according to reasonable
expectations rather than the sanctity of terms and introduced a
further technical idea that a discharge by breach results in the
termination of a contract. That was the case where D were to design,
install and erect a system for storing and dispensing stearine in a
molten state in P's old plasticine factory. P proposed to have a
system by which the stearine should be kept in special storage tanks
fitted with heating apparatus. The stearine would be carried from
those tanks to the machines by a heated pipeline. The aim was to keep
the stearine liquid throughout. D who were experts in the storage
and conveyance of liquid substances and who install most of the petrol
pumps in the country made the design, which was accepted by P, and
carried out the work. Storage tanks of mild steel fitted with heaters
were installed and a plastic material called durapipe was used for the
pipeline. The durapipe was wrapped with a heating tape and fitted
with a thermostat to control the temperature. Upon the completion of
the work, D's servants turned on the heating to melt the solidified
stearine for the purpose of testing the system the next day. But the
system was negligently left unattended overnight. The durapipe being
unsuitable for the purpose, distorted; the stearine ignited and the
factory was burnt down. The Court of Appeal unanimously held that
there was a fundamental breach and D could not rely on a clause which

(footnote cont'd)
Coote, B., "Discharge for Breach and Exception Clauses since
Harbutt's "Plasticine" (1977) 40 Modern L.Rev. 31; Dawson, F.,
"Fundamental Breach of Contract" (1975) 91 L.Q.Rev. 380;
Hall, G., "Exemption Clauses: the Legal Haze Clears?" (1977) 127
New L.J. 919; Waddams, S.M., "Contracts - Exemption Clauses -
L.Rev. 73; Burrows, J.F., "Fundamental Breach Again" [1970]
N.Z.L.J. 225; Silberberg, H., "The Doctrine of Fundamental Breach
limited their liability to a sum which "should not exceed the total value of the contract" [1].

Widgery and Cross L.J.J. [2] relied on Lord Reid's dictum in Suisse Atlantique and held that the contract had been terminated by P at their option although it was recognised that they had truly little choice. Whether the exception clause applied implicitly depended on the fact of affirmation or disaffirmation, a proposition which was criticised in Suisse Atlantique itself [3].

Similarly Lord Denning held that an election to treat a breach as a repudiation brought the contract to "an end" "for the future" and "such an ending disentitles[d]" the guilty party from relying on an exception clause in respect of the breach [4]. The same result, according to him, followed where the contract, as in the instant case, was automatically terminated. However, if a party elects to affirm the contract, the contract continues to exist and an exception clause applies according to its interpretation.

Contrary to opinion then prevailing, Lord Denning insisted that the result of Suisse Atlantique was to affirm the "long line of cases" that when a party is guilty of a fundamental breach and the contract comes to an end by the election of the other party, an

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[1] P had in fact been compensated by their insurance company which brought the action against the defendants in subrogation.


[3] Even Widgery and Cross L.J.J.'s proposition does not justify awarding the cost of building a new factory (which is related to loss incurred before the termination of the contract, and by Lord Reid's argument is not immune from the effect of any exception clause) to the innocent party.

exception clause cannot apply [1]. Karsales v. Wallis was cited as a well-known example. He further insisted that in the name of construction we return to the pre-Suisse Atlantique position. In other words, the construction of an exception clause was to take account also of (at least) the quality of misperformance since, as Lord Denning had stressed frequently, an exception clause cannot be used as a cloak for misconduct. Although it is true that none of the pre-Suisse Atlantique cases was overruled by the House of Lords, the example of Karsales v. Wallis was unfortunate. For it, together with Lord Denning's exposition of the 'rule of construction', gave the appearance that the notion of fundamental breach as applied in those cases had not been rejected by Suisse Atlantique. It also led both judges and lawyers to conclude that Lord Denning was reinstating the pre-Suisse Atlantique rule of law in the guise of a rule of construction but with a difference. That is, whether an exception clause applies now depended on the fact of affirmation or disaffirmation [2], a conclusion which seemed confirmed by his introduction of a further erroneous technical idea which became the subject of severe criticism.

A fundamental breach, said Lord Denning, leads to the termination of a contract which destroys the exception clause so that it cannot be invoked. Professedly drawn from the dicta of Lords Reid and Upjohn, the idea is, however, patently inconsistent with them. Lord Denning failed to appreciate the difference between the

opinions [1]. Whereas Lord Upjohn had suggested that the contract is
avoided ab initio, Lord Reid said that the exception clause ceases to
apply from the moment the repudiation is accepted but remains
applicable to that which precedes such acceptance. Unlimited damages,
he suggested, could not be claimed for harm already caused to a
party's existing interest, but full loss of profits could be recovered
by reason of the other party's non-performance thereafter. Moreover
the idea that an election to disaffirm a contract terminates it, is
contrary to established principle. The House of Lords in Heyman v.
Darwins [2] has explained that when a party accepts a breach as going
to the root of the whole contract he is discharged from further
performance and is entitled to sue for damages, but the contract
itself is not extinguished.

Lord Denning's idea was taken further in

Farnsworth Finance v. Attryde [3], where it was observed that even if
the hirer had affirmed the contract despite the delivery of the
seriously defective motor cycle which amounted to a fundamental
breach, the exception clause could not apply. This was held to be the
case in Wathes v. Austins [4]. Drawing an analogy to the
Harbutt's Plasticine case, the court said in Wathes v. Austins that
"as a matter of construction" the exception clause could not have

[1] See chap. IV.


mention the Harbutt's Plasticine case but seemed to have found
that the parties had not contemplated such a misperformance that
they can be supposed to have provided against it without
destroying the "whole contractual sub-stratum".

Word?" (1978) 41 Modern L.Rev. 92-96; Brownword, R., "Suisse
applied where the contract was repudiated and therefore would not apply where the contract was affirmed.

In Wathes v. Austins, P supplied and installed an air-conditioning plant in D's shop. The plant was so noisy in its operation that it amounted to an actionable nuisance. D undertook work at their own expense to abate the nuisance but affirmed the contract. When sued for the contract price, D counterclaimed for the cost of work for the abatement of the nuisance and the costs of compromising the nuisance action. It was held that an exclusion from liability for any consequential loss could not apply. Two of the judges [1] did not regard the decision in the pre-Suisse Atlantique decision of Charterhouse Credit v. Tolly [2] as having been overruled by Suisse Atlantique (as indeed it had not been overruled) but treated it as an instance where clear words of exemption have not been used. Sir John Pennycuick expressly supported his decision with Charterhouse Credit v. Tolly, the Harbutt's Plasticine case, Farnsworth Finance v. Attryde and Suisse Atlantique.

When the court in Kenyon v. Baxter Hoare [3] was faced with the patently conflicting decisions of, in particular, the Harbutt's Plasticine case and Suisse Atlantique, it was bound by Williams v. Glasbrook [4] to follow the former. Believing that the Harbutt's Plasticine case was at odds with Suisse Atlantique, Donaldson J. distinguished the former on the ground that the breach in that case was of a non-contractual or deviatory kind. The defendant

in the Harbutt's Plasticine case, he suggested, rendered a non-contractual performance by designing, supplying and installing a system which was wholly unsuitable for the purpose for which it was required, and which gave rise to potentially disastrous consequences. And as he understood Suisse Atlantique,

"it is only in cases in which the performance is non-contractual, in the sense that it is totally different from that which the contract contemplated, that one can ignore the construction of the exception clause or treat it as inapplicable notwithstanding that, as a matter of construction, it covers the loss which has occurred." [1]

In Kenyon v. Baxter Hoare bags of shelled groundnuts were stored by P in D's warehouse. D were "experienced warehousemen" and P made salted peanuts for human consumption. It appeared that the warehouse was structurally sound and suitable for storing nuts but was not rat-proof because of the condition of the floor and a gap at the bottom of the doors which opened outwards onto an upward slope. D knew that there were rats in the area and in due course discovered them in the warehouse. But they took the view that they were to be expected. D mended bags, restacked the loose nuts, cleaned up rat droppings and notified the local authority and thought there was nothing else they could do. Seventeen visits were made by the local authority during which they laid and changed bait. As a consequence of substantial rat infestation more than twenty per cent of the value of the nuts were seriously damaged and special procedures had to be devised to sort out those that could be used after cleaning.

Donaldson J. found that although the performance fell "far short" of what P was entitled to expect and had contracted for, the default was not so serious as to remove the "sub-stratum" of the contract. And although D's failure to use reasonable care and skill was "gross and culpable" they were protected by an exception from all liability short of "wilful neglect or default". However, he added, if there had been wilful default and not in a minor respect or in respect of a small portion of the goods, the breach would strike at the substratum and neither the clause in question nor one limiting liability to a certain sum would apply. In other words a performer cannot exclude or limit his liability for his own wilful default or misperformance if it results in removing the "substratum" of a contract. The idea of termination was discretely passed over, unmentioned.

Donaldson J.'s distinction was based on his interpretation of Lord Wilberforce's opinion in Suisse Atlantique which is based on the premise that short of restricting an exception clause to save a contract which would otherwise be illusory, exception clauses apply in every case according to the contractual intention of the parties. Subsequently, Lord Wilberforce in Photo Production v. Securicor Transport applauded Donaldson J.'s "ingenious" effort. It follows from the distinction that there are now two types of fundamental breach, one more fundamental than the other. Some fundamental breaches it seems may be excused by express exception while others can never be. The important point that emerges is this: even Donaldson J.'s 'rule of construction' does not allow a performer to excuse his own wilful destruction of the substratum of the contract. In effect, his application of the rule of construction does not overrate the sanctity of terms at the expense of the reasonable
expectations.

Perhaps because attention was focused on the faulty idea of termination the bias of fundamental breach as a rule of construction as it was developed in the post-Suisse Atlantique cases was hardly recognised. Much was said about the Harbutt's Plasticine case which was widely regarded as unsound and radically inconsistent with Suisse Atlantique. In Mayfair Photographic Supplies v. Baxter Hoare [1], MacKenna J. echoed what was often seen as the daunting inconsistency in the cases:

"If it has been necessary for me to apply the decision of the Court of Appeal in Harbutt's Plasticine I would have had great difficulty in discovering a ratio decidendi which could be reconciled with the decisions in Suisse Atlantique... and Heyman v. Darwins Ltd."

Indeed the applications of fundamental breach in, for example, the Harbutt's Plasticine case, Farnsworth Finance v. Attryde, and Wathes v. Austins were regarded as so unconvincing and so indistinguishable from a rule of law that the House of Lords in the recent case of Photo Production v. Securicor Transport [2] saw the

[2] [1980] 2 W.L.R. 283 (H.L.), at pp.288-289, per Lord Wilberforce:

"I have no second thoughts as to the main proposition that the question whether, and to what extent, an exclusion clause is to be applied to a fundamental breach, or a breach of a fundamental term, or indeed to any breach of contract, is a matter of construction of the contract. Many difficult questions arise and will continue to arise in the infinitely varied situations in which contracts come to be breached - by repudiatory breaches, accepted or not, by anticipatory breaches, by breaches of conditions or of various terms and whether by negligent, or deliberate action or otherwise. But there are ample resources in the normal rules of contract law for dealing with these without the superimposition of a judically invented rule of law."
need to reject the specific idea in the Harbutt's Plasticine case on termination [1] and to restore and reaffirm the 'rule of construction' in Suisse Atlantique. Lord Wilberforce conceded the "ambiguity" and "inconsistency" in the opinions of Lords Reid and Upjohn but urged that the "whole purpose and tenor" of the opinions in Suisse Atlantique, if somewhat "indigestible", was to reject the 'rule of law'. The decision in the Harbutt's Plasticine case itself was not overruled.

In Photo Production v. Securicor Transport, D had contracted to provide night patrol services to P's factory to guard against the hazards of fire and theft in particular. The actual patrol services was done by a servant of D. One night in the course of his employment the servant intentionally lit a fire by throwing a lighted match into some cartons which got out of control and burnt down a substantial part of the factory. Although it was not found that the servant intended to burn down the factory, he was convicted of the criminal offence of causing malicious damage. D sought the protection of an exception clause which excused them from the servant's lack of reasonable care which they could not prevent by the use of reasonable diligence. It was found that D had exercised all reasonable diligence in the employment and supervision of the servant. MacKenna J. held that the clause was a reasonable one and protected D [2]. The Court of Appeal reversed the decision on the ground that as a matter of construction the parties could not have intended to excuse D from liability for breach by deliberate fire. In any event, it added, the


[2] MacKenna J.'s decision is unreported and must be gleaned from the Court of Appeal decision.
clause cannot apply on the authority of the Harbutt's Plasticine case to the fundamental breach [1]. The House of Lords unanimously restored MacKenna J.'s judgment.

The actual grounds of decision in the House of Lords, however, differed. Lord Wilberforce held that although there was a breach of contract by D they were protected by the exception clause which, being a reasonable one in the circumstances, was intended by the parties to apply. D had an implied obligation to use due care in selecting their patrolmen, to take care of the keys and to operate the service with due care and proper regard to the safety and security of the premises. The "breach of duty committed...lay in a failure to discharge this latter obligation". Alternatively they were vicariously responsible for the servant's act. And the exception clause was intended to protect them because D's charge for their services was "very modest" [2] and D had not agreed to provide equipment. Nor did they know the value of P's factory or the efficacy of its fire precautions. Moreover, they had contracted as equal parties. It could not therefore have been their intention that D assumed the risks of the fire. Lord Diplock on the other hand held that, as a result of the exception clause, D had not assumed the vicarious responsibility (or what he preferred to call the absolute responsibility) for the servant's acts which the law normally implies on his part. This, he said, must have been the intention of the parties because reasonable men would apportion such risks.


The House of Lords' treatment of fundamental breach was conservative. Exception clauses must continue to be strictly construed. It was not denied that fundamental breach was a special principle, although the House insisted as it did in Suisse Atlantique that it is not a 'rule of law'. Lord Diplock suggested that the greater the departure from the obligations implied by law, the more strictly the clause must be construed. But the House of Lords in Photo Production v. Securicor Transport did not elaborate on when an exception clause, which prima facie excuses a performer from his own breach of contract, can be overridden by a fundamental breach. The House had in fact deliberately refrained from elucidating the 'rule of construction', although it admits that "many difficult questions" will continue to arise from the use of the 'rule of construction' in the "infinitely varied situations in which contracts come to be breached" [1]. This reluctance was in part due to the fact that in the United Kingdom the Unfair Contract Terms Act 1977 was already in force.

A paradox that follows from Suisse Atlantique remains unresolved. Indeed neither the House of Lords in the earlier case nor the House in Photo Production v. Securicor Transport has quite come to grips with the crux of fundamental breach. The paradox is this. If a deliberate or wilful breach of almost half of what the shipowners in Suisse Atlantique may in normal circumstances expect to get under the charterparty can be excused by a minor and not particularly specific demurrage clause (which says nothing about wilful breaches), it follows that a negligent misperformance (for instance one to which the Gibaud rule applies) should also not be a fundamental breach that

overrides a more specific and clearer express exception clause. But in *Suisse Atlantique* itself the whole House had unanimously endorsed Pearson L.J.'s statement of fundamental breach in *U.G.S. Finance v. National Mortgage Bank of Greece* which adopted the Gibaud rule. Lord Wilberforce [1], for instance, expressly referred to and approved the Gibaud rule; although he subsequently suggested in *Photo Production v. Securicor Transport* that it should be a separate category of its own [2]. Similarly if the deliberate breach in *Suisse Atlantique* did not override the demurrage clause, how could the negligent misperformance in the *Harbutt's Plasticine case* override the limited liability clause in issue there? Yet the House of Lords in *Photo Production v. Securicor Transport* only rejected the specific reasoning of the *Harbutt's Plasticine case* (that an exception clause cannot apply because the contract terminates) but not the actual decision of that case. Even *Kenyon v. Baxter Hoare*, which has not been the subject of much criticism because it applied a 'rule of construction', is on closer analysis counter to *Suisse Atlantique*. For Donaldson J. said in that case that a wilful default in a major respect or in respect of a big portion of the goods will not be protected by any exception clause including one which limits the performer's liability.

Perhaps the most interesting part of the case is Lord Diplock's analysis of contractual liability [3] which resembles Devlin

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[1] [1967] 1 A.C. 361 (H.L.), at pp.443-444.
J.'s exposition of the fundamental term in the pioneering case of Smeaton Hanscomb v. Sassoon I. Setty. Approaching the problem from an essentially remedial point of view, Lord Diplock explained that every failure to perform a "primary obligation" is a breach of contract, but any unperformed primary obligations remain undischarged "except in two cases": where there is a fundamental breach and a breach of condition. There is a fundamental breach when the event resulting from the failure by the performer to perform a primary obligation results in the payor being deprived of substantially the whole benefit which it was intended by them to be due to the payor. There is a breach of condition where a performer fails to perform a term, whether express or implied, which the parties have agreed would give the payor a right to end the primary obligations irrespective of the consequences of the breach. In neither fundamental breach nor breach of condition can the "secondary obligation" (which is implied by common law or even statute) to pay damages be totally excluded if the payor chooses to put an end to his primary obligations. But precisely drafted exception clauses may despite their strict construction still modify this secondary obligation. They do not, however, deprive the payor of the right to be discharged from any unperformed primary obligation.

The post-Suisse Atlantique cases were therefore an immensely difficult group of cases to contend with. It is possible to deal with them in several ways. One can resign oneself to the confusion and continue to insist that the 'rule of construction' in Suisse Atlantique is to be applied in each case in its own light and reject the 'deviant' cases. Another possibility is to explain the inconsistencies from a sociological point of view, that is to say, that some of the decisions represent iconoclastic efforts by
over-creative judges. A third possibility might be to say that of the three principal cases the Harbutt's Plasticine case adopted a tough line against exception clauses, that it was followed somewhat by Kenyon v. Baxter Hoare, but that Photo Production v. Securicor Transport seems to reverse this policy. None of these options is really satisfactory. It is submitted that although the decisions of the three main cases seem to be incompatible, they do reveal a subtle and consistent pattern. The rest of the chapter will attempt to extrapolate this coherent structure of results.

2. A Proposed Reconciliation

Harbutt's Plasticine, Kenyon v. Baxter Hoare and Photo Production v. Securicor Transport, to begin with, involve certain kinds of negligent misperformance against which a performer may guard himself in service contracts. Thus they may be regarded as a class different from Suisse Atlantique which raises the different question, namely, when liability for one's own wilful default may be excluded.

In the Harbutt's Plasticine case the mistakes made by D were blatant and elementary evincing appalling incompetence on their part. As the court of first instance found as a matter of fact, it was a "major blunder" for D to use durapipe at all. Stearine remains in a molten state at a temperature between 120°F and 160°F while durapipe distorts at 187°F. The "margin of safety" between the two was thus "dangerously small". Furthermore because of the low thermal conductivity of the durapipe it was by no means clear that an internal temperature of 160°F could be attained without exceeding an external temperature of 187°F. The low thermal conductivity of the durapipe
also made it difficult to maintain a constant temperature along the length of the pipe and rendered a thermostat useless. For it could provide no reliable indication of the varying temperatures at different parts of the durapipe: a spot underneath the electric heating tape would register a temperature much higher than one away from the tape. "In the result it was inevitable that, if the tape was energised, the exterior of the pipe in contact with the tape would become dangerously hot before the interior of the pipe reached 160°F, and that in the absence of an effective thermostat the external temperature might build up until the pipe disintegrated and the now highly inflammable stearine came into contact with the heating element in the tape" [1]. D had "designed, supplied and erected a system which was thoroughly — . . . wholly — unsuitable for its purpose . . . , and certain to result not only in its own destruction but in considerable further destruction and damage . . . " [2].

The risks that arose from the breach were risks of experimentation only in the sense that durapipe was used by D for the first time. They were not risks of experimentation in the true sense which would arise if for instance the properties of durapipe were uncertain and the parties had nonetheless agreed to test its use in the installation. The risks inherent in the innovation and arising from the uncertain (hence unavoidable) would be true risks of experimentation. These latter risks may arguably be passed to the payor [3]. In the instant case the risks arose indisputably from D's


[2] Id., at p.231, per Lord Denning M.R. quoting the finding of the trial judge.


(cont'd next page)
incompetence. The regrettable mistakes stemmed from D's failure to consider the low thermal conductivity of the durapipe. The unsuitability of the durapipe was so basic that its use together with the fact that D were experts in conveying liquids could only be regarded as incompetence and negligence of the gravest kind. So that even if it was P who had preferred the durapipe on account of some small reduction in cost, D, by reason at least of their special skills vis-a-vis P, had a duty to advise P that it was unsuitable. This as Widgery L.J. said, D had not done because "no thought" was given to it [1]. Moreover, D "ought to have known" that leaving the tapes energised and unattended was liable to cause the collapse of the durapipe and was a "dangerous risk of fire" [2]. Indeed if the installation was experimental, as D claimed, this negligence on their part (and conceded by them) may well be regarded as recklessness [3].

Kenyon v. Baxter Hoare is more difficult to explain. The warehousemen's "gross and culpable" [4] failure to use reasonable care

(footnote cont'd)

He gave the example in which company A buys from company B and installs an electronic system for some novel purpose. Numerous different pieces of equipment, possibly situated in different parts of the country, all of which must work together are involved. The pieces of equipment may be tested separately but there is no means of testing the whole system short of installing it completely and operating it. If the system fails A loses the whole benefit of the contract and B is, he fears, by any means in fundamental breach of his contract. But according to our analysis, B may well be protected by an exception clause, the performance-related risks being, unlike those in the Harbutt's Plasticine case, risks similar to true risks of experimentation.


[2] Ibid.


and skill seems on the face of it only a shade different, if at all, from the incompetence of D in the Harbutt's Plasticine case. Theirs, as the court said, was "not deliberate and conscious neglect or default" [1]; theirs was the "carelessness of the fatalist and defeatist" [2] a "carelessness of the incompetent" but "not a reckless carelessness" [3].

It is of course possible to distinguish the two cases on the ground that in Kenyon v. Baxter Hoare the misperformance seems to be only in respect of a minor portion of the nuts and did not give rise to consequences of a comparable magnitude. But this would not be entirely satisfactory, for the suggestion is that apart from the consequences of the breach the quality of the misperformance is also material. Perhaps a better explanation is this. When rats infest nuts warehoused in a locality where rats are known to be common, such an occurrence is not too unlike a natural disaster, the consequences of which one can too easily not completely foresee. The natural attraction of high protein food for rats makes the task of preserving and storing the nuts more difficult even for experienced warehousemen. The negligence in question arose from the "dim lights" according to which the warehousemen looked after the nuts, and the "wholly mistaken, but sincerely held belief" that what they did was all that they may be expected to do. The risks of this remissness or unawareness of the risks involved may be acceptably passed to the owners of the goods. This is arguably the case even if the damage was decidedly substantial.

[1] Ibid., at p.717.
[2] Ibid.
[3] Ibid.
How then can Securicor in Photo Production v. Securicor Transport justifiably shift the risks of its employee’s negligent misperformance which results in the substantial destruction of the factory to the owners? Ordinarily, where the contract is actually performed by persons other than the contracting party the law implies an absolute responsibility on the part of the contractor for his employee’s exercise of reasonable care and skill. But if the employer has taken due care to delegate and supervise performance to a particular employee, the former may pass risks of the employee’s misperformances which he cannot control by reasonable diligence to the other party. Here what Securicor seeks to guard against are risks of fire which can be said to arise from acts or events which are not only extraneous (and therefore cannot be prevented) but also against the consequences of which the owners of the factory had already protected themselves by insurance. This was perhaps the idea that lurked behind Lord Wilberforce’s warning that it is “important to bear in mind” that the employee did not intend to destroy the factory although he deliberately lit the fire. Underlying this caution seems to be a hint that if the employee had intended to destroy the factory, Securicor would not have been able to pass the risk of such deliberate or intentional misperformance to the owners even though they exercised due care in the supervision of their employee’s conduct. This in turn suggests that our explanation should not be put too widely. Any exclusion of liability for the consequences of specific things done by Securicor’s employees, say pilfering, would (in the same way as arson) be quite distinguishable on the ground that the employee would be doing precisely what Securicor was not supposed to do thereby bringing about the very risk which it was supposed to guard against.
It will be oversimplifying matters as well as misleading to say that the element of consistency in the three cases is to be found in the risk of negligent misperformance, a risk we find in each case. For such risks of negligent misperformance that may be passed to the payor, in spite of the destruction of the substratum, entail elements which are immensely difficult to avoid and hence are in a sense comparable to extraneous circumstances. But these analogous extraneous circumstances are to be distinguished from the extraneous circumstances that have often given rise to dispute in yet another group of service contracts. They are the irresistible forces that commonly cause damage in charterparties where a ship is deviating from its course but the risks of which cannot by virtue of the Gibaud rule be passed to the payor. The different treatment of the two types of extraneous circumstances is warranted by the fact that in the first type of service contracts the analogous extraneous circumstances are not brought on or induced by avoidable deliberate conduct. Whereas in the second group of service contracts, the risks of the extraneous circumstances arise because the performer by his own avoidable conduct deliberately subjects the payor to them.

3. The Adjustment of Performance-Related Risks Reviewed

If it is necessary to put the intuitive differentiation of performance-related risks on a more general basis, it may be said that it turns on the quality of the breach and the consequences of breach. All performance-related risks, unlike risks arising from unforeseen supervening events, are risks arising from culpable (in the sense of avoidable) misperformances. A performer cannot unilaterally impose upon the payor increased risks of certain kinds of culpable
misperformance which result in a total collapse of a bargain [1].

Generally when a bargain collapses totally in consequence of a breach, an aggrieved party is entitled to be discharged of his obligations under the contract irrespective of any exception clause that may provide to the contrary. The reason is that in every bilateral contract, apart from contracts of chance, there is a minimum standard of exchange which cannot be eviscerated or emptied and for the non-performance of which the aggrieved party should not have to pay. For otherwise a performer would be allowed to subject the other party to what is at best a different contract without entitling the latter to rescind on account of the exception clause. The minimum standard of exchange thus preserves the essential bargain. And in every case the question is whether a party has received that minimum degree of performance of the particular exchange expected under the contract. In this respect, it is submitted that Lord Devlin's proposal of a common criterion of facts resulting in a frustrating event for both dissolution and repudiation should be taken note of. Any formulation of principles which indicates the factual bases of their operation is to be welcomed for it adds clarity to the law.

Generally, too, whether all other exception clauses which directly or indirectly modify the payor's usual remedy in damages apply, where a bargain has collapsed totally, depend on the type of performance-related risk involved. This in turn depends on the

[1] Cf. in the Louisiana Civil Code there are more sophisticated provisions that recognise at least three degrees of fault, namely, gross, slight and very slight fault. The relations between them and the extent of liability are also clearly established; see Litvinoff, S., "Stipulations as to Liability and as to Damages" (1978) 52 Tulane L.Rev. 258; see also Rieder, R.W., "Exculpatory Clauses" (1975) 36 Alabama Lawyer 254; Tillman, M.M., "Restrictions on Attempts to Contract Away Liability for Negligence" (1960) 12 Baylor L.Rev. 298.
quality of the breach and the nature of the contractual obligation. Where the breach is wilful the performer is not protected whatever his obligation may be. Otherwise his promise amounts in effect to a potestative condition.

In sale of goods and hire-purchase the quality of breach has a different significance. This is because the obligation in these contracts is to deliver goods of a specific or otherwise specified kind. So that notions of doing one's best or acting diligently rarely arise; the evaluation of the quality of performance here coincides with a preceding question of whether there was performance of the contract at all. The risks of avoidable misperformance against which the seller cannot be protected are those of a tender of goods "different in kind". The one exception thus far that follows from the unobserved comment of Lord Loreburn in Wallis v. Pratt and the case of Pinnock v. Lewis & Peat, is the risk of honest mistake which may be passed to the buyer entirely so that there cannot be said to be total collapse of the bargain; or putting it differently, the seller is protected in spite of the collapse of the bargain. A more recent development of Lord Loreburn's idea is to be seen in Green v. Cade Bros. Farm [1]. That was a case where twenty tons of uncertified King Edward potatoes sold turned out to be unmerchantable because of a latent virus. The source of the unmerchantability was, however, not finally diagnosed until some nine months later. The sellers sued for, inter alia, the price and the buyers counterclaimed for a total loss of profit on the crop planted of about ten times the price of the potatoes. The sellers sought to rely on two exception clauses which

required the buyers to give notice of their claim within three days of receipt of the potatoes and which limited the sellers' liability to the price of the potatoes. Griffiths J. disallowed reliance on the first clause but upheld the second. Under s.55(4) Sale of Goods Act 1893 an exception clause which exempts unmerchantability cannot be enforced to the extent that it would not be fair and reasonable to allow reliance on it.

The sellers could not reasonably rely on the time clause because the buyers could not be expected to complain within three days of delivery of a latent defect which they did not become aware of until much later. It was, however, reasonable to allow reliance on the limitation of liability because, among other reasons, neither party was morally blameworthy and neither knew or could be expected to know of the infection [1].

In contracts of service the quality of breach assumes a far wider role. Even so, a performer who steps outside the 'four corners' of his contract, however innocently or inadvertently, bears the risks arising in consequence including those which are due to unforeseen supervening events. Risks of the performer's negligence within the 'four corners' may, it would seem, be passed to the payor although certain shades of gross negligence or recklessness may not be similarly shifted. However, if the risks of negligent misperformance

[1] There was even a clause explaining the need for the limitation of liability:

Seed potatoes sometimes develop diseases after delivery. It being impossible to ascertain the presence of such diseases by the exercise of reasonable skill and judgment the Seller cannot accept any responsibility should any disease develop after delivery other than as provided under clause.
include extraneous risks of a kind not induced or brought on by the performer, and in certain circumstances against which the payor is protected by insurance, they may be wholly passed to the payor and in spite of a total collapse of the bargain.

The idea that risks are differentiated according to the quality of conduct introduces into the law a distinction between culpable and innocent breach which may have a wider significance going beyond fundamental breach. Traditionally a breach is said to be committed when a party "without lawful excuse, refuses or fails to perform, performs defectively or incapacitates himself from performing the contract" [1]. But according to our idea that risks are differentiated according to the quality of conduct, a breach may be innocent where a party fails to give what he is supposed to give without intending to refuse or to repudiate performance. A ready example is where a party fails to perform because of an unexpected financial difficulty which forces him out of business [2].

Apart from enabling courts to determine who should bear the risks of different kinds of culpable breach, such a distinction between culpable and innocent breach can also form the basis for protecting a performer's reliance and restitution interests. So that where a performer has incurred loss in preparing for the performance of his promise in reliance on the contract, the other party can be made to share the loss on the basis that the former's breach was innocent [3].


The law on part performance which gives rise to unsatisfactory questions of unjust enrichment may be profitably re-structured on a similar basis. An argument of Treitel's supports the latter idea and by a parity of reasoning, supports the former as well. He contends that the Law Reform (Frustrated Contracts) Act 1943, which protects the performer's restitutionary interest to some degree, should be extended and applied to make some form of restitutionary relief available even where the failure is due to breach. The distinction between frustration and breach, he said, is "not so firmly based on moral considerations as to justify the imposition of what is in substance a penalty in the latter case" [1]. Thus it was hard to see why a builder disabled by a credit squeeze should be more harshly treated than one disabled by supervening illegality. The current general proposition that performance of every entire contract must be complete penalises performance: where performance is incomplete the innocent party gets something for nothing and the performer is prejudiced. Indeed the less serious the defect the greater is the penalty. Foreseeably the main relevance of this protection will not be in fundamental breach situations where in most, if not all, cases no benefit as expected under the contract is conferred because the bargain collapses totally [2].

[1] Treitel, G.H., "Some Problems of Breach of Contract" (1967) 30 Modern L.Rev. 139, at p.143. He suggests an approach based on more practical considerations rather than the extensive conceptualisms and metaphors that riddle the law. The problem has to be looked at from these planes: (i) the distinct nature of the problems of defective performance, (ii) the practical effects of possible remedies and (iii) the respective interests of the parties in using or resisting the use of any remedy. Contra Devlin, Lord, "The Treatment of Breach of Contract" (1966) 24 Camb.L.J. 192 who seems to prefer a more conceptual approach.

Chapter VI

REASONABLENESS AND FUNDAMENTAL BREACH
The Introduction of a Concept of Reasonableness

A concept of reasonableness has recently attained some prominence through the efforts of Lord Denning in the three principal cases of Gillespie v. Roy Bowles [1], Levison v. Patent Steam Carpet Cleaning [2] and Photo Production v. Securicor Transport [3]. Until then no such concept was recognised in the common law. In proposing the concept of reasonableness, Lord Denning has gone further than anyone in criticising a certain rule of construction which, stated in its most general form, provides that only words clear beyond doubt entitle a party to protection from the consequences of his own negligence [4]. This is better known as the rule in Rutter v. Palmer [5]. That was the case where the owner of a car left it with a motor dealer to sell on commission. The car was damaged by the dealer's servant who drove it negligently during a...

demonstration of the car to a prospective buyer. The question was whether the dealers were protected by a clause which stated that "Customers' cars are driven by your staff at customers' sole risk". It was held that these general words of exclusion which were prima facie wide enough to protect the dealers did protect them from their servant's negligence. In the course of his judgment Scrutton L.J. spelt out the three aspects of the rule. First, adequate words must be used to excuse liability for a servant's negligence. Second, the dealer's liability must be ascertained apart from the exception clause. Third, the words of the exception clause must be considered and they will more readily be construed to protect him if his only liability was for negligence [1].

In practice the rule in Rutter v. Palmer has been applied rigorously with courts insisting on precision of expression before words were said to be adequate. In particular intricate distinctions between the 'kinds' of loss and the 'cause' of loss were made to deny a party the protection of an exception clause. The word 'whatsoever' denoted the former whereas the expression 'howsoever caused' was necessary to cover the latter. Thus, an exception clause which provided for "any loss" was viewed as not sufficiently clear to cover the cause of the loss, but the additional words 'howsoever caused' were sufficient [2]. It is, the courts have admitted, a fine line between words used to denote the kind and cause of loss [3].

[1] Id., at p.92.


Although the robust use of the rule enabled courts to arrive at fair solutions, the limits of an essentially semantic approach are obvious enough. In [Hollier v. Rambler] [1] Salmon L.J. warned against a literal approach to the rule for it would "make the law entirely artificial by ignoring that rules of construction are merely our guides and not our masters; in the end you are driven back to construing the clause in question to see what it means" [2]. A year later in Gillespie v. Roy Bowles, Lord Denning again mounted an attack on the rule: the court subjects a clause to a literal analysis and then concludes that it is not clear enough to exempt or limit liability in any particular case. It assumes that the words are at face value wide enough to cover the dispute and then uses an artificial rule to compel the court to depart from the ordinary meaning.

The artificiality of the rule is exemplified in its application to clauses which do not exclude a performer's liability for aspects of his contractual duty, but instead seek to confer on him ancillary advantages including a quantitative limitation of his liability. For example, where a clause limits a performer's liability quantitatively, in 'any case', the natural and ordinary meaning of these words themselves are clear and unequivocal and are incapable of any stricter construction. Courts have nonetheless often concluded that its meaning is not sufficiently clear and that the parties did

[1] [1972] 1 All E.R. 399.

[2] Id., at p.406. Salmon L.J. was referring specifically to a passage in Lord Greene M.R.'s judgment in Alderslade v. Hendon Laundry which suggested that if negligence was the only liability under the contract, then an exception clause must be construed to excuse such liability for otherwise the contract would lack subject-matter. See also Sales' criticism in "Standard Form Contracts" (1953) 16 Modern L.Rev. 318.
not intend it to apply. Traditionally no distinction was made between the two types of clauses. And when Suisse Atlantique made a capital issue of the 'rule of construction' the implication was that an ancillary benefit clause, like any other exception clause, may apply in spite of a fundamental breach if it is clear enough. The House gave little thought to the matter and did not in any event suggest that the two types of clauses may need to be treated differently. The upshot was that the rule in Rutter v. Palmer, being one of construction, applied with perhaps even enhanced importance.

Lord Denning's argument is that linguistic acrobatics should be abandoned, the natural and ordinary meaning of words adopted, and an exception clause upheld if it is reasonable or reasonable in its application. After all, according to him, in those cases where the courts have twisted the ordinary and natural meaning of words to find that they were not sufficiently clear, the rejection of those clauses was really justified by the unreasonableness of the clauses. Thus, according to Lord Denning, there is, and in any event should be, a concept of reasonableness in the common law.

Lord Denning resorted to authorities dating back to Hinton v. Dibbin [1], which have been confirmed to be the uniform practice since [2], to show that judges had, contrary to established practice at that time, upheld exceptions from liability for loss or damage caused by negligence according to their ordinary meaning [3]. From this change in approach, Lord Denning concluded that "the only

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justification" for upholding those exception clauses was that they were "eminently reasonable" when given their ordinary meaning. But the historical support which Lord Denning had obtained from the cases, for example Lord Blackburn's judgment in M.S. & L. Railway v. Brown [1], was gratuitous. Lord Denning had in fact borrowed a statutory notion of reasonableness developed in carrier's liability and, treating it as an idea native to the common law, applied it to non-carrier cases.

Before Hinton v. Dibbin and as illustrated in Wyld v. Pickford, the courts without exception felt themselves bound by authority to construe exception clauses so as not to apply to negligence. When Hinton v. Dibbin came before the court in 1842, it was the first case under the Carrier's Act 1830 [2] which provided that carriers were not to be liable for loss or injury unless the value of the goods was declared and the goods insured. In view of the objective of the legislature to provide absolute protection to carriers and in view of the considerable doubt and uncertainty in the state of the law to be removed by the Act [3], the court felt "unfettered" to take the natural and ordinary meaning of the words. It came to be suggested that a similar construction should be pursued in the common law [4].

When the new law [5] was gradually taken advantage of by the

[2] 11 Geo. 4, and 1 Will. 4, c.68.
[5] Ibid., per Lord Blackburn's summary of it.
railway companies, which had a "practical monopoly of the carriage of goods", the Railway and Canal Traffic Act 1854 was passed. This Act provided that a contract, even though signed, was void if it purported to free a railway or canal company from responsibility for the negligence of their servants, unless it was adjudged reasonable by a judge or court [1]. Courts have consequently adjudicated on the reasonableness of clauses but only as statutorily empowered. Left entirely to their devices, the courts developed a notion of "fair alternative" under which a clause was reasonable if one had a choice to have his goods carried at his own risk or at the carrier's risk for different charges [2].

Support for a concept of reasonableness in the common law is divided. Although the weight of judicial opinion denied courts could invalidate a term of a contract on the ground that it was unreasonable or unfair [3], there is no dearth of suggestion to the contrary [4].


In Gibaud v. Great Eastern Railway [1] for instance, the court recognised that it was reasonable for carriers to limit their liability proportionately to their charges. However, judicial attitudes in recent years have not been overly receptive to a notion of reasonableness. The House of Lords has rejected, as "beyond sound authority", similar arguments by Lord Denning in Greaves v. Baynham [2] and Liverpool City Council v. Irwin [3], which sought to replace the implied term which is necessary to give business efficacy and the standard of the "officious by-stander" with a general principle of reasonableness [4]. The House of Lords in Photo Production v. Securicor Transport did not endorse or reject it. But Lord Wilberforce in that case regarded the reasonableness of the


[1] [1921] 2 K.B. 426.


exception clause as a valid and important factor in deciding whether
the parties have presumably intended it to apply [1].

When the concept of reasonableness appeared for the first
time in Gillespie v. Roy Bowles [2], its nature and scope were not
entirely obvious. It seemed to be another method of dealing with
exception clauses quite independent of existing methods. It was an
alternative ground of decision to 'strict construction' and
fundamental breach, both of which were discussed under separate
headings. Yet, the case of Wathes v. Austins [3], which was decided
on the ground of a fundamental breach and which denied that
reasonableness and fundamental breach were synonymous, was cited to
illustrate both concepts without differentiation [4]. In Gillespie v.
Roy Bowles the plaintiff, a firm of forwarding agents hired a van and
a driver from carriers for the purposes of their business. The
contract incorporated the Conditions of Carriage (1967) of the Road
Haulage Association which included a clause whereby the forwarding
agents agreed to keep the carriers "indemnified against all claims or
demands whatsoever by whomsoever made in excess" of the carriers'
liability, which was limited to a rate of £800 per ton but not to be
below £10 in respect of any one consignment. A parcel of gold watches

[1] [1980] 2 W.L.R. 283 (H.L.), at p.291. Although the ground of
decision based on fundamental breach in Levison v.
Patent Steam Carpet Cleaning [1977] 3 All E.R. 498, was rejected,
the alternative ground based on reasonableness was not discussed.
It was only suggested that the case may be explained as an
application of the rule in Alderslade v. Hendon Laundry, [1945] 1
K.B. 189.


was lost as a result of the driver's negligence. Since the forwarding
agents had excepted themselves from liability for loss or damage to
goods whilst not in their actual custody, and had limited their
liability in any case to a maximum of £50 per ton, the owners of the
goods sued the carriers in tort and recovered the damages. The
carriers in turn claimed indemnity for damages paid to the owners of
the goods in excess of their limited liability. Buckley and Orr L.JJ.
kept to the "true construction" of the clause. Indeed their decisions
rested on the "proper construction" of the one word "whatsoever"
which, according to them, (but inconsistently with previous decisions)
covered the driver's negligence [1]. Lord Denning found that the
carriers were entitled to the indemnity from the forwarding agents
because the clause was reasonable as between the parties and could be
applied reasonably in the circumstances. He explained that exception
clauses are generally to be construed against the performer. If this
is of no avail (as in the case of the limitation of liability clause
here in dispute), the court may resort to reasonableness or
fundamental breach which still applies in standard form contracts
where bargaining power is unequal. In "other cases", presumably in
non-standard form contracts and in respect of exclusion clauses
(rather than ancillary benefit clauses), the court applies the strict
construction which enables a performer to rely on an exception clause
only when the contract is being carried out in substance and not when
he is breaking it in a manner which goes to the root of the contract.

[1] [1973] 1 All E.R. 193, at pp.202-204, and 205 respectively. This
was disapproved in Smith v. U.M.B. Chrysler (Scotland) [1978]
S.C. 1, (H.L.). Buckley L.J. thought that it was not the
function of the court to "fashion a contract in such a way as to
produce a result which the court considers that it would have
been fair or reasonable for the parties to have intended" (at
p.205).
To what extent reasonableness, fundamental breach and the strict construction are related or overlap is unclear [1]. Both reasonableness and fundamental breach apply to at least standard form contracts which display unequal bargaining power, but it seems that neither is confined to such types of contract. Fundamental breach is not in principle restricted to standard form contracts. The concept of reasonableness too does not seem to be confined to them because Lord Denning's application of it was fortified by the Unfair Contract Terms Bill then before the English Parliament, which provided for a wide range of contracts. Indeed his conclusion that there is "no reason why [reasonableness] should not be applied today" seemed to anticipate a forthcoming and larger as well as more direct role for courts in the surveillance of exception clauses. The distinction between fundamental breach and the requirement that a contract must be performed in substance before an exception clause will be upheld is even more difficult. The latter is reminiscent of the Gibaud rule as well as some statements of fundamental breach.

Whatever distinction there may be between reasonableness, fundamental breach and strict construction in Gillespie v. Roy Bowles became unimportant in the Court of Appeal decision in Photo Production v. Securicor Transport [2]. There, Lord Denning expressly unified fundamental breach and reasonableness on the ground that they "meet in practice". That is, whichever notion is invoked, the courts reach the same conclusion on the facts of any particular case. Thus fundamental breach can be subsumed under the concept of


reasonableness: the court will not allow a party to rely on an exception or limitation of liability clause in circumstances in which it would not be fair or reasonable to allow reliance on it, even if a clause in its natural and ordinary meaning would give exception from or limit liability for a breach.

It can be said that from one point of view reasonableness gives substance to fundamental breach as a rule of construction. Its emergence is certainly influenced by the inadequacy of the latter in the treatment of exception clauses. Indeed the argument for its recognition is that in practice courts determine the contractual intention according to the reasonableness of the clause. It was only their reluctance to acknowledge openly the real or actual grounds of decision that has resulted in the array of difficult linguistic distinctions, confused constructions and massive conceptualisms such as the 'implied intention', the 'presumed intention' and the 'contemplation of the parties'. Reasonableness is the "principle which lies behind all our striving" [1] and represents a break away from the strained constructions that obscure the actual processes by which and the true grounds on which courts decide whether an exception clause may be relied on. The pretence that fundamental breach is explicitly or implicitly based on the contractual intention of the parties is abandoned. Reasonableness emerges in a straightforward manner to establish its own principles. Reasonableness would therefore avoid the practices which 'do not truly represent the ways in which the courts act'.

Courts would now, under the concept of reasonableness, give effect to a clause (be it an exclusion, limitation of liability or indemnity clause) according to the ordinary and natural meaning by which 'ordinary mortals' understand them, provided always that it is 'reasonable' in operation as between the parties.

2. When Is An Exception Clause Unreasonable?

An exception clause is unreasonable if a court can say:
"The parties as reasonable men cannot have intended that there should be exemption or limitation in the case of such a breach as this". The court applies an "objective rule of law of contract" to the obligations which the parties have imposed upon themselves in the light of the contingencies that arise subsequently. The "court itself" must be the "spokesman" of the fair and reasonable man. It is thus otiose to speak in terms of the presumed intention of the parties. The parallel between reasonableness and frustration is interesting: support for reasonableness was obtained from Lord Radcliffe's explanation in Davis Contractors v. Fareham U.D.C. [1] that the "true action" of the court in applying frustration was to represent an "anthropomorphic conception of justice".

In the early case of M.S. & L. Railway v. Brown [2], to which Lord Denning referred for some historical support, Lord Bramwell had doubted the ability of a judge to decide whether an agreement between parties of whose business he knew nothing was reasonable or

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not [1]. Despite greater confidence in the judge’s ability, there is as yet no discernible pattern of criteria that can be gleaned from the few cases. It is therefore instructive to consider in some detail the three main cases which have discussed or applied the concept.

Why the clause in Gillespie v. Roy Bowles was reasonable is not easily ascertained. Several considerations were taken into account: (i) it was "common practice" for goods owners to insure if they wanted coverage in excess of the liability undertaken or assumed by the carrier; (ii) the carriers' charges had been based on the footing that the limitation was valid and effective and insurance premiums had been likewise calculated on that premise; and (iii) the contract as well as the clause in question was in standard form.

It is unlikely, however, that common use of a particular type of exception clause is sufficient to make the clause reasonable. Otherwise the widely used standard form contracts and their exception clauses which are particularly suited for the selective control of risks upon which the parties can plan their insurance coverages would not be objectionable and indeed ought to be eminently reasonable.

From the tenor of the judgment a more pertinent consideration could have been that the carriers' charges were not proportionate to the risks that they were said to have undertaken. In view of the range of services they performed and the types of goods they conveyed, the carriers needed to guard against extensive liability. As the state of the law then was, the carriers were also liable to owners of goods and could not rely on any exception even if

it was expressed to protect them [1]. Any loss of or damage to goods might subject them to claims for heavy damages from the goods owners if the goods happened to be very valuable (as was the case here). The carriers could not even begin to provide for the diversity of risks especially where the performance of the contract was undertaken by servants. They therefore had to ensure that they did not bear risks disproportionate to what they would get out of the transaction. Consequently, it was reasonable for them to limit their liability and to secure its effectiveness by means of an indemnity clause. But this kind of argument boils down to recognising that the performer needs a 'safety valve'. It is unconvincing and can be made in most contracts.

An interesting point that emerges from the case is that the court will be less inclined to question the extent of the limitation where both parties are insured and where such arrangements have been the practice for a considerable period of time (and is presumably well known to them). Thus in the circumstances, Lord Denning saw no reason why the forwarding agent should not bear the loss. Having been employed by the owner of the goods to make the necessary arrangement for him, the forwarding agents, he said, should see that the owners insured the goods or they themselves should take insurance to cover the goods.

In the second case, Levison v. Patent Steam Carpet Cleaning [1], the plaintiff sent an expensive carpet worth £900 to the defendant's laundry for a wash. By clause 2(a) of the printed terms of the contract, the maximum value of the carpet, based on its area, was deemed to be £40 and clause 5 provided that "All merchandise is expressly accepted at the owner's risk". The carpet was inexplicably lost. Lord Denning disallowed both clauses 2(a) and 5 on the ground that they were unreasonable.

A limitation of liability for a £900 carpet to £40 could not be reasonably relied on as it was imposed "without a word of warning". Similarly it would be unreasonable for the laundry to rely on clause 5 because of the unfair advantage taken of the customer in securing the contract. The laundry abused its superior bargaining power by asking the customer to sign the contract without giving him an opportunity to consider it or to object to it. Lord Denning suggested that had the defendant at least drawn clause 5 specifically to the plaintiff's attention and made it clear that he ought to insure against loss or damage, the clause would have been reasonably applied [2].

But as it happened, the customer was not actually prejudiced for he had, despite his ignorance of the clause, protected himself by insurance [3] and had been compensated. The action was brought by the insurance company in his name. The implication that arises is that inequality of bargaining power together with the imposition of unfair

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[2] Id., at p.503; cf. Orr L.J. at p.505, applying Alderslade v. Hendon Laundry and Suisse Atlantique, held that the clause "All merchandise is expressly accepted at the owner's risk" was insufficiently clear. Sir David Cairns held that the same clause clearly gave exemption from liability for loss due to negligence but not for so fundamental or radical a breach as a misdelivery.
terms is objectionable as a matter of principle, regardless of whether an aggrieved party may have suffered any actual disadvantage or prejudice. Such a proposition has an element of deterrence about it. Alternatively, Lord Denning might have intended to influence the incidence of insurance in the laundry business. He might have thought that the laundry and not the customer should insure, but this would be a questionable intrusion into commercial matters.

How may the two cases be reconciled? Why was a carrier's limitation of liability for expensive gold watches to £800 per ton reasonable whereas a launderer's limitation of liability for an expensive carpet to £2 per square yard unreasonable? Both bailments in Gillespie v. Roy Bowles and Levison v. Patent Steam Carpet Cleaning involved the rendering of services for charges which bore no proportionate relation to the extensive liability which might be incurred. In all probability too the type of limitation of liability clause in question had long been used in the laundry business just as the carriers' conditions had been commonly used in their trade. Both considerations were taken into account in Gillespie v. Roy Bowles but not in Levison v. Patent Steam Carpet Cleaning. Perhaps in the latter case the relative status of the parties (i.e. the juxtaposition of the 'weaker' consumer and the business enterprise) which was a "classic instance of superior bargaining power" overrode such consideration.

In the third case, Photo Production v. Securicor Transport [1], which we have already looked at from a different point of view, the plaintiffs, a firm, contracted with the defendants, a security firm, for the provision of a night patrol service for their factory to guard against the main perils of fire and

theft. The contract was on the defendant's standard form which provided that the defendant company should not be responsible for any injurious act or default by an employee of the company unless such act or default could have been foreseen and avoided by the exercise of due diligence on the part of the company as employer, and that the company should not be responsible for any loss suffered through fire or any other cause, except insofar as such loss was solely attributable to the negligence of the company's employees acting within the course of their employment. One night, the defendant's employee entered the factory on patrol duty and intentionally lit a fire which destroyed the factory.

As we have seen, it was held by the Court of Appeal that by deliberately lighting the fire which destroyed the factory a fundamental breach occurred which discharged the contract and prevented reliance on the clause. Alternatively, (per Lord Denning M.R. and Waller L.J.) the presumed intention of the parties was that the clauses should not cover the act in question, or the clause did not relieve the defendants from liability for an action in no way connected with the contract. Lord Denning further held that the court would not permit reliance on the clause because in the circumstances it was not fair and reasonable to do so.

The court, according to Lord Denning, had to consider whether the contract was in a standard form, whether there was equality of bargaining power, the nature of the breach and "so forth". Although it was pointed out that the contract was in a printed form used by the Securicor group, there was no suggestion or evidence of any inequality of bargaining power between the parties or of any unfair term exacted thereby. The distribution of loss via insurance was material, but here both parties had insured and hence the
insurance factor "cancelled out". The crucial fact was the employee's deliberate act of lighting the fire which burnt down the premises. According to conventional analysis this fact could have been objectionable in the circumstances on any or all of three grounds: (i) the defendant was not doing what he had contracted to do, (ii) the breach was malicious and/or (iii) the consequences of the breach were so severe as to deprive the plaintiff of what he had contracted for (i.e. a total failure of consideration). It is a matter of conjecture how these grounds rate in importance or if any of them or which combination of them would have been sufficient for the decision. Lord Justice Shaw seemed to stress the first. Protection, he said, was only in respect of what might properly be regarded as activities in pursuance or purported pursuance of the objectives of the contract and was not available for an activity so foreign to those objectives as to have been completely beyond the range of anything the parties could have had in contemplation when the contract was entered into [1].

The important point is that the court took into consideration the misperformance subsequent to the formation of the contract, in the light of the original contract, and decided that it was unreasonable in the circumstances to expect an aggrieved party to perform his obligations. The clause was unfair in its results when applied to the circumstances that gave rise to the dispute. In this respect, it is noteworthy that MacKenna J. in the lower court had looked at the content of the clause, without regard for the consequences of the breach and concluded that the clause on its face was reasonable. The clause, he said, determined the distribution of risk fairly and practically in a business sense and was a reasonable

[1] Id., at p.867.
one to incorporate into the contract.

[The condition], as I construe it, is, I think, a reasonable provision... Either the owner of the premises, or the person providing the service, must bear the risk. Why should the parties not agree to its being borne by the owners of the premises? He is certain to be insured against fire and theft, and is better able to judge the cover needed than the party providing the service... That is only another way of shifting the risk from the party who provides the service to the party who receives it. There is...nothing unreasonable, nothing impolitic, in such a contract [1].

This reasoning somewhat begs the question which asks precisely what risks Securicor assumed under the contract. If, as the argument goes, there was no reason why the parties should not agree that the risks in question were to be borne by Securicor, the reasonableness of the exception clause derived from the element of agreement. It follows that the reason is simply this: it was reasonable because they agreed to it. In which case, there was no need for the court then to consider if the clause was unreasonable or impolitic. The argument that Photo Production had insured, and impliedly should absorb the loss, somewhat falsifies the picture because Securicor was similarly covered by insurance. Besides, why should it matter that Photo Production was in a better position to judge the cover needed if, say, it was not in a better position to take such cover? The observation that the exception clause was just another way of shifting risks says nothing in itself and still leaves the question of the risks assumed untouched.

Instead of suggesting that one was a better risk absorber than the other, Lord Wilberforce in the House of Lords, in reversing the decision of the Court of Appeal, said that Securicor only assumed a "modest" risk which bore some relation to the "very modest charge" for their services. "No one could consider it unreasonable that as between those two equal parties the risk assumed by Securicor should be a modest one and that the plaintiffs should carry the substantial risk of damage and destruction" [1]. The emphasis was thus neither on the element of agreement nor the comprehensiveness of the words used in the clause. By scaling the risks there arising according to the consideration, Lord Wilberforce arrived at the reasonable expectations of the parties in the circumstances giving rise to the dispute. Effectively, this means that the notion of the intention of the parties supposedly gathered from the express words is not the starting point of or central to the determination of the risks borne by the parties. Rather, the risks so determined are ascribed to the parties' intention. That this must have been the 'intention', it was said, was a view also bolstered by the fact that Securicor had no knowledge of the value of the factory and the efficacy of its fire precautions.

This discussion then shows that the concept of reasonableness is still skeletal. No particularly conclusive evaluation of it is at this stage possible. Diverse factors are taken into consideration and include the economic bargaining power of the parties, the seriousness of the breach, the form of the contract, any reliance by one on the other, and insurance. It is difficult to derive from these factors a coherent policy as they concern aspects ranging from the reasonableness of the parties' conduct in the

negotiations and procurement of the contract, through the
reasonableness of the content or substance of the clause (i.e. whether
the terms on their face render a contract too onerous to one party),
to the reasonableness of the clause when applied in the circumstances
which lead to the dispute. The courts in the few cases discussed have
also been somewhat preemptory. After launching into the facts in
considerable detail and after theorising on the applicability of the
concept, they have weakly said that the clause was reasonable or
otherwise without much discussion of how the standard of
reasonableness was applied to the facts. Reasonableness is therefore
an open and indefinable standard. It is also a variable standard
under which certain of its aspects are more in question in some
situations than others. This may in effect mean that the courts are
free to do justice as they see fit.

3. Reasonableness and Fundamental Breach

We suggested that reasonableness in a sense gave substance
to fundamental breach as a rule of construction. However, relatively
little attention has been paid to it as an extended development of
fundamental breach. This neglect may have been due to the opinion
that reasonableness was a restatement of fundamental breach as
enunciated in the Harbutt's Plasticine case, so that when the House of
Lords rejected the latter, it seemed to follow that reasonableness was
also implicitly rejected. Moreover the proponents of reasonableness
were themselves not always clear about its role in the adjustment of
performance-related risks.
A parallel development in the law of a notion of unconscionability in a concept of abuse of bargaining power also diverted attention away from the concept of reasonableness [1]. Unconscionability, which was frequently also present in the cases that introduced reasonableness, primarily reconciles the conflict between freedom of contract and judicial interference in order to justify the review of a contract which is substantially unfair but which is not otherwise open to judicial review. As both reasonableness and unconscionability were in a broad sense concerned with ideas of fairness and justice, they were regarded generally as a trend in the law towards a more open and direct approach to exorbitant exception clauses and unfair contracts [2]. In view of the fact that their frameworks are uncertain and ideas of their scope are still fluid, it is not surprising that both concepts were at times treated in a rather imprecise way as one. Indeed reasonableness will foreseeably be rapidly overshadowed by the increasingly popular notion of unconscionability.

The most significant advantage of the concept of reasonableness is its abandonment of covert considerations. It deals openly with the social and economic matrices, which constitute material considerations in many cases but which have hitherto been obliquely acknowledged, if at all.

[1] Chapter VII discusses the notion of unconscionability.

[2] In his interesting article "From Sanctity of Contract to Reasonable Expectation?" (1979) 32 Current Legal Problems 17, J.H. Baker suggests that the notion of reasonable expectation is the foundation on which, by way of the rule in deviation cases, the 'four-corners' rule, and the rule against repugnancy, it begat, for example, fundamental breach and unconscionability.
Viewed in the context of the theme of conflict between the strict principle and the adjustment principle, the concept of reasonableness represents a visible movement of the law away from the strict principle. No longer rivetted on the letter of the contract, the judicial mind is now receptive to the forthright adjustment of the relative exchange positions of the parties. In the meantime there has been a spectrum of covert compromises between the strict principle and the adjustment principle evident in the preoccupation with the niceties of words. Fundamental breach as a 'rule of law', fundamental breach as a 'rule of construction' and reasonableness are themselves instances of the recurring theme of the adjustment of performance-related risks. We may say that the phenomenon of fundamental breach adumbrates the conflict; and the concept of reasonableness is the culmination of the adjustment principle.

The progression of the concepts reflects to some extent the intuitive attempts by the courts to adjust performance-related risks. Fundamental breach as a 'rule of law' was regarded as unsatisfactory because it could not treat exception clauses discriminately; exception clauses applied or did not apply according to whether there was a fundamental breach. Fundamental breach as restated in the Harbutt's Plasticine case, it was thought, did virtually the same thing with an added (at times unreal) option to the aggrieved party to affirm the contract despite the fundamental breach and to assume the performance-related risks covered by the exception clause. In shifting performance-related risks from the performer to the other, both statements of fundamental breach also rigidly deprived the performer of all the protection of his exception clause even to the extent that it might be directed at lesser breaches. Fundamental breach as a 'rule of construction' avoided the blanket operation of
its predecessors and purportedly had the flexibility for a more
discerning and discriminating adjustment of risks. It is potentially
capable of giving due regard to the various kinds of exception clauses
and transactional contexts. But a flexible 'rule of construction' was
inadequate without some guidelines or standards by which the
performance-related risks of exchange may be appropriately adjusted.
Hence arose the concept of reasonableness which seeks to supplement
the inadequacies of fundamental breach as a 'rule of construction' and
to enable courts to deal openly with the problem unencumbered by
doctrinal niceties.
Chapter VII

UNCONSCIONABILITY AT COMMON LAW:
ITS RELATION TO FUNDAMENTAL BREACH

[Text continues on the next page]
1. The Origin of Unconscionability

In the post-Suisse Atlantique cases a notion of unconscionability also came to the fore side by side with fundamental breach and reasonableness as a third means of dealing with exception clauses. It enables courts to review transactions (in particular adhesion contracts) not otherwise open to review on the ground that they are procured by the abuse of unequal bargaining power.

Unconscionability is sometimes believed to have made fundamental breach redundant. It is therefore proposed to consider in this chapter the relation between the two notions to determine how and to what extent unconscionability supersedes fundamental breach. It is not intended here to study the subject of unconscionability for its own sake as it is outside the scope of this thesis. The following discussions of its origin, theoretical basis and scope are only to facilitate our primary interest to see it in its relation to fundamental breach.

According to its chief proponent, Lord Denning, the notion of unconscionability, which is developed through the concept of abuse of bargaining power, has older origins and is a progression of the common theme of relief from unfairness underlying several traditional defences. These include undue influence [1], duress of goods [2],


[2] As where a party has a strong bargaining position because he has possession of goods obtained by a legal right as a pawn or pledge: e.g. Astley v. Reynolds (1731) 2 Stra. 915, 93 E.R. 993; Green v. Duckett (1883) 77 Q.B.D. 275; Pigot's case (1614) 11 Co.Rep. 26b, 77 E.R. 1177; Parker v. Bristol & Exeter Railway (1851) 6 Exch. 702; Steele v. Williams (1853) 8 Exch. 625; Maskell v. Horner [1915] 3 K.B. 106.
salvage agreements where broadly speaking, the abuse of unequal
bargaining power was the basis for reopening bargains where exchanges
had been made for totally inadequate considerations [3].

Gathering all together, I would suggest
that through all these instances there
runs a single thread. They rest on
"inequality of bargaining power". By
virtue of it, the English law gives
relief to one who, without independent
advice, enters into a contract upon
terms which are very unfair or transfers
property for a consideration which is
grossly inadequate, when his bargaining
power is grievously impaired by reason
of his own needs or desires, or by his
own ignorance or infirmity, coupled with
undue influences or pressures brought to
bear on him by or for the benefit of the
other... The one who stipulates for an
unfair advantage may be moved solely by
his own self-interest, unconscious of
the distress he is bringing to the
other. I have also avoided any
reference to the will of the one being
"dominated" or "overcome" by the other.
One who is in extreme need may knowingly
consent to a most improvident bargain,
solely to relieve the straits in which
he finds himself [4].

The time has come, says Lord Denning, to unite the several established

[1] E.g. Evans v. Lewellin (1787) 1 Cox C.C. 333, 29 E.R. 1191,
"equitable surprise"; Fry v. Lane (1888) 40 Ch.D. 312, "unfair
advantage"; Wood v. Abrey (1818) 3 Madd. 417, 55 E.R. 558;
O’Rorke v. Bolingbrooke (1877) 2 App.Cas. 814, at p.823 per Lord
Hatherley. In these cases the contract is invalid.


"Inequality of Bargaining Power" (1975) 38 Modern L.Rev. 463;
Sealy,L.S., (1975) 34 Camb.L.J. 21; Wooldrige,F., "Inequality of

12 O.R. (2d) 719 (Ont.C.A.) where a bank was held to have taken
advantage of a woman's emotional relationship with a man and a
wrongful seizure of a car.
rules into a general principle: "as a matter of common fairness, it is not right that the strong should be allowed to push the weak to the wall" [1].

If unconscionability seems new it was only because the traditional defences enumerated by Lord Denning have in the course of becoming accepted doctrines concealed the notion of unconscionability that threaded them [2]. For example, the notion of unconscionability which underlies undue influence has, as a result, laid buried all this while in the chapter of undue influence. The specific doctrines which define in some detail the types of clauses and contracts that could be set aside, in turn resisted the development of a general principle of unconscionability. The view was taken that the specific doctrines ought not be extended liberally [3]. In equity too was hidden a doctrine of mistake and surprise which prevented a party from 'snapping up an offer' because of unconscionable conduct vis-a-vis the other [4]. As a matter of fact, a general relief from unconscionable transactions was being developed by the Court of Chancery but it scarcely made its mark because it was overshadowed by the specific equitable relief granted to certain more common types of


[3] For example, Sir Eric Sachs (and Cairns L.J. agreeing) in Lloyds Bank v. Bundy was sympathetic with Lord Denning's view of a general doctrine of abuse of bargaining power but preferred to base his decision on the ground of undue influence in a relationship of trust and confidence which was conceded by the bank.

unconscionability: in particular, the equitable relief exercised in favour of heirs and expectant heirs [1]. Until Chesterfield v. Janssen [2], the courts were more willing to consider transactions involving heirs and expectant heirs as being harsh and oppressive [3].

But it is only partly true that unconscionability is derived from the traditional doctrines. For unconscionability has arisen mainly in consequence of exception clauses and standard form contracts

[1] See Fletcher, K.L., "Review of Unconscionable Transactions" [1973] 1 Uni.Qld.L.J. 44; Waddams, S.M., "Unconscionability in Contracts" (1976) 39 Modern L.Rev. 369; Lawson, R.G., "The Law Relating to Improvident Bargains" (1973) 24 No.I.L.Q. 171; Slayton, P., "The Unequal Bargain Doctrine. Lord Denning in Lloyds Bank v. Bundy" (1976) 22 McGill L.J. 94; Winder, W.H.D., "Undue Influence and Coercion" (1939-40) 3 Modern L.Rev. 97; Crawford, B.E., "Restitution - Unconscionable Transaction - Undue Advantage Taken of Inequality between Parties" (1966) 44 Can. Bar Rev. 142; and generally, Wilson, N., "Freedom of Contract and Adhesion Contracts" (1965) 14 Int.Com.L.Q. 173; Ross-Martyn, J.G., "Unconscionable Bargains" (1971) 121 New L.J. 1159. It is sometimes thought that James v. Morgan (1663) 1 Lev. 111, 83 E.R. 323 is the earliest case providing for review of unconscionable bargains in the common law. In that case there was a sale of a horse for a barley corn a nail in the horse's shoes, doubling the amount for each successive nail. There were 32 nails and the price came to 500 quarters of barley worth 100. The jury at Hyde C.J.'s urging awarded 8, the value of the horse as damages for breach of contract. There is, however, no indication in the brief reports of the facts of the case and the judge's direction that there was any unfair or opprobrious practice in the procurement of the contract. Thornborow v. Whitacre (1705) 2 Ld.Raym. 1164, 6 Mod. 305, 92 E.R. 270 (an agreement to deliver an amount of rye which exceeded that in the whole world) - a poorly reported case which was settled out of court has also been regarded as support for James v. Morgan; cf. in Hume v. U.S. (1889) 132 U.S. 406 and Chesterfield v. Janssen (1751) 2 Ves.Sen. 125, 28 E.R. 82, where damages were awarded according to what the courts regarded were the parties' fair entitlement where the contracts were unreasonable and unconscionable.


[3] The other party was required to discharge the onus that there was no unconscionable practice in the procurement of the contract. In Wiseman v. Beake (1690) 2 Vern. 121, 23 E.R. 688, for example, a transaction entered into by an expectant heir who was an ecclesiastical law practitioner to raise money on promissory notes due on his uncle's death was avoided. Although there was no undue pressure or questionable conduct by the other party in the procurement of the agreement, the court held that his urgent need of money was used to get from him the harshest terms possible in return.
whereas the traditional doctrines have arisen quite independently of them. At most it may be said that exception clauses are merely "penalty clauses in reverse" [1] and whereas some of the traditional doctrines deal with "unduly high liquidations", unconscionability deals with "unduly low liquidations" [2]. While unconscionability has special relevance to standard form contracts, none of the traditional doctrines is concerned with them. It would seem that if unconscionability does in fact deal with the same problem as do the traditional doctrines, these latter doctrines would be quite sufficient.

2. Different Problems

In the cases of undue influence typified by Allcard v. Skinner [3] the element of unconscionability lay in disreputable, unconscientious conduct and the assertion of pressure of a very personal kind. Some "unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating, and generally, though not always, some personal advantage obtained" by the guilty party was involved [4]. Thus, to capitalise on a father's fear of the


[2] The expressions are borrowed from Waddams.


[4] Id., at p.181, per Lindley L.J.; in Union Bank of Australia v. Whitelaw [1906] V.L.R. 711, at p.720, the court spoke of "the improper use of the ascendancy acquired by one person over another for the benefit of himself or someone else, so that the acts of the person influenced are not in the fullest sense of the word his free, voluntary acts".
criminal prosecution of his son [1], to take advantage of one suffering from religious delusions [2] or of the old age and lack of business experience of a party [3] are well known examples. Similarly, in the cases of the vulnerable expectant heirs the advantage taken of their financial embarrassment involve comparable pressure.

But in a corporate economy characterised by mass production, transactions are seldom quite so personalised that one party may be said to have gained dominance over the needy or the desperate [4]. Situations of fiduciary or confidential relationships are perhaps even less common in the many situations involving the use of standard form contracts. Here the "trading on the weakness of another" takes the form of a diminished or unreal option in the market, a lack of informed or rational choice, and the use of the notorious "small-print" clauses to surprise the other party. The subservient or exploited party is often the consumer; the oppressor, usually a business corporation. Indeed the element of oppression derives precisely from the impersonalised and non-individualised means of contracting of which the standard form contract is a classic example.

[3] Blomley v. Ryan (1957-58) 99 C.L.R. 362; Black v. Wilcox (1977) 70 D.L.R. (3d) 192. A sale of land at a serious undervalue was set aside for unconscionability where the vendor knew that the purchaser was suffering from the effects of alcohol and had no independent advice.
3. The Theoretical Basis of Unconscionability

Unconscionability is more favourably received than fundamental breach because it seems less opposed to the sanctity of terms and freedom of contract, for these are given a fresh interpretation to accommodate judicial review of an unconscionable contract.

Without denying the basic idea of consensus it is now insisted that the element of agreement must be 'real'. When bargains were more individualised and parties co-determined the terms of their contract it was acceptable to regard the contract as the objective manifestation of the parties' subjective actual agreement to their terms. But in standard form contracts where one party does not negotiate and co-determine the terms with an approximate economic equal, the resultant contract cannot realistically be said to reflect his agreement. The truth of the matter is that if both parties are to have meaningful freedom of contract, the need to refrain from interference must be reconciled with the need to ensure real freedom of contract. For this purpose a distinction is made between freedom to enter into an agreement "freely and voluntarily" and the freedom from intervention once the contract is made [1]. Judicial

[1] This distinction is valid since, as already noted in Chapter I, the concept of freedom of contract was originally to ensure freedom of action and not to enshrine contracts. See also Isaacs, N., "The Standardising of Contracts" (1917) 27 Yale L.J. 34 (freedom of contract is not synonymous with liberty); Meyer, A.W., "Contracts of Adhesion and the Doctrine of Fundamental Breach" (1964) 50 Va.L.Rev. 1178 (freedom of contract protects against interference with the freedom to enter into contracts but not the freedom of enforcement); Wilson, N., "Freedom of Contract and Adhesion Contracts" (1965) 14 Int.Compl.Q. 173; Wooldridge, F., "Inequality of Bargaining Power in Contract" [1977] J.Bus.L. 312.
intervention is said to be necessary precisely for the preservation of freedom of contract that underpins contract law. To put no restriction on the freedom, it is said, will "logically lead...to contracts of slavery" [1]. In effect then, freedom of contract and sanctity of terms remain as fundamental concepts of contract law.

Unconscionability accordingly focuses on the circumstances and process of contract procurement which affect the free and rational choice of one party. It justifies judicial revision of the substantive unfairness of a contract.

The concept of abuse of bargaining power is not as yet well developed and its general framework is uncertain. It has nonetheless been said to "herald the eventual acceptance of a new contractual doctrine of economic duress" [2] or to be the promising beginning of a doctrine of unconscionability comparable to s.2:302 of the American Uniform Commercial Code [3]. On a more moderate note, some commentators conclude that the development is only suggestive of attitudes and prefer to explain the cases on more familiar grounds [4].


It appears from the three main cases [1] that there are various kinds of unconscionability and, accordingly, different ways in which unequal bargaining power may be abused. Unequal bargaining power may exist because men are "necessitous" there being an abuse of such power when advantage is taken of their need. Lloyds Bank v. Bundy involved an abuse of bargaining power of this kind. Bundy had guaranteed his son's company's overdrafts and executed sizeable charges on his only asset to the bank to borrow money for the son whose company was in dire straits. Bundy had no independent advice and the forms were not left for his consideration. In allowing the appeal on the ground that the contract was unfair and had resulted from the abuse of unequal bargaining power, Lord Denning took into account (i) the fact that the consideration which the bank had supplied was grossly inadequate; it had merely extended overdraft for a short period of five months; (ii) the relationship of trust and confidence which existed between them and that the bank knew Bundy relied on it; and (iii) the bank's awareness that the farm was his only asset and that despite this and the conflict of interest between them, the bank had traded on his weakness by allowing him to charge to his ruin without independent advice. In extreme cases neither independent advice nor an understanding of the transaction would prevent the contract from being impugned [2].


[2] An alternative ground of decision was the breach of a fiduciary relation owed by the Bank to Bundy. (cont'd next page)
A more economic instance of abuse of bargaining power is where a party exploits his superior market power by the use of standard form contracts. Here, standard form contracts are seen as the result of the concentration of particular kinds of businesses in relatively few hands. Unless, it is said, they are the result of extensive prior negotiations by representatives of the commercial interests involved and are adopted because experience has shown that they facilitate the conduct of trade and where the parties' bargaining powers are fairly matched, they are unconscionable. For they are dictated by that party whose bargaining power, either exercised alone or in conjunction with others providing similar goods or services, enables him to say: "If you want these goods or services at all, these are the only terms on which they are obtainable. Take it or leave it". When a party is in a position to adopt such an attitude, it is a "classic instance of superior bargaining power" [1]. The English ticket cases in the nineteenth century, it is said, were probably the first examples. The restraint of trade agreements in Schroeder Music Publishing v. Macaulay [2] and Clifford Davies v. W.E.A. Records [3] are more recent instances. In both cases,

(footnote cont'd)

This comes within the second class of undue influence described by Cotton L.J. in Allcard v. Skinner where the court intervenes "not on the ground that any wrongful act has in fact been committed by the donee on the grounds of public policy and to prevent the relations which existed between the parties and the influence arising therefrom being abused". The other judges based their decisions on this ground too. See the conservative approach by Cairns L.J. in Mountford v. Scott [1975] 1 All E.R. 198, at p.202; cf. McVeigh J. in Buckley v. Irwin [1968] N.I. 98.


exceedingly lop-sided agreements were entered into between individual songwriters and publishers. The songwriters were bound to assign to the publishers for a period of five years (which could be extended by the publishers to ten years) the world copyright in all compositions. Royalties were payable for songs published or recorded but the publishers were not bound to exploit the works. The contracts were set aside on the ground that the bargains were unfair [1] with Lord Diplock observing in the first case that what your lordships have in fact been doing has been to assess the relative bargaining power of the publisher and the songwriter at the time the contract was made and to decide whether the publisher had used his superior bargaining power to exact from the songwriter promises that were unfairly onerous [2].

The contracts were unconscionable because they were not the subject of

[1] It was assumed by the House of Lords that the agreement was in restraint of trade. Under the accepted law a restraint is void unless it is compatible with public interest and is reasonable between the parties. The leading case in the nineteenth century on these tests was Nordenfelt v. Maxim Nordenfelt Guns & Ammunition [1894] A.C. 535; see also Herbert Morris v. Saxelby [1916] 1 A.C. 688, at p.707; a different approach was adopted in Jacobs v. Bills [1967] N.Z.L.R. 249, pp.252-253; Peters v. Schimanski [1975] 2 N.Z.L.R. 328, p.335. In Australia, ss.45(1) and (2) of the Trade Practices Act 1974 (Cwth.) prohibit corporations from entering into contracts, arrangements or understandings which are in restraint of trade. This general prohibition is qualified by ss.45(3) and (4) which require, in effect, that any restraint within the section should have a significant impact on competition. Under s.51, there are more exceptions including service agreements. Therefore the common law doctrine of restraint still has a residual role; cf. Quadramain v. Sevastopol (1976) 50 A.L.J.R. 475, 8 A.L.R. 555 (H.C.). Under s.4M of the Trade Practices Amendment Act 1977 (Cwth.) the concurrent operation of the common law and the Act in this area is recognised; s.41 also recognises the doctrine of severability.

[2] It is quite clear that the test of restraint of trade is now the fairness of the contract: "the test of fairness is, no doubt whether the restrictions are both reasonable, (cont'd next page)
negotiation between the parties. The policy, Lord Diplock explained, is to protect weaker parties from being forced into unfair bargains by those who are in stronger bargaining positions.

A difficulty with this type of abuse of bargaining power relates to how superior market power is determined. It seems to be presumed in Lord Diplock's discussion of standard form contracts that the use of consumer standard form contracts is per se the result of the concentration of market power. The sweep of such a suggestion can be grossly misleading for it takes a linear view of standard form contracts. Thus it has been severely criticised as being "entirely without factual foundation" [1]. Perhaps Lord Diplock did not intend to assert categorically that their use is invariably the result of the concentration of market power. The emphasis on bargaining power in standard form contracts was in reply to the contention that because the contract was a standard form one used by the performer in every necessary for the protection of the legitimate interests of the promisee and commensurate with the benefits secured to the promisor under the contract". Lord Diplock's approach is wider than even Lord Pearce's comment in Esso Petroleum v. Harpers Garage (Stourport) [1968] A.C. 269 (H.L.), at p.324, that the two traditional questions are not separate but there is "one broad question - is it in the interests of the community that this restraint should as between the parties, be held to be reasonable and enforceable".

[1] Trebilcock, M.J., "The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords" (1976) 26 Uni. Toronto L.J. 359. According to him the real measure of choice is whether a consumer has available to him a workably competitive range of alternative sources of supply and not the commonality of terms which may be expected even in a perfectly competitive market where the product is homogeneous and every supplier 'takes' his price and other terms from the market. At the same time the presence of dickering between the parties is not necessarily assurance of competition because dickering may be a reflection of a monopolistic attempt to price discriminate among customers.
case, it was fair and reasonable [1].

It seems possible that even in the absence of any concentration of market power, there may be unequal bargaining power as where through the operation of competition, producers take their terms from the market so that effectively there is one price in a choice- or competition-diminished market. This may seem like a result flowing from the use of standard form contracts by a significant number of producers and was the thrust of Lord Reid's decisions in Schroeder Music Publishing v. Macaulay. Instead of discussing market power and the alternatives available from other suppliers, he merely looked to the presence or absence of negotiation between the parties to the contract. The agreement, he observed, was not "made freely by

[1] It may also have been that the English ticket cases of the nineteenth century which Lord Diplock thought were the first examples of such a phenomenon were very much in his mind when he generalised on the characteristics of objectionable standard form contracts. His observations reflect the condition of the English railway industry at that time when the superior bargaining power of the railway companies was undoubtedly typified by a 'take it or leave it' attitude. In England the economic strength of the four main line railway companies in 1937 was reflected in the report by the Ministry of Transport of their refusal to accept liability for accidents to passengers travelling by train with the cheap daily tickets which constituted a high proportion in the number of their contracts. The bias of the common law in those cases in favour of the railway companies had undoubtedly also contributed much to their strength. April 14, 1938 Hansard Vol.334, Col.1129; Sales,H.B., "Standard Form Contracts" (1953) 16 Modern L.Rev. 318. In G.N. Railway v. L.E.P. Transport and Depository (1922) 127 L.T. 664, p.670, Scrutton L.J. noted the strength of these companies. For example in McManus v. Lancashire & Yorkshire Railway (1859) 4 H. & N. 327, at p.346, 157 E.R. 865, Erle J. said that the railway companies were as much in need of every aid law can afford as customers of railways were in need of protection on account of their incapacity to resist oppression. Thus a person who entered into a standard form contract, the terms of which were all specifically brought to his notice, was bound even if he objected to them: Walker v. York & North Midland Railway (1853) El. & Bl. 750, 118 E.R. 948; Eric Gnapp v. Petroleum Board [1949] 1 All E.R. 980; Thompson v. L.M.S. Railway (1930) 141 L.T. 382, at p.385.
parties bargaining on equal terms" or "moulded under the pressures of negotiation, competition and public opinion": and such evidence as there was, was inadequate to justify the bargain [1].

Other suggestions of abuse of bargaining power include the situation where an offeror has had the advantage of time and advice to draw up a contract which the other has little or no opportunity to examine or would not have understood in any case. In Clifford Davies v. W.E.A. Records, for instance, Lord Denning M.R. inferred from the cyclostyled contract which was very long and full of legal terms and phrases that it was drawn up by lawyers and the manager had taken a stock form, got the blanks filled in and asked the composer to sign it without reading it through or explaining it.

There may also be abuse of unequal bargaining power where a party by virtue of his official position or public profession can exact more than what is justly due.

The suggestion in the cases so far is that the abuse of unequal bargaining power must be quite substantial before it justifies intervention. A party's bargaining power must be "grievously impaired" [2]. Advantage must also have been taken of one's bargaining power to procure a contract which is "unreasonable, and not in accordance with the ordinary rules of fair dealing" [3].

[3] Samuel v. Newbold [1906] A.C. 461, per Lord Macnaughten at p.470, the court gave relief under the Money-Lenders Act 1900 to cases beyond those to which the Court of Chancery would have granted relief before it. The Port Caledonia v. The Anna [1903] P. 184, the towage contract was "ineQUITable, extortionate and unreasonable".
The abuse of unequal bargaining power is therefore only the justification for the judges to revise bargains. The subject of revision is in the last analysis an unfair or lop-sided bargain or harsh terms. But harsh terms alone will not justify review: "No bargain will be upset which is the result of the ordinary interplay of forces" [1].

How severely imbalanced a contract or how harsh a term must be before a court will review it and its relation to the degree of unequal bargaining power needed to justify the review, are matters yet to be worked out. Conceptually, abuse of bargaining power is wider than the traditional doctrines and may well protect not only persons who enter into contracts without genuine consent but also those who willingly but foolishly undertake onerous contractual obligations [2].

4. The Influence of Legislative Developments

The emergence of the common law notion of unconscionability in the concept of abuse of bargaining power was encouraged and inspired by concepts of unconscionability in contemporary legislation, in particular s.2:302 [3] of the American Uniform


[2] Contra no relief from "voluntary foolish bargains" was granted under the earlier doctrines: Pawlett v. Pleydell (1679) 79 Selden Soc. 739, where although the terms were onerous there was no evidence that the lenders had acted unconscionably. Besides, the court noted, the plaintiff had agreed voluntarily. Batty v. Lloyd (1682) 1 Vern. 141, 23 E.R. 374: a loan of £350 to be repaid double after the death of two relatives (which happened within two years of the loan) was a normal business risk.

Commercial Code (U.C.C.). Even there the scope of unconscionability remains unclear. The U.C.C. itself does not define it. S.2:302 imposes a duty of good faith in the performance and enforcement of every contract or duty. The more prominent s.2:302 [1] provides for a general concept of fairness and bestows upon judges a broad and relatively uncircumscribed discretion to police 'unconscionable' transactions [2]. It enables courts to reopen a transaction and to set aside a part or whole of a contract which is found as a matter of law to be unconscionable at the time of its formation [3]. The text of s.2:302 does not provide any particularly

(footnote cont'd)

[1] The Official Text of the U.C.C. was published in 1952; s.2:302 as it was in the amended Official Text of 1957 remains the current version, unaffected by the subsequent revisions in 1958 and 1972. Comment 1 explains that the section is intended to make it possible for the courts to police explicitly unconscionable contracts or clauses and to abandon the practice of covert policing by the manipulation of established rules.

[2] S.2:302 operates in the context of two other major controls, namely, s.2:719 (limitation and exclusion of remedies) and s.2:316 (exclusion and modifications of warranties) of the U.C.C. An earlier statutory embodiment of the concept of unconscionability in a common law country is s.8 of the New Zealand Hire Purchase Act 1939; see also ss.5.108, and 6.111 of the Uniform Consumer Credit Code. For a discussion of other similar provisions, see chapter VIII.

[3] The parties are entitled to a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

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certain guideline or explain much of its purpose. Judges regard it as "an amorphous concept obviously designed to establish a broad business ethic" [1], and it is assumed that the generality of the section should be given content by the courts on a case by case basis and that some practical framework may be built up on precedents [2]; the underlying idea being to preserve the adaptability of the section to the infinite types of fact situations that may arise.

The Official Comment [3] to s.2:302, however, does state the basic test of unconscionability to be whether the clauses are in the light of the commercial background and setting of the transaction "so

(footnote cont'd)
Although a court may rewrite a limited damages or penalty clause it cannot award damages to a party who unwittingly enters into an unconscionable contract: Pearson v. National Budgeting Systems Inc. (1969) 297 N.Y.S. 2d 59. S.2:302 applies only to "transactions in goods" (s.2:102) but its scope has been so extended, directly or by analogy that it is accepted as a general concept of contract under the Second Restatement of Contracts (Ten. Drafts 1-7, 1973) para.234.

[1] Kugler v. Romain (No.2) 279 A. 2d 640 (1971); Unconscionability is a 'residual' concept which cannot be precisely defined as are the concepts of 'good faith' and reasonableness: Ellinghamus,M.P., "In Defence of Unconscionability" (1969) 78 Yale L.J. 757, 759 and n.11.

[2] "The framers of the Code naturally expected the courts to interpret it liberally so as to effectuate the public purpose, and to pour content into it on a case-by-case basis..." Kugler v. Romain (no.2) 279 A. 2d 640 (1971); see Deutch's attempt to throw some light on s.2:302 by looking at the concept of unconscionability in common law, equity and Art.138 of the German Civil Code, the BGB, and the legislative history of s.2:302 : Duetch,S., Unfair Contracts, chap.2.

one-sided as to be unconscionable" [1]. Unfair surprise and oppression and not disturbance of allocation of risks because of superior bargaining power are paramount considerations. Although the distinction between "oppression and unfair surprise" on the one hand and "superior bargaining power" on the other hand is not an easy one, the objection seems to be in respect of the unfair terms and unfair results and not of any disparity in bargaining power per se [2]. No exact balance of contractual terms is necessary or, for that matter, possible and mere unequal bargaining power is insufficient justification for judicial interference [3].

In the words of the Official Comments, the contracts must be oppressive as well as the result of unfair surprises sprung by one party on the other. The example given of an excessively one-sided exchange unjustified by commercial needs is Campbell Soup v. Wentz [4] which involved a substantially "hard" bargain embodied in a standard form contract with the more common mix of objectionable practices


[2] Leff suggests that the contract must be accompanied by circumstances of unfair procurement in the "process of bargaining" and it must also be substantially unfair. See Spanogle's suggestion of a 'sliding scale' theory that if the resulting contract was grossly unfair, a small degree of procedural unfairness is sufficient and conversely, where there is considerable procedural unfairness the terms or result need not be grossly unfair: "Analyzing Unconscionability Problems" (1969) 117 U.Pa.L.Rev. 953.


[4] 172 F. 2d 80 (1948). Wentz, farmer-growers, sold to Campbell all chautenay red-cored carrots to be grown on his land during the 1947 season.

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including numerous fine print clauses drawn by skilled draftsmen solely for Campbell's benefit.

Following an initially cautious use of s.2:302 a stream of cases since the 1970s has discussed various essential features of unconscionability. Thus although the American courts are reluctant to define unconscionability they have not refrained from openly considering its aspects in the cases before them. For instance, in Kugler v. Romain [1] the Supreme Court of New Jersey said:

The standard of contract contemplated by the unconscionability clause is good faith, honesty in fact and observance of fair dealing. The need for application of the standard is most acute when the professional seller is seeking the trade of those most subject to exploitation—the uneducated, the inexperienced and the people of low incomes. In such a context, a material departure from the standard puts a badge of fraud on the transaction and here the concept of fraud and of unconscionability are interchangeable.

In applying s.2:302, courts have quite liberally taken into account a spectrum of factors ranging from economically superior market power, through the relative status of the contracting parties to the individual inadequacies of one party. The use of unconscionability to

(footnote cont'd)

Under this contract Campbell could refuse carrots in excess of 12 tons to the acre, reject any carrots which it could not handle as a result of any circumstance beyond its control or industrial dispute, and refuse delivery when its production fell as a result of diminished demand for its soup. Wentz on the other hand could not allow anyone else to grow carrots on his land or sell his carrots (except those rejected by Campbell) to other buyers. He was not protected from declines in market prices and could not benefit from any rise in market prices since Campbell was protected against it. Wentz had to pay liquidated damages of $50 per acre for any breach whereas Campbell had no such corresponding obligation. Moreover Wentz had to undertake various other ancillary services. Specific performance sought by Campbell was refused on the ground that the contract was unconscionable.

protect the weak is quite extensively promoted: "The law is beginning
to fight back against those who once took advantage of the poor and
illiterate" [1]. Thus it was held that a mother of seven, separated
from her husband, and whose only income was governmental relief of
$218 per month had no real choice and hardly any bargaining power.
Moreover, her little education and the fact that she was not given
copies of the contracts, some of which were signed in blank, did not
provide her with "reasonable opportunity to understand the terms of
the contract". Consequently, "add-on" clauses which enabled a seller
to repossess all items ever purchased under several instalment
contracts in the event of any default in payment were not valid [2].

The introduction and development of a concept of
reasonableness in various Acts of Parliament especially in the United
Kingdom have also encouraged the English courts to employ openly the

264 (Nassau County Sup.Ct. 1969), welfare recipients contracted
to pay $1,439.69 for a freezer. The freezer itself worth $300
was bought for $900 and credit charges made up the balance of the
exhorbitant sum; see also Star Credit Corporation v. Ingram 71
Misc. 2d 787, at 789, 337 N.Y.S. 2d 245 at 248 (N.Y. Civil Ct.
1972), s.2:302 is to "provide the necessary instrumentality to
pierce the shield of caveat emptor when it is sought to be used
as a word at the throats of the poor and illiterate".

2d 445. The District of Columbia Court of Appeals sent the case
back to trial for findings on the issue of unconscionability.
There must be "an absence of meaningful choice on the part of one
of the parties together with contract terms which are
unreasonably favourable to the other party". "Did each party to
the contract, considering his obvious education or lack of it,
have a reasonable opportunity to understand the terms of the
contract, or were the important terms hidden in a maze of fine
print and minimised by deceptive sales practices?... [W]hen a
party of little bargaining power, and hence little real choice,
signs a commercially unreasonable contract with little or no
knowledge of its terms, it is hardly likely that his consent, or
even an objective manifestation of his consent, was ever given to
all the terms". The decision of this case was delivered before
the U.C.C. became effective in the District of Columbia. Hence
s.2:302, strictly speaking, did not apply. See Singer v.
rubric of fairness and associated ideas. Under these Acts courts are increasingly required to decide on the reasonableness of contracts. Limited powers of review in specific contracts were also rapidly extended and made available to a large range of contracts in pursuance of specific goals, the best example of which is perhaps the promotion of consumer protection in the sale of goods legislation. The first major legislative development in England was the Misrepresentation Act 1967 [1] based on the Tenth Report of the Law Reform Committee which pre-dated Suisse Atlantique. Section 3 provides that any exclusion or restriction of any liability of a party arising from a misrepresentation and any remedy available to the other by reason of such misrepresentation is of no effect unless the court finds it is fair and reasonable to allow reliance on it in the circumstances of the case. The operation of s.3 is left to the discretion of the courts there being no guideline provided in the Act [2]. In 1973, substantial amendments were made to the Sale of Goods Act of 1893 in the Sale of Goods (Implied Terms) Act 1973 along similar but more specific lines. These amendments were made as a result of the findings of two enquiries [3] to the effect that there was general


[2] When the 1966 Bill was introduced s.3 was confined to negligent and fraudulent misrepresentation and the clauses would be valid if they had been "arrived at in negotiations between the parties". In the House of Lords the workability of the criterion was doubted (274 H.L. 936-7) and the clause was amended to be its present form.

abuse of freedom of contract by sellers and that buyers were unaware of the fact that they were waiving and signing away meaningful contractual rights. Consumers generally, the enquiries concluded, needed protection for they were often in no position to get a better bargain even if they were informed and knowledgeable. The 1973 Act consequently adopted three major tactical approaches [1]. First a distinction was made between consumer and commercial sales [2]. The major implied conditions in the 1893 Act were entrenched as inexculdable rights in consumer sales [3]. Second, commercial sales were subjected to a 'fair and reasonable' standard and guidelines were provided for it [4]. Third, the same provisions were made for hire-purchase contracts [5]. Courts were also empowered to re-open extortionate credit bargains in order to protect the hirer in a contract of hire or rental in ss.137-140 of the Consumer Credit Act.

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[1] The Supply of Goods (Implied Terms) Act 1973 was followed in Australia. Despite the suggestion of the New South Wales Law Reform Commission in its 1975 Working Paper on Sale of Goods that exception clauses may have a legitimate place in consumer transactions, the law was amended in N.S.W. to follow the United Kingdom approach.

[2] S.55(7) defines 'consumer sales'; s.55(8) places the onus on the seller to show it was not a consumer sale; see s.55(4).

[3] E.g. ss.13, 14 and 15 of the Sale of Goods Act 1893. Ss.12-15 of the 1893 Act are restated with substantial amendments. The 1973 Act also has an extended s.55 where s.55(1) basically corresponds with the original s.55; s.55(2) replaces s.14(4), and s.55(3) to s.55(11) are new. Note, however, that ss.13-15 of the 1893 Act inherently allow limited contracting out.


[5] E.g. ss.9-11 imply the same conditions in consumer sales into hire-purchase contracts; s.12(2) makes similar provisions (as ss.55(3)) in respect of title, quiet possession and freedom from encumbrance.
1974 [1].

Even as the common law develops its own principles on a more enlightened plane, legislation has been rapidly introduced to control the use of exception clauses. In the United Kingdom the Unfair Contract Terms Act 1977 is the most comprehensive attempt yet to deal with exception clauses and unfair terms [2]. Although the Unfair Contract Terms Act 1977 is not concerned with a general principle of fairness it nonetheless requires courts to deliberate on the reasonableness of certain contract terms. It can now be said that there is in English law a general statutory concept of fairness, however prescribed, in relation to exception clauses.

5. The Essential Difference between Unconscionability and Fundamental Breach

Both unconscionability and fundamental breach are concerned, albeit in different ways, with the fairness of exchange. What fairness of exchange may mean precisely is immensely difficult to

[1] Goode, R.M., "The Consumer Credit Act" (1975) 34 Camb.L.J. 79; Lawson, R., Consumer Credit Act (casette). The Act affects a regulated agreement (i.e. one not in excess of £5,000) and linked transactions: s.173(1). Any other agreement relating to an actual or prospective regulated or linked transaction is also caught. Any such transaction is void to the extent it is inconsistent with the protection accorded to the hirer, his relative or surety under the Act or regulations made under the Act. See also Hire Purchase Act 1960 (New South Wales) s.32; Vic. Hire Purchase Act 1959, s.24; Qld. The Hire Purchase Act 1959, s.28; S.A. Consumer Credit Act 1972-73, s.46; W.A. Hire Purchase Act 1959, s.24; Tas. Hire Purchase Act 1959, s.29; A.C.T. Hire Purchase Ordinance 1961, s.29; Trebilcock, M.J., "Reopening Hire-Purchase Transactions" (1968) 41 Aust.L.J. 424; Hire Purchase Act 1971 (N.Z.) s.37.

define. Just as difficult, if at all possible, is to ensure fairness in a positive sense. But it is possible to attain some notion of fairness of exchange by ensuring that some of the surrounding conditions that normally make for and are accompanied by a fair exchange are observed.

Unconscionability does this by policing contract procuring circumstances which derive from the dominance of one party over the other or from the subjective inadequacies of an individual. It focuses on the position and knowledge of the two parties vis-a-vis each other. It asks if the making of the contract and the resulting terms are fair to the other party. A contract is unconscionable if on its face it is unfair to one side. The whole contract, it may be said, is voidable ab initio and the contract falls entirely.

Fundamental breach, on the other hand, is concerned with the performance of the terms of the contract. It asks when a performer may be able to pass the risks of his own avoidable misperformances to the other party. It is therefore not simply a matter of protecting the weak and vulnerable but of finding some reciprocity or some balance in the risks of exchange. More specifically, it aims to prevent a performer from unilaterally imposing upon the other certain increased risks of his own avoidable misperformance although contingency risks including performance-related ones are inherent in every contract of some duration. It is, we may say, a matter of restoring to some extent the essential bargain that has been deflected by exception clauses in the light of subsequent avoidable misperformances. Fundamental breach operates apart from any unconscientious conduct, over-reaching or objectionable circumstances in the procurement of the contract. Thus the fairness of exception clauses is, so to speak, determined in retrospect. Indeed it has been
observed that fundamental breach is "a process of working backwards commencing with the breach by the defaulting party and then relating it back to the terms of the original contract between the parties" [1]. Unlike unconscionability, fundamental breach only limits the operation of exception clauses so that a contract may well 'survive' if, as it is suggested in *Suisse Atlantique*, an aggrieved party 'affirms' it.

The important consequence of the difference between unconscionability and fundamental breach is this: although in a large number of cases, unconscionability may admittedly operate to ensure fairness of exchange and hence render fundamental breach unnecessary, there remain those contracts which on their face are not unfair or, even though unfair, are not the result of any oppressive conduct or circumstance in their procurement and to which unconscionability does not apply. Thus fundamental breach has a residual significance and a function which cannot be completely performed by unconscionability.

Case examples in which questions of unconscionability arose include the frequently cited *Henningsen v. Bloomfield* [2] and perhaps *Levison v. Patent Steam Carpet Cleaning* [3]. In the first, a woman's husband, P, bought a car which 468 miles later, was substantially destroyed injuring her. The car was being driven by her on a paved roadway at moderate speed when the steering mechanism suddenly failed and the car turned and crashed into a brick wall. The couple sued the


seller and the manufacturers on a warranty of merchantability imposed by the Uniform Sales Act [1]. The court upheld the implied warranty on the part of the manufacturers despite the exception clause that excused the latter from liability for it for a combination of reasons. The contract was an adhesive one used by all American motor car manufacturers. The monopoly in the motor vehicle industry together with the method of distribution (i.e. the promotion of sales and advertisement which were also prepared and maintained by the manufacturer) and the wide disclaimer clauses inserted in fine six-point script had misled and prejudiced the buyer. In situations typified by Henningsen v. Bloomfield the emphasis is on the element of adhesion. The lack of choice and the severe imbalance of the agreement are found to be factually independent of any adverse consequences of a breach. Hence, it has been said that unconscionability takes into account only circumstances at the time the contract is made and ought not to take into account subsequent changes in circumstances.

In the cases where no apparent unfair or harsh bargain is identifiable and no oppressive conduct or circumstance may be present, a further question remains if as a result of the performer's subsequent avoidable misperformance risks turn out to be grossly disproportionate vis-a-vis the other. Suisse Atlantique is a striking example. Unsatisfactory as its actual decision may be, its facts and the problem that arises there provide an excellent example of the importance of fundamental breach, for in that case there was no question of the bargain being unconscionable. Another example is the new development described by Kerr which is "becoming fashionable in

[1] The plaintiffs also sued for negligence but this count was dismissed.
unremunerative long-term charterparties on a depressed freight market where the charterers...commit a breach which is clearly repudiatory in an attempt to get rid of the charter, and then...content that the shipowners are obliged to accept the breach as a repudiation and to treat the charter as at an end” [1]. The residual role of fundamental breach in these cases is clear.

It is now obvious that where there is neither comprehensive legislative provision nor any development of a comparable notion of unconscionability, fundamental breach has a larger residual importance. This, as we are about to see, is the special and perhaps even ironical relevance of fundamental breach in Australian law where there is nothing to diminish the role of fundamental breach in the way it has been superseded in England or America. It is ironical because there is a general impression that fundamental breach has little importance in Australia [2].

When the English courts were in the thick of the 'rule of law' versus 'rule of construction' debate over fundamental breach, Australian courts stayed outside that controversy. From the start they had not accepted fundamental breach as enunciated in Karsales v. Wallis. Indeed the High Court of Australia in a sense anticipated Suisse Atlantique and insisted that whether an exception clause applies is in every case a matter of the contractual intention of the parties as apparent on the face of the contract [3]. Fundamental


[2] Subject to what is to be said in Chapter VIII.

breach thus had a rather less dramatic career in Australia than it had in the United Kingdom. This at times has given the appearance that Australian law does not host the concept of fundamental breach and has throughout been faithful to the strict approach. This neat appearance of symmetry is of course not completely accurate.

To the extent that Australian courts endorse and indeed identify the 'rule of construction in *Suisse Atlantique*' with their own view of fundamental breach, the concept is very much a part of Australian contract law. But whereas the English regard fundamental breach as a special rule, even if it is one of construction, the Australian courts have tended to treat it as just another aid to construction. Consequently with the latter, the criteria for deciding when a performer may excuse liability for his own avoidable misperformance have become somewhat nondescript.

At the same time Australian courts are disinclined to review contracts and will not liberally find an abuse of bargaining power to justify relieving a party from a harsh transaction. In *The South Australian Railways Commissioner v. Egan* [1], for example, the court noted the exceedingly unbalanced nature of the standard form contract but declined to infer from the form and circumstances of the contract any abuse of bargaining power. Menzies J. deplored the "outrageous" "most wordy, obscure and oppressive contract" he has come across in which "not one oppressive provision which could be found was omitted" [2]. But he would not grant relief:


[2] For instance, clause 32 entitled "Settlement of Disputes" had about 700 words to the effect that any dispute was to be referred to and decided, finally and conclusively by the chief engineer for Railways.
The contract is so outrageous that it is surprising that any contractor would undertake work for the Railways Commissioner upon its terms. It is, of course, a contract to which the doctrine of contra proferentem applies. The employment of such a contract tempts judges to go outside their function and attempt to relieve against the harshness of, rather than give effect to, what has been agreed by the parties. Courts search for justice but it is justice according to law; it is still true that hard cases tend to make bad law [1].

This has not, however, always been the case. Some forty-five years earlier a promising Tasmanian case was decided in a manner very similar to Lloyds Bank v. Bundy. That was Harrison v. National Bank of Australasia [2] which seems to have been largely overlooked. A 67-year old woman without legal advice gave a bank security over land to help her son-in-law in a business venture. Although she was inexperienced in business matters, she knew she would lose her property if the business failed. Crisp J. held that she was not bound to the agreement which had been entered into without due deliberation, independent advice and knowledge of its true effect [3]. Although the decision could, as was done in Lloyds Bank v. Bundy, be explained on the well settled principle of a breach of fiduciary relationship between the bank and the woman, the tenor of the judgment

[1] See also Gibbs, J., "Provisions such as those contained in the contract under consideration find little favour in modern eyes, but we are required to give them their legal effect and are not to be deflected from that course because they appear unfair and one-sided."


is that the judge had construed the facts with an eye to granting relief from the transaction. In two subsequent cases, the courts seemed prepared to consider harsh and unconscionable practices. Windeyer J. in TNT v. May & Baker [1] touched on the justice of enforcing a contract according to its terms where there is inequality between the parties. The High Court of Australia in H. & E. Van Der Sterren v. Cibernetics [2], Walsh J. (with whom Barwick C.J. and Kitto J. agreed), in finding for the proferens, stressed that the contract was freely entered into by two informed parties.

The neglect of fundamental breach in the Australian common law and the conservative attitude towards unconscionability have primarily served to relegate the problem of performance-related risks as well as objectionable contract procuring practices to legislative rescue which, in the Australian constitutional set-up, may be a difficult affair. In the next chapter we shall consider the limited headway that has been made in this direction.

Chapter VIII

LEGISLATIVE REFORMS:

THE RESIDUAL SIGNIFICANCE OF

FUNDAMENTAL BREACH
1. A Further Question

Numerous provisions for exception clauses lace the formidable bulwark of English and Australian legislation. In the United Kingdom the most comprehensive and uniform response to the problems of exception clauses is the Unfair Contract Terms Act (1977). In Australia, however, there is no comparable concerted effort. Exception clauses are still dealt with only incidentally in a maze of particular and detailed legislation concerned with diverse matters in six states, two territories and the Commonwealth. These statutes are piecemeal responses to individual needs as they arise, employing wide-ranging techniques [2] and generally aimed at protecting consumers.

[1] Hereinafter referred to as the U.C.T.A. It is the result of the Second Report on Exemption Clauses of the Law Commissions, 1975, Law Com. No.69; Scot. Law Com. No.39. Another consultative document was published in 1971 containing "provisional proposals relating to the exclusion of liability for negligence in sale of goods and exemption clauses in contracts for the supply of services and other contracts". The U.C.T.A. has three parts: the English provisions in Part I apply also to Northern Ireland and Wales while Part II applies to Scotland and Part III contains general provisions for the whole of the United Kingdom.

[2] E.g. the regulation of business techniques, the monitoring of merchandising methods, the implication and entrenchment of rights in favour of the economically weaker classes. E.g. the Consumer Protection Act 1964 (Vic.) and the corresponding South Australian Act with departures from the basic New South Wales, Victoria and Queensland Acts, monitor practices in, among other things, advertising, sales promotion and packaging. See Sutton, K.C., "The Consumer Protection Act 1969 (N.S.W.) and Comparable Legislation in Other States and Overseas" (1971) 4 Adelaide L.Rev. 43; Sale of Goods (2nd ed. Aust., The Law Book Co. Ltd. 1971), chap. XXIII. More specific legislation includes the Door-to-Door Sales Act 1967 (N.S.W.); The Motor Dealers Act 1974 (N.S.W.); The Law Reform (Manufacturers Warranties) Ordinance 1977 (A.C.T.), and the Manufacturers Warranties Act 1973 (S.A.). The Hire-Purchase legislation in Australia since about 1960 prohibit in specific cases, any attempt to exclude the operation of terms implied therein.

(cont'd next page)
We are concerned with the state of the legislation in respect of exception clauses only to enable us to assess the extent to which, if at all, the role of fundamental breach in the adjustment of performance-related risks of exchange has been superseded. It was seen in the last chapter that where a contract can be reviewed and an exception disallowed on the ground of unconscionability at common law it may be unnecessary to apply fundamental breach. The question remains if the legislative provisions and in particular the legislative notion of unconscionability (by whatever name called) which generally goes further than its common law counterpart, make fundamental breach redundant. For this purpose it is proposed to discuss the U.C.T.A. and to consider a current trend in Australia towards a more uniform attempt at combatting excessive exception clauses beyond the pot pourri of legislative provisions that exists. In the case of Australia the Contracts Review Act 1980 of New South Wales will be the focus of our discussion as it represents an enthusiasm for the introduction by legislation of a general doctrine of unconscionability modelled on the approach in s.2:302 of the American U.C.C. Otherwise it is beyond both the scope and concern of this thesis to grapple with the legislative provisions for exception

(footnote cont'd)

See also Part VIII of the N.S.W. Sales of Goods Act that deals with 'consumer sales': s.64(1) provides that conditions implied by ss.18, 19 or 20 cannot be excluded; s.10 Consumer Transactions Act 1972-73 (S.A.); s.68 Trade Practices Act 1974; legislation also provides assistance and facilities for the enforcement of rights to ensure their reality: e.g. the Small Claims Tribunals Act 1973 (Qld.); Small Claims Tribunals Act 1974 (Vic.), and Consumer Claims Tribunals Act 1974 (N.S.W.) aim at providing more accessible means of settling disputes between consumers and traders involving goods and services up to a prescribed ceiling in value.
clauses which are mainly in pursuance of consumer protection [1].

2. The U.C.T.A.: Aim and Design

The U.C.T.A. is relatively recent and any evaluation of its effect is to some extent speculative [2]. It is primarily aimed at


controlling excessive exception clauses - to "impose further
limits" on the extent to which civil liability for breach of contract
or for negligence or other breach of duty can be avoided by means of
contractual terms and otherwise [1]. It is not confined to contracts
and it is not concerned with the fairness of contractual terms in
general. Its targets are the exclusions and restrictions of
contractual and tortious liability by means of "any contract term" and
a "contract term or notice" respectively.

The U.C.T.A. seeks to achieve its aim in three main ways.

First, it repeals the statement of fundamental breach in the
Harbutt's Plasticine case. Strictly speaking s.9 of the U.C.T.A.
expressly repeals the reasoning in that case (to the effect that a
discharge by breach terminates a contract) only in cases where the
clause in question is subject to the criterion of reasonableness [2].
This anomaly was, however, indirectly corrected when the House of
Lords in Photo Production v. Securicor Transport rejected the same
rule.

Second, it protects the private rights of particular
contracting parties and entrenches them as 'inalienable' rights by
nullifying any attempt to contract out of them. It distinguishes
between consumer and non-consumer contracts and bolsters the
bargaining strength of consumers on the assumption that the other
party is a better distributor of loss. But these controls in cases of
sale of goods, hire-purchase and misrepresentation in the U.C.T.A. are
mainly restatements with occasional extensions of the existing law as

[1] Preamble of the U.C.T.A.

[2] E.g. ss.4, 6(3) and 7(3). Tettenborn, A.M., "Fundamental Breach:
found in the former Sale of Goods Act 1893 [1], the Supply of Goods (Implied Terms) Act 1973 and the Misrepresentation Act 1967. In other words the U.C.T.A. does not significantly diminish the application of fundamental breach in these contracts. S.6(2)(a) of the U.C.T.A., for example, restates the 'inalienable' rights in consumer sales created by the Supply of Goods (Implied Terms) Act 1973, and s.6(2)(b) restates in respect of hire-purchase contracts, the same implied terms together with the unrevised s.15 of the 1893 Act dealing with sales by samples [2].

Finally it permits the exclusion or restriction of other clauses only if they are reasonable. It invests in the courts a discretion to police them under a broad statutory standard. This


[2] S.6 of the U.C.T.A. is illustrative of the modern growth of consumer protection. It bans the exclusion and limitation of responsibility for title, correspondence with description, merchantable quality and fitness for purpose in consumer sales. Under the common law there was no general inexcludable implied term as to the quality of goods. Caveat emptor prevailed: Barr v. Gibson (1838) 150 E.R. 1196. The law was codified in ss.13 and 14 of the Sales of Goods Act 1893. In all contracts for the sale of goods, a term may be implied in respect of the seller's undertaking that the goods correspond with their description or sample, that the goods are fit for their purpose and that they are of a merchantable quality only in the absence of contrary evidence. The rationale was that the parties were free to determine their own rights and liabilities: Chalmers, M., "Codification of Mercantile Law" (1903) 19 L.Q.Rev. 10. In 1973 the Supply of Goods (Implied Terms) Act redrafted ss.13, 14 and 15 of the 1893 Act and created 'inalienable' rights in consumer sales which are restated in s.6(2)(a) of the U.C.T.A. A buyer from a private seller is, however, only protected to the same extent as a buyer in a commercial sale since he does not "deal as a consumer". In any event the control is dependent on there being a statutorily implied condition before the issue of an acceptable exclusion or restriction clause arises. For instance, the implied condition as to merchantable quality and fitness for a particular purpose only arises when the supplier acts in the course of a business and a private seller would not be subject to the implied condition. And where the private seller chooses to undertake express conditions the U.C.T.A. does not prevent him from restricting liability for breach of an express, as opposed to an implied undertaking.
control is foreseeably, if at all, the primary means of superseding fundamental breach.

3. The Residual Role of Fundamental Breach after the U.C.T.A.

Common law principles obviously continue to apply to all contracts left outside its ambit. In respect of such contracts, fundamental breach applies merely by virtue of it being a common law principle. In addition, fundamental breach applies to the extent that the statutory concept of reasonableness does not replace it completely. We shall look at each in turn.

a) Contracts Exempt from the U.C.T.A.

Three classes of contracts and contractual provisions are not regulated by the U.C.T.A.:

(i) Those left completely unaffected. Examples are contracts made before 1st February 1978 when the U.C.T.A. came into force [1], contractual provisions authorised and required by legislation or in compliance with international agreements to which the United Kingdom is a party [2], and contracts for the international supply of goods [3].

(ii) Those within Schedule I of the U.C.T.A. which are left unaffected to varying degrees. For instance, the provisions

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[1] A contract made before but renewed after that date as a matter of right is presumably similarly affected since it would appear to be outside the U.C.T.A. In the case of noncontractual claims, it applies where the loss or injury is incurred on or after that date: s.31(1) and (2).


[3] Ss.26, 26(3) and 26(4).
relating to the exclusion of negligence [1], terms in consumer contracts and written standard terms of business [2] and indemnity [3] do not apply at all in insurance contracts and apply only "so far as it relates" to the matters specified therein in other contracts. More importantly in contracts of marine salvage or towage, charterparty of a ship or hovercraft and carriage of goods by ship or hovercraft [4], common law principles apply except where certain provisions of the U.C.T.A. [5] apply in favour of a consumer [6]. This means that the problem posed by the facts of Suisse Atlantique is not provided for by the U.C.T.A. Another example is contracts of employment in which common law principles apply in respect of liability for personal and other loss or damage resulting from negligence except as against the employee; and,

(iii) Any other contract not involving any business liability [7] (excepting sales and hire-purchase contracts) [8] in respect of

[4] Para.2, Sch.1; and also para.3.
[8] The exception is necessary because ss.12 and 13 of the Sale of Goods Act 1893 and ss.8 and 9 of the Supply of Goods (Implied Terms) Act 1973 to which s.6 of the U.C.T.A. relates are not confined to business liability. S.8 relating to liability under s.3 of the Misrepresentation Act 1967 is also not conditional upon business liability.
matters within ss.2-7. Private sales are anticipated here where the liability is not in respect of breach of obligations or duties arising from things done or to be done in the course of business, whether a person's own or his vicarious liability, or from the occupation of premises used for business purposes of the occupier [1].

b) Reasonableness

Non-consumer contracts generally [2] are subject to a requirement of reasonableness which is basically a modified derivation from corresponding provisions in the previous legislation. In s.6(3) of the U.C.T.A. (which deals with the same matters as s.6(2) does in consumer sales), the previous law in s.55(4) of the 1893 Act (inserted in 1973) is restated with two differences.

First, unlike the 1893 Act, a clause is no longer assumed under the U.C.T.A. to be reasonable until proven otherwise. The onus is on the party relying on the clause to show that it is fair and reasonable [3]. There is, however, no change in the guidelines for the test of reasonableness under the U.C.T.A. from those set out in s.55(5) of the 1893 Act. To decide if a particular clause is reasonable or not reasonable, a court is to consider the guidelines in Schedule 2 of the U.C.T.A. They include the relative bargaining

[1] 'Business' includes a profession and the activities of any government department or local or public authority: s.14. This definition is the same as that in the Supply of Goods (Implied Terms) Act 1973. It is not free from problems of interpretation and has been described by Lord Diplock as an "etymological chameleon" in Town Investments v. Department of the Environment [1977] 1 All E.R. 813, at p.819.

[2] Reasonableness may be applied to ss.2(2), 3, 4, 6(3), 7(3) and (4), and 8.

positions of the parties, the availability of alternatives, the parties' knowledge, the reasonableness of the time for complaints, whether it was the acquirer who stipulated the specification of the goods to be manufactured, all the circumstances especially the exact knowledge, actual or implied, that the buyer had of the extent of the term, and whether the buyer had a choice of adopting the contract with or without the exception clause. Schedule 2, however, specifically applies to only certain provisions of the U.C.T.A. [1]

Where the court has to decide on the reasonableness of a contract term or notice which seeks to restrict liability to a 'specified sum' of money, it must consider the resources which the proponent of the clause could expect to be available to meet the liability and the availability of insurance [2]. Underlying this provision is a search for the visibly acceptable risk absorber.

Apart from the foregoing provisions there is no other general test of reasonableness or other guideline. Presumably, the guidelines in Schedule 2 are neither exhaustive in scope nor exclusive in application and will be freely resorted to for analogies. The Law Commission in its Second Report felt that all circumstances of the case should be interpreted widely, the object of the reasonableness test being that the court should have regard not merely to the terms of the exception clause or of the relevant contract but that it should take account of the "commercial and social realities of the situation".

[1] Ss.6(3), 7(3) and (4), 20 and 21.

Second, s.55(4) of the 1893 Act provided that any clause attempting to exclude the stated matters (i.e. ss.13-15 of the 1893 Act) "shall not be enforceable to the extent that it is shown that it would not be fair or reasonable to allow reliance on the term" [1]. The U.C.T.A. now requires the reasonableness of the clause to be determined at the time when the contract is made [2]. Only the circumstances which were, or ought reasonably to have been known to or in the contemplation of the parties when the contract was made are to be considered. It is thought that to take into account later events would be to change the rules of the game [3]. It is also anticipated that the reasonableness test is inherently uncertain and by stipulating the time at which the test applies, uncertainty can be mitigated. The result is that any unreasonableness that flows from the operation of a term in the circumstances of a case does not make the term objectionable if it was per se reasonable at the time the contract was made. The court is specifically prohibited from considering the nature of the breach [4]. A court may therefore find

[1] Similar rules are applicable to hire-purchase transactions by virtue of the Supply of Goods (Implied Terms) Act 1973, s.12, as amended by the Consumer Credit Act 1974, s.182(3)(a) and Sch.4, para.35.

[2] S.6(3) together with s.11(1) U.C.T.A., contra s.11(3) U.C.T.A. which deals with non-contractual notices. S.8 of the U.C.T.A. which is substituted for s.3 of the Misrepresentation Act 1967 also requires the reasonableness of the clause to be determined at the time when the contract is made. The previous law in s.3 of the Misrepresentation Act 1967 provided that any attempt to exclude or restrict liability for misrepresentation was of "no effect except to the extent (if any) that...the court...may allow reliance on it as being fair and reasonable in the circumstances of the case".


a disputed term unreasonable if the parties were relatively unequal in bargaining power and the performer had virtually dictated the terms; but it may not disallow a term which is on its face reasonable but which becomes unreasonable in operation when, say, the performer wilfully breaches the contract because it is in his interest to do so. Nor would the buyer in Rasbora v. J.C.L. Marine [1] be able to succeed in his claim on the ground that if the exception clause were to apply he "would be left without any remedy at all". That was the case where D contracted to build a boat for the buyer and limited his liability to replacement and repair of faulty materials and workmanship. Lawson J. held that D appreciated that defective design was likely to cause a fire and was by reason of such negligence guilty of a fundamental breach. It was therefore not fair or reasonable to allow reliance on the exception clause under s.55(4) of the Sale of Goods (Implied Terms) Act 1973 especially when the boat, by reason of D's defective workmanship, was destroyed just over a day after it was handed over.

The reasonableness of an exception clause under the U.C.T.A. is therefore determined by the impeachability of the way the contract is procured. Reasonableness is therefore distinctly different from the concept of fundamental breach. Like the common law notion of unconscionability it does not adjust the performance-related risks of exchange. Reasonableness under the U.C.T.A. seems to be different from its common law counterpart as well as the comparable American notion of unconscionability in two respects. One is that the U.C.T.A. speaks of the reasonableness of the clause in question, not the reasonableness of the transaction as in s.2:302 of the U.C.C. which

requires the transaction to be substantially unfair too. Clauses and
not transactions are regulated by the U.C.T.A. Several types of
clauses are specifically regulated to varying degrees. They include
those which make a party's liability or its enforcement subject to
"restrictive or onerous conditions" [1], exclude or restrict any right
or remedy in respect of liability or subject a person to "any such
prejudice in consequence of his pursuing any such right or
remedy" [2], and clauses which subvert the rules of evidence or
procedure [3]. Clauses which exclude or restrict liability by the
exclusion and restriction of the duty of reasonable care and skill [4]
and certain duties relating to the sale and supply of goods [5] are
also monitored by the U.C.T.A. Other clauses include those which give
a performer the choice to render a "substantially different"

[1] S.13(1)(a); e.g. an onerous procedure for complaints as a
condition of acceptance.

[2] S.13(1)(b); s.8; e.g. a requirement that the buyer indemnifies
the seller for his own breach.

[3] S.13(1)(c); e.g. a clause that the buyer had satisfied himself
that the performance or the goods delivered were in order would
make evidence to the contrary inadmissible. Under the common law
such a clause has been held to have no legal effect as a contract
term or a representation creating an estoppel: Lowe v. Lombank
[1960] 1 All E.R. 611.


[5] Ss.5, 6 and 7 also prevent excluding or restricting liability by
reference to terms and notices which exclude or restrict the
relevant obligation or duty. See also the concluding words of
s.13(1)(c). A preliminary question which a court has to answer
in every case is whether a clause excludes liability via the
exclusion of duty or prevents the duty from arising in the first
place. It is likely that the court will go behind the facade of
the words employed and determine if the clause was one or the
other. This would be in keeping with the spirit of the U.C.T.A.
performance from that which the other party can reasonably expect [1],
clauses which purport to excuse non-performance of a part or whole of
a contract, excepted perils clause, and indemnity clauses which pass
to the other party the loss occasioned by a party's breach in respect
of that other party or a third party [2]. A supportive provision
which prevents evasion by means of a secondary contract is intended to
ensure effective control [3].

It is, however, open to question if courts will in practice,
even if they can, decide on the reasonableness of a clause alone, in
abstracto and single-mindedly, without due consideration of the rest
of the contract. The other difference is that reasonableness under
the U.C.T.A. does not seem to take into consideration or deal with the
more subjective and personal inadequacies of the individual as do the
notions of unconscionability in s.2:302 of the U.C.C. and the common
law. It employs the objective standard of the 'average' and
reasonable contractor.

In principle the adjustment of performance-related risks of
exchange is therefore not moribund. It has not been, nor can it be,
eliminated or replaced by a doctrine of unconscionability. For the
adjustment made by fundamental breach is not in respect of unfairness
in the sense of over-reaching but of a very onerous imbalance of risks
arising from subsequent performance-related contingencies.

Suisse Atlantique is of course the classic example. However, in sale

[2] S.4. Written agreements to arbitrate are not regarded as
exclusions or restrictions within s.13. Genuine agreed damages
clauses are probably not affected by the U.C.T.A. but,
foreseeably, their validity will be subject to scrutiny.
of goods in which the element of culpability has less relevance, unconscionability is by far the more important concept.

There is in this respect a very interesting idea in Angelo and Ellinger's comparative study of unconscionability [1]. They recommended that any general concept of unconscionability must be augmented by a provision that courts should review the unfair use of perfectly legitimate and unobjectionable contractual terms. This recommendation recognises the need for such a review as well as the inability of the concept of unconscionability to fulfil the task. It sums up, unintentionally, the residual significance of fundamental breach (by whatever name one may choose to call it) in the adjustment of performance-related risks of exchange.

Similarly in its Report on Credit Contracts, the Contracts and Commercial Law Reform Committee of New Zealand recommended the control of the misuse of prima facie unobjectionable contractual rights in addition to the policing of unfair contract procurement conduct and devices:

"We think that much of the difficulty in applying any rule invalidating unconscionable transactions would be alleviated by recognising a clear distinction between unconscionable contracts on the one hand, and unconscionable conduct under unexceptional contracts on the other hand. It may be "excellent to have a giant's strength" by obtaining wide-reaching terms in the contract itself, but it may be "tyrannous to use it as a giant" by

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unconscionably applying such terms. So it is not always easy to decide whether the fault lies in the terms or in the application of the term. For this reason we consider that it is desirable that the court should be furnished with jurisdiction not only to review contracts which contain unconscionable terms, but also to grant relief against the unconscionable exercise of contractual rights and powers in particular cases." [1]

Two other aspects of the concept of reasonableness under the U.C.T.A. need to be considered a little further. The Law Commission explained that:

"Clearly any attempt to rely on an exception clause can only succeed if the exemption in question was intended to apply in the situation that has in fact arisen. If it does not apply it cannot be relied upon, and no control over the exemption clause is needed in that case. Only if the exemption clause is wide enough to apply to the breach that has taken place is it necessary to bring into play a control by a reasonable test." [2]

It appears that the Law Commission was concerned to clarify the obvious, that is, that the ambit of a clause must be wide enough to apply to the facts in question before the need to control it arises. However, the rule of construction in U.G.S. Finance v. National Mortgage Bank of Greece [3] was specifically retained. Fundamental breach in Suisse Atlantique and as reaffirmed recently by Photo Production v. Securicor Transport continues to apply in

[1] Report of the Contracts and Commercial Law Reform Committee, New Zealand, presented to the Minister of Justice, February 1977, hereinafter referred to as Report on Credit Contracts, para.7.22, p.67. A general guideline was also suggested: para.7.46 at p.82. See also Art.138 of the German BGB which, augmented by Art.242, has enabled courts to reckon with the unfair use of contractual rights even where the term which confers them is not unconscionable per se.


principle by virtue of it being a rule of construction. For the purpose intended by the Law Commission, it may be more helpful to require courts to adopt the natural and ordinary meaning of words before subjecting the clause to a test of reasonableness. Depending on how the courts will find that a clause is 'intended' to apply, the 'rule of construction' in *Suisse Atlantique* may be used effectively with far-reaching results beyond that intended by the Law Commission. We have already seen that in *Photo Production v. Securicor Transport*, Lords Diplock and Wilberforce recognised reasonableness as an aid to construction [1]. It is easy enough to find that an exception clause was not intended to extend to a wilful or even reckless breach (for instance on the ground that it would be unreasonable to assume otherwise or because a clause which *prima facie* seeks to do that is unreasonable) and thus to do away completely with the need to apply the statutory standard of reasonableness. Contracts which have not been procured in objectionable circumstances may yet be reviewed by a court in the manner just described.

Although the *U.C.T.A.* is mainly aimed at unconscionable practices it makes an interesting distinction between three types of clauses in s.3, namely, (i) clauses by which a performer excludes or restricts any of his liability in respect of his own breach of contract (thus including even strict liability for breach of contract), (ii) those by reference to which a party claims to be entitled to render a contractual performance substantially different from that which is reasonably expected of him, and (iii) those by which a party claims to be entitled to render no performance at all in respect of the whole or any part of his contractual obligation. The

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distinctions can serve to remove some of the confusion that surrounds such clauses. The first type of clause presupposes that notwithstanding the clause a contractual obligation has been undertaken and it protects a party from aspects of that liability. The second type is more involved. An example is found in Anglo-Continental Holidays v. Typaldos Line [1]. The defendants who were travel agents, agreed to book for the plaintiffs, who were also travel agents, cruises on a named ship following a fixed itinerary. The agreement was subject to the following clause:

"Steamers, Sailing Dates, Rates and Itineraries are subject to change without prior notice."

Relying on this clause, the defendants offered the plaintiffs cruises on a different ship following a different itinerary. It was found as a fact that the substituted ship was inferior to the ship originally named and that from the plaintiffs' point of view the new itinerary was inferior to the original. In the Court of Appeal, Lord Denning M.R. doubted if the clause relied upon by the defendants formed part of the contract; but, on the assumption that it did, he held that the defendants could not "rely on a clause of this kind so as to alter the substance of the transaction" [2]. The cases cited in support of this view suggest that Lord Denning, with whose views Davies L.J. agreed, regarded the clause as an exception clause. Russell L.J., however, disagreed: "It is a clause under which the actual contractual liability may be defined, and not one which will excuse from the actual contractual liability... I prefer to state it as being a

matter of construction of a general clause, and the propounder of that clause cannot be enabled thereby to alter the substance of the arrangement". It is now immaterial under s.3 whether or not the clause is an exception clause.

Evidently it is necessary to determine the 'substance' of an agreement before it can be said if a clause enables a party to render a performance which is substantially different. The 'substance' of the agreement is that which is reasonably expected of the other and not the actual obligations undertaken by him. For this purpose a judge could adopt one of two approaches: (i) to arrive at what may be reasonably expected of one party solely from the language of the agreement; or (ii) to determine the legitimate expectations of a party by virtue of the contract being a transaction of that type, taking into consideration all circumstances especially the price. The second approach would bring the law more realistically in line with lay expectation [1] and would prevent a performer from using vague phraseology or a less specific content to better enable him to argue that a particular performance was not on the face of the contract reasonably expected. It must be noted that any such clause which purports to entitle a party to render a substantially different performance is subject to it being reasonable. In other words s.3 sets a minimum standard of exchange and monitors the procurement of the contract. In setting the minimum standard of exchange, s.3 may well overlap with the role of fundamental breach.

In the third type of clause, the criterion is not the reasonable expectation of a party but what was in fact undertaken by the other. To ensure that parties have freely agreed to such a contract of chance, s.3 requires the court to be satisfied that the clause is reasonable, that is, that it should be procured in unobjectionable circumstances.

4. Some Problems of the U.C.T.A.

The U.C.T.A. is a complex piece of legislation. Although concerned with unfair use of bargaining power in the formation of contracts it is confined to certain contracts and only controls specific clauses. It distinguishes between types of liability, transactions, losses, contractual terms and the status of the parties. It invests in the courts a broad discretion (with vague and general guidelines) applicable only to narrowly specific situations. As Waddams puts it neatly: it appears to be saddled with the uncertainty inherent in a broad discretion based on fairness and lacks the flexibility that goes with it [1].

Under the law now, a defaulting party in a non-consumer contract has to rebut evidence that he has breached the contract fundamentally, or show that the exception clause is reasonable, if, notwithstanding such breach, the exception clause is construed according to the rule in Suisse Atlantique to cover the consequences.

It is therefore not surprising that the U.C.T.A. has been received with mixed feelings. It has been welcomed as a "gratifying piece of law reform", regarded as a "major advance" in consumer

protection, regretted as a "grievous mistake" at the level of principle and in terms of its practicality, and doubted for its social significance.

Before we turn our attention to legislative developments in Australia, we may mention some of the difficulties of especially the new controls in the U.C.T.A. First, there are two main problems with s.7 of the U.C.T.A. which extends inalienable rights, in matters of the goods' correspondence with description and sample, their quality, and fitness for any particular purpose, to consumer contracts under which or in pursuance of which possession or ownership of goods passes but where the laws of sale of goods and hire-purchase do not apply [1]. Previously an aggrieved consumer's remedy in these contracts depended on there being a duty of care under the general law. The exclusion or limitation of the implied condition of title is now subject in both consumer and commercial contracts to the requirement of reasonableness [2]. There is, however, no provision for freedom from encumbrances.

One difficulty is the unclear difference between sales and contracts analogous to sales. To use a ready case example, does a provision of a 'free gift' of four gallons of petrol with a purchase of goods make the transaction a contract analogous to sale [3]? The

[1] In corresponding commercial contracts where a supplier acts in the course of business and the other does not deal as a consumer, the exclusion or restriction of similar rights must be reasonable: s.7(3).


other is the uncertainty of the obligations implied by law and their scope to which the controls in s.7 relate. They are not set out in the U.C.T.A. or in any other Act and can only be ascertained from judicial decisions [1]. The Law Commission published a working paper in 1977 identifying at least three different tests for the obligation to supply goods fit for their purposes [2]. It was provisionally recommended that the obligations should be analogous to those in sales and hire-purchase and be as nearly as possible the same whatever kind of contract is made, that is, whether they are contracts of hire, contracts for work and materials, contracts of exchange or, generally, service contracts [3].

Second, the effectiveness of s.5, which prohibits the exclusion or limitation of liability for negligence for defective products by the use of a manufacturer's written guarantee [4], is dubious. The section applies where the goods are "of a type ordinarily supplied for private use or consumption". Loss or damage must arise from the goods proving defective while in consumer use and must result from the negligence of the manufacturer.


[3] Unlike the private seller in sales and hire-purchase, the private supplier is not affected by the U.C.T.A. because s.7 applies only where there is business liability.

Some difficulty of definition is expected where the goods have both consumer and commercial functions. It would seem compatible with the spirit of the provision to consider an item with mixed functions to be "in consumer use" even though it was being used for business purposes when the damage happened. Evidently s.5 only applies where the guarantee is part of or constitutes a contract between the buyer and the manufacturer. A manufacturer commonly undertakes an obligation of free repair in consideration of an exclusion of his liability in negligence. Now that s.5 disallows the exclusion of negligent liability, a guarantee may be unenforceable for lack of consideration. This is to the consumer's disadvantage if the guarantee is in the circumstances the most effective and practical remedy available. However, if the guarantee was part of the contract, as where a consumer knows about it beforehand, and a collateral contract is formed with the manufacturer, a consequence of s.5 is that a manufacturer's guarantee now gives consumers additional rights without taking away any of their legal rights.

The operation of s.5 can be extremely limited because a manufacturer is not even compelled to give a guarantee. Moreover, s.5 only removes the bars to recovery and an aggrieved party has no new remedy. Neither s.5 nor the rest of the U.C.T.A. deals with the issue of whether a manufacturer should be liable for shoddy products which, it is submitted, must surely be the real issue. Negligence, as it was established in the leading case of Donoghue v. Stevenson [1], remains the consumers' only remedy. Subsequent development of further duties of care have been in respect of the manufacturer's tortious liability.

[1] [1932] A.C. 562. The plaintiff customer in that case will now be able to recover under s.2(1) of the U.C.T.A.
In contract, he is not liable to the consumer for shoddy or defective products; he has no responsibility for the quality of his products similar to those of the retailer under the Sale of Goods legislations [1].

The reason for s.5 is itself contentious. The Law Commission thought it was necessary to prevent the consumer from abandoning rights "far more valuable than those he has gained" [2].

There is some evidence that negligence is in fact the less popular recourse especially in consumer transactions [3]. Consumers' ignorance of their rights and the often forbidding cost of private litigation discourage its initiation, although an action in negligence will perhaps be more readily resorted to where large sums of money are involved.


[2] Second Report on Exemption Clauses, Law Com. No.69; Scot. Law Com. No.39, para.99-104. The Law Commission felt that the buyer is unable to evaluate the relevant advantages of the guarantee on the one hand and the common law remedies on the other, if he gets to know of the guarantee at all.

[3] See Beale, H., and Dugdale, T., "Contracts Between Businessmen: Planning and the Use of Contractual Remedies" (1975) 2 Brit.J.L. and Soc. 49; Macaulay, "Non-contractual Relations in Business" (1963) 28 Am. Sociological Rev. 455; Yates, D., Exclusion Clauses in Contracts, chap.1; Cranston, R.F., Consumers and the Law (London: Weidenfeld & Nicholson 1978) chap.3. According to these writers there is not very much reliance in practice on legal rights in commercial relationships and pressure to do business seems to rate more importantly in solving contractual problems. In both consumer and commercial transactions, there is greater reliance on legal remedy where large sums are involved.
The third problem concerns s.2(1) [1] which prohibits exclusion or restriction of liability for death and personal injury caused by negligence. The protection afforded by s.2(1) is only co-extensive with a cause of action in negligence. Negligence is the breach of any express or implied obligation or any common law duty to take reasonable care or to exercise reasonable skill or the breach of a duty under the Occupiers' Liability Act [2]. Other exceptions from liability for loss and damage, e.g. physical or economic loss, must be reasonable [3]. In anticipation of the plea of volenti non fit injuria, it is provided that the agreement to or awareness of an exemption clause is not of itself to be taken as indicating an acceptance of the risk [4]. Under the common law, a party has to prove on the balance of probabilities that the other party assented to run the risk of negligence and to exempt the other from liability for it. The law remains the same but the onus is not discharged by showing merely agreement to or awareness of the clause

[1] Personal injury includes disease, impairment of physical and mental condition: s.14.

[2] S.1(1). Presumably any other lesser or greater obligation than that of reasonable care (e.g. strict liability) is not affected. It appears that negligence here is wider than that in Tort because s.1(4) stipulates that the manner of breach, i.e. whether it was inadvertent or intentional, direct or vicarious, is immaterial.

[3] S.2(2). Car parks offering free parking facilities are caught by the section which is not confined to contractual terms.

in dispute. It may be possible to use an indemnity against the liability in s.2 in non-consumer transactions. Neither s.4(1) which bans the use of unreasonable indemnity clauses in consumer transactions nor s.3(1) prohibits it. A court may attempt to use s.13(1) to remedy the mischief as the indemnity may be said to prejudice the pursuit of rights in negligence [1]. But strictly speaking, s.13(1) refers back to s.2(1) and may only be used if an indemnity clause can be said to 'exclude and restrict liability'. Judges may nonetheless interpret the phrase to 'exclude and restrict liability' liberally especially since Part I of the U.C.T.A., unlike Part II, does not define generally what excluding and restricting liability means.

Difficulties of interpretation seem rife. S.3, for example, applies to both consumer [2] and commercial contracts. The latter must, however, be a standard form contract and only a party dealing on the other's standard form contract is protected. But no definition of "written standard terms of business" is given although one may have some idea of it from any existing judicial consideration and the

[1] In Smith v. South Wales Switchgear [1973] 1 All E.R. 18 an attempt at this argument was unsuccessful.

[2] S.12 explains when a party "deals as a consumer". In Rasbora v. J.C.L. Marine [1977] 1 L.L.R. 645 (decided under the Sale of Goods (Implied Terms) Act 1973 which had a comparable provision of consumer sale) an incorporated company wholly owned by the buyer was substituted as the buyer in an agreed novation of a contract of sale of a boat. Lawson J. held that the original contract was a consumer sale and was unaffected by the novation. Alternatively, the substituted contract was in any case a consumer sale since the new buyer was wholly owned by the original buyer and was formed solely for the purpose of buying the boat for the use of the original buyer or his licensees. There was no intention to hire or use the boat for non-consumer purposes.
experience of other jurisdictions. Judges can define the phrase broadly to bring such contracts liberally within their scrutiny in view of what they often perceive as ills which accompany their use.

S.10, which is intended to tighten control by preventing evasions by means of a secondary contract, is illustrative of poor drafting giving rise to undesirable consequences. It oddly refers to terms "prejudicing and taking away rights" while s.13, which sets out some of the types of clauses affected, speaks of terms "excluding or restricting" liability. Thus the latter cannot, strictly speaking, be used to explain the former. A more serious difficulty is that the description "prejudicing and taking away rights" does not seem to differentiate between two types of clauses contrasted in s.3(2)(b): those which exclude and restrict liability and those which prima facie prevent duties from arising.

5. Legislative Response in Australia

We have already noted the state of the law in Australia on consumer protection which constitutes the substantial response, however indirect at times, to the problem of exception clauses. Numerous provisions for exception clauses straddle statutes which often vary from jurisdiction to jurisdiction [1]. Before discussing the Contracts Review Act 1980 (N.S.W.) we may mention briefly Part V, Division 2 of the Trade Practices Act 1974 (Cwth.) which perhaps comes closest to a uniform but limited response to the problem of exception clauses.

clauses.

The Trade Practices Act 1974 as amended by the Trade Practices Amendment Act 1977 (Cwth.) came into force on 1st July 1977. It is modelled substantially on the Supply of Goods (Implied Terms) Act 1973 (U.K.) and implies rights generally in favour of the buyer [1]. Division 2, Part V, therefore, like the 1973 Act embodies the belief that the commercial interest is in the best position to reallocate loss. But Division 2 is superimposed on the various special and specific provisions relating to consumer sales present in the respective states and territories [2]. Thus although 'consumer sales' is similarly defined in both sets of legislation, in practice it may be difficult to apply Division 2. This may be so despite the suggestion [3] that the Trade Practices Act will prevail over state laws on the presumption that the Commonwealth legislation was intended to "cover the field" because the types and nature of the transactions affected by the two sets of laws may not always coincide.

[1] For example, s.71(1) not only follows the corresponding English provision but also adopts its definition of merchantable quality; s.71(2) provides for an implied term of fitness for purpose and s.72 provides for an implied term of correspondence with sample: s.70(2) follows s.2 of the Supply of Goods (Implied Terms) Act 1973; s.70(1) follows s.4(7) of the 1973 Act (which is now s.50 of the U.C.T.A.) but exclusion of sales by competitive tender is deleted. The terms set out in ss.68-74 of the Trade Practices Act 1974 are implied into contracts other than sales of goods. This is the combined effect of the definition of 'supply' in s.4 of the Trade Practices Act 1974 and the House of Lords' decision in Young and Marten v. McManus Childs [1969] 1 A.C. 454 and the High Court of Australia's decision in Helicopter Sales v. Rotor-Work (1974) 132 C.L.R. 1 (to the effect that the usual implied terms are also implied in contracts an incident of which is the supply of goods).


Exception clauses are generally prohibited or permissible according to whether the transaction is of the consumer or non-consumer variety [1]. Only "reasonable" limitation of a supplier's liability for breach of implied terms (other than title under s.69) is permissible in non-consumer transactions (i.e. one for the supply of goods or services of a kind not ordinarily acquired for personal, domestic or household use or consumption [2]). In the same way as s.55 of the 1973 (U.K.) Act, as inserted into the 1893 Sale of Goods Act, seeks to oversee contractual procurement circumstances and conduct, s.68 A(2) and (3) of the Trade Practices Act require the court to consider the bargaining power of the parties, the availability of the goods or services from alternative sources, the course of dealings between the parties, whether the goods were "made to order" in the particular case, and to decide in the circumstances of the case whether it is fair and reasonable for the corporation to limit or modify its liability.

6. Current Trends in Legislation:

The Contracts Review Act 1980 (N.S.W.)

In late 1975, the Working Party on Consumer Protection Laws for the Australian Capital Territory (A.C.T.) prepared a Bill for the

[1] S.68 Trade Practices Act 1974: Clauses that purport to "exclude, restrict or modify or [have] the effect of excluding, restricting or modifying the application of any of the provisions of Part V, Division 2..., the exercise of a right conferred by any such division, or the liability of a 'corporation' for a breach of a term implied by any such provision" are void.

Law Reform (Harsh and Unconscionable Contracts) Ordinance 1976. It went further than the isolated s.88F of the Industrial Arbitration Act 1940 of New South Wales [1] and s.32 of the Hire-Purchase Act 1960, also of New South Wales [2]. However, the Bill did not progress beyond the Legislative Assembly.

The Consumers' Affairs Council of the A.C.T. decided in May 1980 to further consider the matter and to determine what action if any, should be taken. In South Australia, the Law Reform Committee in its 43rd Report "Relating to Proposed Contracts Legislation" recommended that the law should be altered to enable the courts to review contracts which are unjust and to modify the application of unjust contractual terms in certain circumstances to avoid injustice that may otherwise ensue [3].

The first concrete move was made when on 24th April 1980, The Contracts Review Act, 1980 was proclaimed in New South Wales. This Act is based on the Peden Report [4] in which Professor Peden

[1] S.88F empowers the New South Wales Industrial Commission to declare a contract void in whole or in part on the ground that it is unfair, harsh or unconscionable, or is against the public interest but only where the contract has an "industrial colour or flavour" and is one by means of or by the agency of which a person performs work in any industry.


[3] The committee received its reference following a resolution of the state's Legislative Council that the Contracts Review Bill before it be withdrawn for reference to the Law Reform Committee "for its report and recommendations regarding the implementation of the Bill and that the Bill be re-drafted to allow for its inter-relationship with other Acts and to take into account its effect on international and currency contracts".

recommended legislation and commented that the "proposals formulated in the Bill for a Law Reform (Harsh and Unconscionable Contracts) Ordinance 1976 in the Australian Capital Territory constitute precedent of most significance and similarity" to his draft bill for New South Wales.

The Contracts Review Act, 1980 generally empowers a court to review "unjust" contracts or unjust contractual provisions [1]. Relief under it, however, not extended to the Crown, public or local authorities or corporations and persons who contract in the course of or for the purpose of any trade, business or profession carried on or proposed to be carried on other than a farming undertaking [2]. The preclusion of relief under the Act to persons contracting in the course of or for the purpose stated severely limits the operation of the Act to essentially consumer transactions. This unjustified restriction latches on the distinction between consumer and non-consumer contracts which baselessly assumes that all contractors acting in the course of or for the purpose of trade are able to protect themselves from unjust provisions. Since the court has to consider factors as the equality of bargaining power and the ability of the party seeking relief to protect himself against injustice, there is no reason why the restriction should be made at all. The restriction departs from the recommendation of the Peden Report. While Professor Peden was prepared to preclude the Crown, state instrumentalities and corporations from relief on the ground that they have "sufficient commercial experience" to protect

[1] The word 'unjust' includes unconscionable, harsh or oppressive: s.4(1).

[2] Ss.6(1) and (2).
themselves, he was concerned to bring within the protection of his draft Bill the many "small family enterprises unlikely to have any more commercial experience than non-professional partnerships or sole traders" [1].

The principal relief under the Contracts Review Act 1980 is set out in a single provision. Where the contract or contractual provision is unjust in the circumstances relating to the contract at the time it was made, the court "may, if it considers it just to do so" mete out any of the prescribed remedies for the purpose of avoiding as far as practicable an unjust consequence or result [2].

It appears that the choice of the word 'unjust', like Professor Peden's preference for "harsh or oppressive or unconscionable or unjust" [3], is intended to confer on the courts a "new and wide discretion" [4] free from any predisposition towards a narrow interpretation according to existing case law.

The crux of the provision seems to be this. The court has the discretion to grant any of the remedies and if it "considers it just to do so" it must exercise its discretion for the purpose of avoiding unjust consequences. This it seems is conditional on there being an unjust contract or contractual provision in the first place. It is not explicitly stated that a contract is unjust if it is on its face substantially unfair and has been procured by some oppressive practice or circumstances. But it would seem that the impeachability of the contract procurement circumstances justifies relief from a

[3] S.7(1) of his draft Bill.
substantially harsh contract and cannot on its own be sufficient to qualify for relief.

The Act only provides that in determining whether a contract or part of it is unjust, the court is to consider the public interest and all the circumstances of the case including the consequences of compliance or breach of the whole or part of the contract. Other valid and supplementary considerations seem to focus more on the procurement of the contract and include (i) the presence or absence of material inequality in bargaining power between the parties, (ii) whether there was any prior negotiation and its practicability for the purpose of modifying the contract, (iii) the presence or absence of provisions which are unreasonably difficult to comply with or not reasonably necessary for the protection of the legitimate interests of any party, (iv) the inability of any party other than a corporation or his representative to protect himself because of his age or the state of his physical or mental capacity, (v) the parties' relative economic status, (vi) the forms of contract, (vii) the availability of independent legal advice, (viii) the use of unfair tactics or pressure on the party seeking relief, (ix) and generally the commercial or other setting, purpose and effect of the contract [1]. The effect of the Act is finally secured by making it incompetent for a party to waive his rights under it, by making void any attempt to exclude, restrict, or modify its application [2], and by making such latter attempts in certain circumstances an offence liable to a penalty of not more than $2,000 [3].

[2] S.17(1) and (2).
It must be obvious by now that (quite curiously, the same provision) s.7, vests in the court two types of discretion and on two levels. It has a broad discretion guided by some supplementary guidelines, to decide if a contract is unjust. It also has a discretion whether or not to grant relief after a contract has been found to be unjust. S.9(5) confirms this:

In determining whether it is just to grant relief in respect of a contract or a provision of a contract that is found to be unjust, the Court may have regard to the conduct of the parties to the proceedings in relation to the performance of the contract since it was made."

A remedy need not follow from a finding that a contract is unjust. It is only available if the court "considers it just" to grant it. If it decides in the affirmative then any remedy chosen must be for the purpose of avoiding as far as possible an unjust consequence. This anticipates that an unfair contract obtained in oppressive conditions may not result in unfair consequences to the complainant. But the Act does not suggest in what circumstances a court may consider it just to give no remedy to an aggrieved party to an unjust contract.

To ensure that the courts do not consider "hardships befalling a party...which are unrelated to the contractual provisions or their implementation" a contract must be found to be unjust at the time when it is made [1]. But the effect of the strict time stipulation goes further and prevents the court from taking into consideration the conduct of the performer, however culpable, in any purported performance of the contract. In other words, the court cannot police the unfair or unjust use of contractual provisions where

there is no unjust conduct or circumstance accompanying the conclusion of the contract. The conduct of the parties in relation to the performance of the contract is only relevant to the court's decision on whether relief will be granted after a contract has been found to be unjust [1].

Consequently, like the U.C.T.A., the Contracts Review Act 1980 does not provide for the problem of when a performer may exclude liability for his own avoidable misperformance. On this question the draft Bill of the Law Reform (Harsh and Unconscionable Contracts) Ordinance 1976 (A.C.T.) imposes no similar constraint. Thus it leaves it open to the court to consider harsh consequences caused in part at least by extraneous changes in circumstances which are unprovided for by the contractual provisions, as well as the conduct of the performer in performing the contract. In which case the Bill may well have incorporated the role of fundamental breach giving it statutory form.

7. Conclusion

Quite clearly, then, English contract law still works with the notions of reasonableness and unconscionability in addition to that of fundamental breach. Some of their overlapping criteria will more naturally attach to one notion rather than to another. As we have indicated earlier, reasonableness is likely to be overshadowed by unconscionability. The same is not true in respect of fundamental breach. However malleable the notion of unconscionability may be, it cannot completely replace fundamental breach. Even in a sale of goods it may be difficult to say that a contract is unconscionable when what

is desired is to prevent risks of honest mistake from being passed to the buyer. Wallis v. Pratt shows at least that even though certain clauses cannot be impugned on the ground of unconscionability or unfairness, a notion of fundamental breach, by contrast, does allow us to open up questions of how the seller should perform the contract; whether his misperformance, not being based on an honest mistake, was nevertheless justifiable, or what degree of culpable negligence ought to bar the operation of an exception clause. Thus fundamental breach can still indicate that the seller should be made to carry all such risks of his own misperformance which he is in the best position to assume, and that he should make sure and take such measures as to ensure that what he delivers is the right kind of goods, for against such misdelivery the buyer can take no precaution. In this light one can say that unconscionability and fundamental breach are really materially distinct concepts.

The crucial problem of fundamental breach, we now know concerns when a performer may protect himself against his own avoidable and culpable misperformance with an exception clause. The doctrine thus adjusts particular kinds of performance-related risks. When seen in a broader historical perspective, the development of fundamental breach represents the most difficult compromise yet between the strict approach and the conflicting principle that adjusts the exchange relationship between contracting parties. Although judicial expositions of fundamental breach have led to perplexing reasons and confusing results, we have extrapolated from the cases patterns of performance-related risks in different types of contracts which have overridden exception clauses which prima facie cover them. By the time of Karsales v. Wallis, there were already in the different contracts of bailment, towage and sale of goods, minimum standards of
industry or care which were required of a party when he performed his
contractual obligations. Subsequently, and even as the House of Lords
strayed into a debate on superficial issues, the facts in
Suisse Atlantique posed a new problem of wilful breach resulting in
substantial loss. In the main post-Suisse Atlantique cases, one
discerns notions of negligent misperformance which only vaguely
resemble fault in tort and which take into account factors such as
insurance and loss distribution. It is believed that we have, in the
spectrum of avoidable and culpable misperformance amounting to
fundamental breach, the beginnings of important ideas and indicia for
further and more sophisticated distinctions between qualities of
contractual behaviour and perhaps, the germs of a notion of
contractual negligence.

There is, admittedly, no reason why the notion of
unconscionability cannot be enlarged to include also the role of
fundamental breach in the adjustment of performance-related risks.
This is what the draft Bill of the Law Reform (Harsh and
Unconscionable Contracts) Ordinance 1976 (A.C.T.) does in effect. The
disadvantage, however, is that unconscionability misdescribes the
issue and does not direct attention to the crucial problem, namely,
the adjustment of risks of certain types of misperformance.

Moreover, any attempt to enlarge the notion of
unconscionability will, it seems, have to be introduced by statute.
Here other questions, including the suitable style of legislation,
arise. How efficacious is, for instance, the approach adopted by the
Contracts Review Act 1980 for such a purpose? It would seem that the
Contracts Review Act 1980, which follows s.2:302 of the U.C.C. in
approach rather than the U.C.T.A., is open to many of the criticisms
to which s.2:302 is subject. These criticisms are mainly directed at
the broad discretion vested in the judges and the anticipated
uncertainty and lack of predictability that is said to result from
it [1]. The controversy is by no means settled.

Clause" (1967) 115 U.Pa.L.Rev. 485. According to Leff, who is
probably the most prominent critic of s.2:302, the expression
'unconscionable' is so void of real referents that s.2:302
ultimately 'says nothing with words'. In its defence, Ellinghaus
insists that there are sufficient real referents in existence and
that unconscionability like 'good faith' and 'reasonableness' is
a residual concept which should not have a structured framework
that may endanger its primary intended advantage - its
flexibility: "In Defence of Unconscionability" (1969) 78 Yale
L.J. 757; see also Sutton, K.C., "Let the Seller Beware: Recent
Developments in Australia" (1973) 10 Ottawa L.Rev. 35, at p.46,
thinks the vague concept of unconscionability is the lesser of
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