DISCHARGE OF CONTRACTUAL OBLIGATIONS

for failure of condition

Jordan English

TABLE OF CONTENTS

Chapter 6: Frustration

Chapter 7: Common Mistake

Chapter 8: Anticipatory Breach

CHAPTER 1: INTRODUCTION

INTRODUCTION

1.1 This book examines situations in which parties are discharged from their contractual obligations for reasons other than performance of those obligations. It explores cases involving breach, cases of frustration, and cases of common mistake and asks why parties are discharged from their obligations to perform. The core claim is that each of these seemingly disparate forms of discharge is in fact explicable as an instance of failure of condition. The reason one or both parties are discharged from their obligations to perform in such cases is that their obligations were expressly or implicitly conditional upon the existence of particular facts or the occurrence of particular events, which do not exist or have not occurred. To say that an obligation to perform is conditional means either that it will not fall due unless a particular fact exists or a particular event occurs (conditions precedent or concurrent conditions) or, if an immediate duty of performance has arisen, that duty will be extinguished if a particular fact exists or a particular event occurs (conditions subsequent).

1.2 For many, this claim will not be new. Various arguments have been made in the past that discharge following breach,[1] frustration,[2] and common mistake[3] can be explained as instances of failure of condition. This is the way

---

[1] Most importantly, AM Shea, 'Discharge from Performance of Contracts by Failure of Condition' (1979) 42 Modern Law Review 623; AM Shea, *Analytical Problems of Discharge of Contracts on Breach* (DPhil Thesis, University of Oxford 1977). See also Charles Bruce Morison, *Rescission of Contracts: A Treatise on the Principles Governing the Rescission, Discharge, Avoidance and Dissolution of Contracts* (Stevens & Haynes 1916) 5, 18–22; FMB Reynolds, 'Warranty, Condition and Fundamental Term' (1963) 79 Law Quarterly Review 534; Francis Dawson, 'Metaphors and Anticipatory Breach of Contract' (1981) 40 Cambridge Law Journal 83, 87–90; FMB Reynolds, 'Discharge of Contract by Breach' (1981) 97 Law Quarterly Review 541; Robert Bradgate, 'Termination for Breach' in John Birds, Robert Bradgate and Charlotte Villiers (eds), *Termination of Contracts* (Wiley Chancery 1995) 15.

[2] JC Smith, 'Contracts—Mistake, Frustration and Implied Terms' (1994) 110 Law Quarterly Review 400, 402–403; Stephen A Smith, *Contract Theory* (Oxford University Press 2004) 374; Jonathan Morgan, 'Common Mistake in Contract: Rare Success and Common Misapprehensions' (2018) 77 Cambridge Law Journal 559, 568; Paul S Davies, *JC Smith's Law of Contract* (3rd edn, Oxford University Press 2021) 353–354.

[3] S Martin Leake, *A Digest of Principles of the Law of Contracts* (3rd edn, Stevens and Sons Ltd 1892) 282–290; CJ Slade, 'The Myth of Mistake in the English Law of Contract' (1954) 70 Law Quarterly Review 385, 396–403; KO Shatwell, 'The Supposed Doctrine of Mistake in Contract: A Comedy of Errors' (1955) 33 Canadian Bar Review 164, 178–182; Arthur L Goodhart, 'Mistake and Frustration in English Contract Law' in *Aequitas und Bona Fides—Festgabe zum 70 Geburtstag von August Simonius* (Helbing & Lichtenhahn 1955) 99; Smith, 'Contracts—Mistake, Frustration and Implied Terms' (n 2); Smith, *Contract Theory* (n 2) 297–304;

in which these instances of discharge were understood for hundreds of years. But few people subscribe to this view today. Instead, the modern view is that English law has a doctrine of termination for breach,[4] a doctrine of frustration, and a doctrine of common mistake, none of which depends on the conditional nature of obligations to perform. These doctrines are often seen as independent of one another, and where links based on their historical roots have been drawn between them, modern scholars have sometimes said that such links are 'misleading'.[5] The result is that we have three seemingly disparate doctrines all in want of a justification and each giving rise to its own difficult doctrinal problems.

1.3 This book takes aim at this modern orthodoxy. To repeat, the claim is not that these are three separate and unrelated instances of discharge, but rather that the reason for discharge in each case is a failure of the conditions that qualify the parties' respective obligations to perform. Insofar as the doctrine of termination for breach is concerned, it will have to be conceded that the 'power to terminate' model now coexists alongside the 'failure of condition' model. But, as we will see, the power to terminate model has created a number of problems in practice that do not arise on the failure of condition model. It also means that English law has lost sight of the relationship between these different instances of discharge and the important distinction between promises and conditions.

1.4 As for frustration and common mistake, this book contends that the failure of condition model remains the best explanation of these doctrines. The reasons given for rejecting the implied condition view of frustration and common mistake—ie that both of these doctrines can be explained as instances in which the parties' obligations, as a matter of construction, were implicitly conditional—are 'superficial'[6] and the arguments made have tended to attack a straw man.

1.5 Ultimately, this book sets out to prove that failure of condition is a basis for the discharge of contractual obligations in cases involving breach and the basis for discharge in cases of frustration and common mistake. And if this

---

Morgan (n 2). For the similar, if not identical, view that it is a matter of the construction of the agreement see: PS Atiyah, '*Couturier v Hastie* and the Sale of Non-existent Goods' (1957) 73 Law Quarterly Review 340; PS Atiyah and FAR Bennion, 'Mistake in the Construction of Contracts' (1961) 24 Modern Law Review 421; Robert Stevens, 'Objectivity, Mistake and the Parol Evidence Rule' in Andrew Burrows and Edwin Peel (eds), *Contract Terms* (Oxford University Press 2007) 102, 105–106; Robert Stevens, 'The Meaning of Words and the Intentions of Persons' in Simone Degeling, James Edelman, and James Goudkamp (eds), *Contract in Commercial Law* (Lawbook Co 2016) 167, 178–179.

[4] Or 'after' breach: Frederick Wilmot-Smith, 'Termination After Breach' (2018) 134 Law Quarterly Review 307.

[5] See, eg, Andrew Burrows, *A Casebook on Contract* (7th edn, Hart Publishing 2020) 361.

[6] Morgan (n 2) 561.

view were given more emphasis in the modern law, many of the problems faced today in the discharge of contractual obligations would fall away.

OUTLINE

1.6 Professor Peter Birks used to say that legal writing should not be like a 'mystery novel'; '[t]he reader should not have to wait until the end when, with a miraculous twist, the answer is produced'.[7] In that spirit, this first chapter aims to provide an overview of the claims made in this book, explain the key concepts, and persuade the reader why the argument matters.

Discharge following breach

1.7 Chapters 2 and 3 are devoted to the claim that the best explanation of discharge following breach is that the innocent party is discharged because their obligation to perform was conditional, and the condition has failed. Chapter 2 (Promissory Conditions) focuses on cases where one party is said to have 'breached a condition'.[8] This chapter explains how it is that the modern law came to distinguish between a promissory condition in the sense of a duty the performance of which is a condition precedent or concurrent condition, and a promissory condition in the sense of an essential term breach of which gives rise to a power to terminate. The chapter shows how, historically, there was no difference between a promissory condition and a promissory condition precedent (or concurrent condition). Rather, as traditionally understood, the phrase 'promissory condition' referred simultaneously to a promise to ensure that some event occurred (or that some fact existed) and to a condition that made the other party's immediate duty to perform depend on that promise being performed. Where one party failed to perform such a promise, the non-occurrence of the condition prevented the performance of the other party's obligation falling due and, where the condition could no longer occur, the condition 'failed'. The result of this was that, unless the condition was waived, the performance of the obligation could never become due and in this sense the party was 'discharged'[9] from their obligation to perform on account of the failure of the condition.

1.8 While accepting that the positive law, through a series of missteps and loose language, has come to recognise a power to terminate for breach of a condition, and that it may now be too late to turn back, this chapter highlights the problems that have arisen from this way of thinking, identifies the

---

[7] Stevens, 'The Meaning of Words and the Intentions of Persons' (n 3) 167. See also James Penner, 'Resulting Trusts and Enrichment: Three Controversies' in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing 2010) 237, 238.
[8] On this loose and inaccurate phrase, see [2.XX].
[9] See [1.XX].

questions that are not being asked as a result, and provides a way forward that can provide just resolutions to contractual disputes.

1.9 Chapter 3 (The Substantial-Benefit Condition) addresses cases involving discharge following breach of so-called 'innominate' or 'intermediate' terms—the form of discharge commonly associated with *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*.[10] It argues that this is also explicable as an instance of failure of condition, and that the best explanation of this form of discharge is the failure of what is termed the 'substantial-benefit condition': the condition that renders one party's obligation to perform conditional on that party receiving 'substantially the whole benefit which it was the intention of the parties as expressed in the contract that [they] should obtain as the consideration for performing those undertakings'.[11] This condition is sometimes referred to as the principle of 'failure of consideration'. As this chapter explains, the substantial-benefit condition has also been deployed in a great number of other cases, including those involving breach and not involving breach, in the context of instalment contracts, and also in the context of the so-called doctrine of substantial performance.

Waiver of conditions

1.10 A core claim in this book is that failure of a condition operates to discharge a party from their obligation to perform unless they waive (or have waived) the condition. Chapters 4 and 5 therefore consider what is meant by waiver and the circumstances in which conditions can (and cannot) be waived. Given that many doubt the existence of a separate body of law concerned with waiver, Chapter 4 (Waiver of Conditions I—Election and Estoppel) makes the argument that there is a distinct area of law concerned with waiver of conditions that is broader than 'waiver by election' and 'waiver by estoppel'. The chapter also argues that there has been a modern tendency to subsume cases of waiver of conditions into the doctrine of promissory estoppel, but the integration has not been altogether satisfactory. Chapter 5 (Waiver of Conditions II—Prevention and Repudiation) considers the waiver of conditions by prevention and on a repudiation. It argues that there is a distinction between the principle of waiver of conditions, which English law does recognise, and the 'fictional fulfilment' of conditions, which English law does not (or at least should not) recognise. Moreover, it argues that not all conditions can be waived, at least not for all purposes. In particular, a condition cannot be waived for the purpose of an action for the price if the performance of the condition is the consideration for the promise it qualifies.

[10] [1962] 2 QB 26.
[11] ibid 66.

Frustration

1.11 Chapter 6 (Frustration) defends the view that the so-called doctrine of frustration is also an instance of discharge for failure of condition and can be explained on the basis of implied conditions. It considers the development of the various conditions in play in cases of frustration and explains that although both parties are discharged, it is often the case that each party is discharged for failure of a different condition. This chapter also criticises the development of a unified doctrine of frustration. Most importantly, Chapter 6 responds to common objections to the implied condition view and argues that the implied condition view has often been misunderstood.

Common mistake

1.12 Chapter 7 (Common Mistake) argues that the doctrine of common mistake is also an instance of discharge for failure of condition and explicable in terms of implied conditions. More precisely, this chapter argues that there is no doctrine of common mistake concerned with the parties' subjective states of mind that is capable of rendering a contract 'void'. Rather, where the obligations of each party are conditional on the existence of particular facts or the occurrence of particular events, and those facts do not exist or the events cannot occur at the time the agreement is made, the parties are discharged from their obligations *ab initio* or, to put it another way, their obligations are 'inoperative'.[12] It will be seen that the notion that there is a subjective doctrine of mistake (which is what the word 'mistake' most naturally connotes) is inconsistent with English law's objective approach to contract law formation and interpretation.

Anticipatory breach

1.13 Chapter 8 (Anticipatory Breach) explores the development of and justifications for the doctrine of anticipatory breach. According to that doctrine, where one party, in advance of the time for performance, renounces their obligations under the contract or disables themselves from performing—both commonly referred to as a 'repudiation'[13]—the other party can, on 'acceptance', treat the repudiation as an event discharging the parties from their contractual obligations to perform and immediately bring an action for damages for breach of contract. The doctrine is an eminently sensible one to have but it has proven difficult, on the orthodox account, to justify it as a matter of theory. The chapter therefore considers whether a failure of

---

[12] PS Atiyah and FAR Bennion (n 3) 427.
[13] See [2.47].

condition model—and the important distinction between promises and conditions—might provide a better explanation.

1.14 Anticipatory breach is also addressed elsewhere in this book. In Chapter 2, for example, we will see how the decision in *Heyman v Darwins Ltd*[14]—a decision about anticipatory breach—has contributed to the modern orthodoxy that following 'breach of a condition' the innocent party is given a 'power to terminate'.[15] And in Chapter 5, we will see how 'long before the doctrine of anticipatory breach of contract was developed',[16] a renunciation or disablement by a promisor operated as a waiver of the conditions to that party's obligation.[17]

Restitution for failure of condition

1.15 Finally, Chapter 9 (Restitution for Failure of Condition) considers the implications of the arguments made in this book for the doctrine of failure of consideration in the law of restitution or, as it is sometimes referred to today, restitution for 'failure of condition'.[18] In particular, this chapter considers what exactly is 'conditional' in failure of condition claims and how this affects the justification for the claim.

KEY CONCEPTS

1.16 Much of the difficulty faced in this area has arisen due to the use of loose language and the fact that in English we often use the same word to describe several different things. It is therefore essential at the outset to explain what is meant when certain concepts are deployed in this book. The key concepts that are commonly deployed throughout are 'condition', 'discharge', and 'failure of condition'. The hope in defining these concepts is that the reader will always be aware of the sense in which these words are being used and that any confusion about the arguments being made in this book will be avoided. A broader hope would be to encourage lawyers, academics, and judges to be precise about the same concepts. But to borrow a statement made by Professor Arthur Corbin with a healthy dose of realism before defining 'condition' in his own contract treatise: 'however, beautiful and exact may be the usage and terminology of this book, comparatively few people will read it; and it is impossible to compel millions of contractors to conform to it'.[19]

---

[14] [1942] AC 356.
[15] See [2.XX].
[16] *Peter Turnbull & Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd* (1954) 90 CLR 235, 246.
[17] See [5.XX].
[18] Frederick Wilmot-Smith, 'Reconsidering "Total" Failure' (2013) 72 Cambridge Law Journal 414, 416.
[19] Arthur Corbin, *Corbin on Contracts: A Comprehensive Treatise on the Rules of Contract Law* (West Publishing Co 1960) vol 3A, 13 §627.

Condition: a chameleon-hued word

1.17 The word 'condition' can be used in a variety of senses depending on the context.[20] To give just four possible meanings, 'condition' can be used to refer to:

1. the terms of the deal (ie the 'conditions' of the contract);[21]

2. the state or quality of goods (ie the goods are in excellent 'condition');[22]

3. an essential term breach of which gives rise to a 'power to terminate';[23] and

4. an uncertain fact or event that qualifies an obligation (or multiple obligations) under a contract.[24]

As this short list shows, 'condition' is a 'chameleon-hued word', and 'in any closely reasoned problem, whether legal or non-legal, chameleon-hued words are a peril both to clear thought and to lucid expression'.[25]

A working definition

1.18 In order to avoid these dangers, unless otherwise stated, the word condition will be used in the fourth sense identified above to refer to an uncertain fact or event upon which the existence of an immediate duty of performance depends.[26] This is a working definition, but four points of clarification must be made.

1.19 First, '[i]t is a source of confusion of thought that the word "condition" is frequently used without exact recognition of what the supposed condition qualifies'.[27] Accordingly, to be clear, the conditions with which we are

---

[20] Samuel Stoljar once identified no less than twelve, though query how many of these overlapped: Samuel J Stoljar, 'The Contractual Concept of Condition' (1953) 69 Law Quarterly Review 485, 486–488.

[21] *Schuler AG v Wickman Machine Tools Sales Ltd* [1974] AC 235. See also Corbin (n 19) 11 §627.

[22] Sale of Goods Act 1979, s 14.

[23] See Edwin Peel, *The Law of Contract* (15th edn, Sweet & Maxwell 2020) 981 [18-043]; Ewan McKendrick, *Contract Law: Text, Cases, and Materials* (9th edn, Oxford University Press 2020) 742; Andrew Burrows, *A Restatement of the English Law of Contract* (2nd edn, Oxford University Press 2020) 118.

[24] See American Law Institute, *Restatement of the Law Second: Contracts 2d* (American Law Institute Publishers 1981) 160 §224 comment (a).

[25] Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale Law Journal 16, 29.

[26] See also to a similar, although not identical, effect: American Law Institute (n 24) 160 §224 ('[a] condition is an event, not certain to occur, which must occur, unless it non-occurrence is excused, before performance under a contract becomes due'); Corbin (n 19) 11 §627 ('an operative fact [or event], one on which the existence of some particular legal relation depends').

[27] Samuel Williston, *The Law of Contracts* (Baker, Voorhis & Co Inc 1921) vol 2, 1283 §666.

concerned qualify obligations of performance under a contract: either an obligation to perform will not fall due (condition precedent or concurrent condition)[28] or, if an obligation to perform has fallen due, the immediate duty of performance it creates will be extinguished (condition subsequent) if the condition is not fulfilled.[29]

1.20 Secondly, the language of an 'immediate duty'[30] is a deliberate attempt to distinguish between an obligation that has fallen due, and therefore calls for immediate performance, and an obligation that requires performance only at some future date. The risk of confusion is that it is common to speak of a party having a 'duty' or 'obligation' to perform even though the duty to perform will not fall due until some future date. As Corbin has observed, '[i]t is our custom, both juristic and popular, to say that a contract creates rights and duties, even though the performance is not yet due and even though some event must still occur before it becomes due'.[31] Thus, a contract entered into on 1 January to deliver a book on 10 January is said to create an obligation to deliver the book. But that obligation is one which only calls for performance on 10 January. The seller is under no immediate duty to deliver the book until 10 January.

1.21 The difference between the two is only in the level of abstraction at which the obligation is described. The risk of confusion will be avoided by distinguishing clearly between when an obligation—used in a more general sense—arises and when the duty to perform falls due. The language of an 'immediate duty' is simply a shorthand for this latter concept. Moreover, as the definition above makes clear, it is the existence of the immediate duty of performance that depends upon the fulfilment or occurrence of the condition, not the existence of the general obligation itself. Further, when referring to the 'existence' of an immediate duty of performance, what is meant is the creation of that duty or its continued existence. The former reflects the fact that often, a failure of condition will prevent an obligation from falling due in the first place.

1.22 The third clarification is that '[n]ot infrequently a promise is subject to more than one condition'.[32] Thus in the context of a sale of goods by sample, the condition of the buyer's obligation to accept and pay for the goods may be both delivery of the goods and that the goods correspond with the sample.

---

[28] See American Law Institute (n 24) 165 §225.

[29] See [1.XX] below. Technically, it can be said that in cases of conditions subsequent the party is discharged for the fulfilment of the condition rather than its failure. But this is just a matter of how the condition is phrased.

[30] For an example of this language see American Law Institute (n 24) 189 §230; Corbin (n 19) 5 §625.

[31] Corbin (n 19) 5 §625.

[32] Williston (n 27) 1308 §677.

This proposition—that obligations in a contract may be subject to multiple conditions—is perhaps trite, but it appears, until recently, to have been forgotten in some contexts.[33]

1.23 Fourth and finally, as the definition makes clear, when using the word 'condition' we are concerned with uncertain facts or events and not facts that are known with certainty to exist at the time of contracting or events that in the ordinary course of things are certain to occur. It follows that 'the mere passage of time, as to which there is no uncertainty, is not a condition and a duty is unconditional if nothing but the passage of time is necessary to give rise to a duty of performance'.[34] In a similar vein, an obligation to perform 'if the sun rises tomorrow' would be treated as absolute and unconditional—this is an event which can be treated as certain to occur.

1.24 On this approach, an obligation to pay a sum of money in 30 days would not be described as subject to a condition that 30 days has passed.[35] Of course, this does not mean that the immediate duty of performance arises before 30 days has passed. In this sense, what we might call a 'temporal' delay, is similar to a condition in that until the time has passed there is no immediate duty to perform. The only difference is that the passage of time is certain, and conditions are concerned with uncertain events. But this distinction is the one that best accords with both the judicial and the ordinary usage of the word 'condition' and for this reason it is maintained in this book. It is also one of ancient providence: classical Roman law drew a distinction between *condicio* (a condition), where the occurrence of a future event was uncertain, and *dies* (a time clause), where the occurrence of the future event was certain to occur.[36]

Conditions precedent, conditions subsequent, and concurrent conditions

1.25 Conditions are often divided up into 'conditions precedent' and 'conditions subsequent'.[37] The words 'precedent' and 'subsequent' 'express [a] relationship in time' between two things.[38] We know that the first of these is the uncertain fact or event that constitutes the condition. The second, as

---

[33] *School Facility Management Ltd v Governing Body of Christ The King College & Isle of Wight Council* [2020] EWHC 1118 (Comm) [421]. See Wilmot-Smith (n 18) 432–434.

[34] American Law Institute (n 24) 161 §224 comment (b).

[35] Corbin (n 19) 7 §626.

[36] Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press 1996) 741; JAC Thomas, *Textbook of Roman Law* (reprint edn, Philip McDonald 2013) 249–255. For *dies*, when the event occurred did not need to be certain (eg when A dies), only that it was certain to occur eventually. A distinction was drawn between *dies certus*, where it was known when the event would occur, and *dies incertus quando*, where it was unknown when the event would occur, but it was inevitable that it would: Zimmerman (n 36) 741; Thomas (n 36) 250.

[37] As we shall see, there is a third category of 'concurrent conditions', but these are just a particular type of mutual conditions precedent.

[38] Corbin (n 19) 15 §628.

outlined above, is the immediate duty of performance. 'Precedent' and 'subsequent' therefore express a relationship between the uncertain fact or event and the immediate duty of performance.

1.26 Where a fact must exist or an event must occur before an immediate duty of performance will arise, it can be referred to as a condition precedent.[39] Thus Corbin, adopting a similar definition to that used here, once said: 'Conditions precedent… are those facts and events, occurring subsequently to the making of a valid contract, that must exist or occur before there is a right to immediate performance…'[40] As an example, a seller's obligation to deliver goods may be subject to a condition precedent that the buyer open a confirmed letter of credit.[41] The seller's immediate duty to deliver the goods will not arise, absent waiver, unless the buyer opens a confirmed letter of credit.

1.27 By contrast, where the existence of a fact or the occurrence of an event after the immediate duty of performance has arisen causes that duty to be extinguished, it can be referred to as a condition subsequent.[42] 'Such conditions are very rare'[43] (or more accurately, discussed very rarely) in cases dealing with the discharge of contractual obligations but, as we will see in Chapter 9, they may be able to explain several instances of restitution for failure of condition. Nonetheless, even in the discharge context obvious examples can be given. If a contract provides for a buyer of goods to return them upon the occurrence of particular events or if particular facts exist, ordinarily there will be an immediate duty to pay upon receiving the goods (unless credit has been given), but this immediate duty can be extinguished upon returning the goods.[44]

1.28 It should be noted that insofar as conditions subsequent are uncertain facts or events that extinguish an immediate duty of performance, technically it can be said that in such cases the party is discharged for the fulfilment of the condition rather than its failure. But it is possible to express conditions subsequent in the form that the continued existence of an immediate duty to perform is subject to a condition that an uncertain fact not exist or an uncertain event not occur. And on this view, there is a failure of the condition whenever the fact exists or the event occurs.

1.29 The third category of conditions—concurrent conditions—are in fact a subset of conditions precedent that arose due to the need to deal with cases

---

[39] Williston (n 27) 1284 §666a.
[40] Corbin (n 19) 16 §628.
[41] See *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 QB 297, 304 at [1.XX] below.
[42] Corbin (n 19) 17 §627.
[43] Williston (n 27) 1286 §667.
[44] ibid.

of simultaneous performance, such as contracts for the conveyance of title to land. In such cases it was recognised that there would be a 'stalemate'[45] if actual performance of each party's obligation was a condition precedent to the other's obligation. Thus, from early times it was recognised that in such cases it was sufficient 'if one party was ready, and offered, to perform his part'.[46] Accordingly, where the parties' obligations are concurrently conditional, each party's obligation to perform is conditional upon the other party being ready, willing, and able to perform, rather than prior performance itself.[47]

1.30 Seen in this light, it can be seen why concurrent conditions are in fact simply mutual conditions precedent; 'concurrent' here refers not to the relationship between the uncertain fact or event and the immediate duty of performance but to the idea that the actual performances are intended to be concurrent. The relevant condition precedent is simply that each party is ready, willing, and able to perform, not that each actually perform. Indeed, it has been said that '[c]oncurrent condition is an elliptical expression for a condition precedent where performances are due at the same time'.[48] In the foundational case, *Boone v Eyre*,[49] Lord Mansfield himself spoke of 'mutual conditions, the one precedent to the other'.

Non-promissory conditions

1.31 Strictly speaking all conditions are non-promissory. This is because a condition is simply an uncertain fact or event upon which the existence of an immediate duty to perform depends. A condition is distinct from a promise (a duty). But where a condition is an uncertain fact or event that neither party has guaranteed or promised exists or will occur, it can be referred to as a 'non-promissory' condition.[50] Such conditions, sometimes referred to as 'contingent conditions',[51] operate only to prevent performance of an obligation falling due or to extinguish an existing immediate duty of performance—the non-

[45] JW Carter and C Hodgekiss, 'Conditions and Warranties: Forebears and Descendants' (1977) 8 Sydney Law Review 31, 35.

[46] *Kingston v Preston* (1773) 2 Doug 689, 691; 99 ER 436, 437–438.

[47] See Corbin (n 19) 19 §629.

[48] American Law Institute, *Restatement of the Law of Contracts* (American Law Institute Publishers 1932) 363 §251, comment (a), quoted in Corbin (n 19) 19 §629 fn 21.

[49] (1777) 1 H BL 273n, 126 ER 160n. See also Williston (n 27) 1285 §666 ('Concurrent conditions, then, do not differ from conditions precedent in the relation of time which the happening of the condition bears to liability on the contract. They are, indeed, mutual conditions precedent.').

[50] '[A] term may simply lay down a condition of one party's liability without implying also a promise to perform the condition': Francis Reynolds, 'Discharge of Contract by Breach' (1981) 97 Law Quarterly Review 541, 547.

[51] See, eg, Jack Beatson, Andrew Burrows, and John Cartwright, *Anson's Law of Contract* (31st edn, Oxford University Press 2020) 148; Peel (n 23) 70 [2-105]; Mindy Chen-Wishart, 'The Agreement' in Hugh Beale (ed), *Chitty on Contracts*, vol 1 (35th edn, Sweet & Maxwell 2023) 317, 425–426 [4-196]. This has a long pedigree: see MD Chalmers, *The Sale of Goods Act, 1893, including The Factors Acts, 1889 & 1890* (William Clowes and Sons Ltd 1894) 165.

occurrence or non-fulfilment of such conditions, not also being a breach of duty, does not give rise to an action for breach.[52]

1.32 It was noted above that conditions qualify obligations to perform under a contract. It has on occasion been suggested, however, that in some cases the effect of the non-occurrence or non-fulfilment of a non-promissory condition is to 'prevent the formation of any immediately binding contract'.[53] Thus in *Trans Trust SPRL v Danubian Trading Co Ltd*,[54] Denning LJ considered a term of the contract that the buyer should open a confirmed credit in favour of the seller and said:

> What is the legal position of such a stipulation? Sometimes it is a condition precedent to the formation of a contract, that is, it is a condition which must be fulfilled before any contract is concluded at all. In those cases the stipulation 'subject to the opening of a credit' is rather like a stipulation 'subject to contract.' If no credit is provided, there is no contract between the parties.

1.33 However, the analogy between these two ('subject to the opening of a credit' and 'subject to contract') is imperfect,[55] for in the case of a non-promissory condition that the buyer open a letter of credit, the condition qualifies the parties' obligations of performance. Its non-occurrence prevents such obligations from falling due, but there is no doubt that there is a valid contract: 'The fact that no liability on either side can arise until the happening of a condition does not, however, make the validity of the contract depend upon its happening. … each is irrevocably bound by a contract from the outset.'[56] By contrast, in the case of a stipulation 'subject to contract' there is no condition upon which the existence of the parties' immediate duties of performance depend—there is simply 'neither offer nor acceptance, and no contract is formed'.[57]

1.34 A 'case often cited'[58] for the proposition that the non-occurrence of a condition can in some cases prevent a contract from being formed is *Pym v Campbell*.[59] The plaintiff, in the course of negotiations to sell to the defendants a three-eighth share in an invention, signed a written document purporting to be an agreement for the sale of the share in the invention.

---

[52] JL Montrose, 'Conditions and Promises' (1960) 23 Modern Law Review 434, 485; Reynolds (n 50) 547.

[53] Beatson, Burrows, and Cartwright (n 51) 148.

[54] *Trans Trust* (n 41) 304.

[55] Ewan McKendrick, 'Express Terms' in Hugh Beale (ed), *Chitty on Contracts* (33rd edn, Sweet & Maxwell 2018) vol 1 1013, 1027 [13-028] fn 115 (this footnote appears not to have been repeated in the later editions); Reynolds, 'Warranty, Condition and Fundamental Term' (n 1) 536.

[56] Williston (n 27) 1283–1284 §666.

[57] Reynolds, 'Warranty, Condition and Fundamental Term' (n 1) 536. See also Stoljar (n 20) 490.

[58] Reynolds, 'Warranty, Condition and Fundamental Term' (n 1) 536.

[59] (1856) 6 El & Bl 370, 119 ER 903; cited for this proposition in Beatson, Burrows, and Cartwright (n 51) 148.

Despite being absolute and unconditional on its face, the oral understanding of the parties was that its operation should be conditional upon the approval of the invention by a particular third party. The third party did not approve. On an action by the plaintiff for the price, Lord Campbell CJ, Erle, and Crompton JJ held that there was 'never any agreement at all'.[60]

1.35 As various commentators have observed, this surely is to introduce conceptual confusion. For it seems that in a case like *Pym v Campbell* there was an agreement—the parties had agreed upon all essential terms—but the majority of the obligations it created were conditional upon the approval by the third party.[61] Moreover, as suggested by Professor Samuel Stoljar, 'it must be perfectly clear that there was in fact a contract; for had the plaintiff tried to revoke his offer before the third party's approval, he would have been guilty of an anticipatory breach'.[62]

1.36 The reason the distinction between 'no agreement' and 'an agreement that created conditional obligations' mattered in *Pym v Campbell* is because of the argument that the parol evidence rule would not admit evidence of an oral agreement that contradicted the terms of the written agreement. Erle J said: 'The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to shew that there is not an agreement at all is admissible.'[63] In light of this, *Pym v Campbell* is probably better understood as 'a striking example of yet another exception to the parol evidence rule'.[64]

1.37 Conditions to the formation of a contract are sometimes referred to as 'external conditions' in contrast to 'internal conditions', which are conditions that qualify obligations to perform.[65] In this book, 'condition' will only be used in the latter sense. Indeed, insofar as external conditions are said to be 'all those operative facts without which a contract can neither exist nor survive',[66] they are only conditions of a contract in the same sense that offer and acceptance are 'conditions' of contract formation. The conditions with which we are

---

[60] *Pym v Campbell* (1856) 6 El & Bl 370, 373; 119 ER 903, 904 (Erle J).

[61] As argued by Arthur Corbin, 'Conditions in the Law of Contract' (1919) 8 Yale Law Journal 739, 766–767; Stoljar (n 20) 492; Corbin (n 19) 111 §649; Smith (n 2) 410. See also Reynolds, 'Warranty, Condition and Fundamental Term' (n 1) 537, albeit equivocal on which view is correct.

[62] Stoljar (n 20) 492. See the similar argument in Smith (n 2) 410 ('The seller was surely bound to give [the third party] the opportunity to inspect the invention. He would have been in breach of an implied term of the agreement if he had refused to do so or if he had sold the invention to a [different person] before [the third party] had had a reasonable opportunity to inspect it.').

[63] *Pym v Campbell* (1856) 6 El & Bl 370, 374; 119 ER 903, 905.

[64] Stoljar (n 20) 492. See also Corbin (n 61) 766–767.

[65] See the discussion in Stoljar (n 20) 489–492.

[66] ibid 489.

concerned are those which qualify obligations to perform, not the existence of the contract itself.

Promissory conditions

1.38 As noted above, all conditions, strictly speaking, are non-promissory. But sometimes a term of a contract may have a 'double operation'[67] and create both a duty and a condition. As Scrutton LJ explained in *Westacott v Hahn*,[68] '[a] condition precedent is a limitation or qualification of another term of a contract, while it may also be itself a term of a contract whose breach gives a cause of action'.[69] In such cases, where the same term in the contract creates both a promise and a condition, it may conveniently be labelled a 'promissory condition'.[70]

1.39 The key point about promissory conditions is that the promise (duty) and the condition are completely co-extensive and, because of this, breach of the duty will always cause the condition to fail. To give an example, if A promises to deliver goods to B that correspond with the description, A's duty is to deliver goods that correspond with the description, and performance of that duty exactly is the condition of B's obligation to pay the price. Hence the label 'promissory condition'—the promise (duty) and condition are co-extensive.

The distinction between promises and conditions

1.40 A recurring theme throughout this book is that the nature of discharge following breach, frustration, and common mistake has been obscured in English law by a failure to draw a distinction between promises (duties) and conditions.[71] Professor Samuel Williston, commenting on the conflation of the two concepts in English contract law books, once wrote: 'The difference between conditions and promises is so radical in its consequence that there is no excuse for a nomenclature which fails to recognize the distinction.'[72]

1.41 The distinction is important because while a breach of duty always gives rise to an action for damages, it does not necessarily discharge a party from their obligation to perform.[73] This is because discharge on the failure of

---

[67] Corbin (n 61) 745; Corbin (n 19) 28 §633.
[68] [1918] 1 KB 495, 513.
[69] Note, however, that here Scrutton LJ appears to be using the word 'term' synonymous with 'duty' or 'promise'. There is no reason why a condition could not be expressly stated in the contract, and therefore a 'term', even though it is non-promissory.
[70] Corbin (n 61) 745; Corbin (n 19) 28 §633.
[71] See Williston (n 27) 1282–1283 §665; Arthur Corbin, 'Supervening Impossibility of Performing Conditions Precedent' (1922) 22 Columbia Law Review 421, 423; Corbin (n 19) 25–36 §633–634; Montrose (n 52) 484–485.
[72] Williston (n 27) 1282 §665.
[73] Sir William R Anson, *Principles of the English Law of Contract* (1st edn, Clarendon Press 1879) 266.

condition model depends not upon a breach of duty, but upon the failure of a condition. Indeed, it is not even necessary for there to be a breach of duty for a condition to fail. In cases of frustration or common mistake, there is no breach of duty, only relevant failures of conditions.

1.42 An example can be given to illustrate the point. Suppose that on 1 January C contracts with D for the use of a music hall for a week at the end of the month and promises to pay £100.[74] Then consider the following three scenarios:

1. On 10 January, D burns the music hall down.

2. On 10 January, the music hall is struck by lightning and burns down.

3. On 1 January, an hour before the contract is signed, the music hall is struck by lightning and burns down.

1.43 According to modern orthodoxy, English law has three distinct doctrines to deal with each of these three scenarios:

1 In the first scenario, C is given a power to terminate either on the basis that D has breached a 'condition', any breach of which automatically gives rise to a power to terminate,[75] or on the basis that D has breached an 'innominate term', the effect of which has been to deprive C of substantially the whole benefit of the contract.[76]

2 In the second scenario, the parties are discharged by the 'doctrine' of frustration.[77]

3 In the third, the contract is said to be 'void' for common mistake.[78]

1.44 By contrast, on the failure of condition model put forward in this book, the reason C is discharged is the same in each case. The effect of the music hall burning down is that C has been deprived of substantially the whole benefit of the contract. The substantial-benefit condition has failed.[79] In the first scenario, it failed due to a breach of duty by D. The only relevance of this, however, is that this breach of duty also gives rise to an action for damages. It is still the failure of the condition that discharges C.

---

[74] This example is taken from seminars in the University of Oxford Commercial Remedies BCL/MJur course run by Professor Robert Stevens and is itself adapted from *Taylor v Caldwell* (1863) 3 B & S 826, 122 ER 309.
[75] See, eg, *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 849.
[76] *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, 66.
[77] *Taylor v Caldwell* (1863) 3 B & S 826, 122 ER 309.
[78] *Bell v Lever Brothers Ltd* [1932] AC 161.
[79] See Chapter 3.

1.45 In the second and third scenarios, this condition failed without a breach of duty. But from the perspective of C's obligation, the result is the same: '[C] has not got what [they] bargained for and need not perform.'[80] Note, however, that D is not discharged for the same reason. D is discharged either because they expressly excepted such events from the scope of their contractual duty[81] or because D's obligation to perform was implicitly conditional upon it being possible to perform.[82]

1.46 When seen in this light, the relationship between these three instances becomes clear. The only relevant difference between the first scenario on the one hand and the second and third scenarios on the other is the existence of a breach of duty. Had D's promise to perform been absolute insofar as the existence of the music hall was concerned, then there would be no difference between the three scenarios.[83] And in all three scenarios C would still be discharged from their obligation to perform on account of the failure of the substantial-benefit condition unless C had also promised to perform absolutely.[84]

1.47 As for the second and third scenarios, the difference here is only a matter of timing.[85] If the obligations of the parties are conditional, then whether the contract never imposes any obligations upon the parties (common mistake) or whether it does but some or all are subsequently discharged (frustration) is simply a matter of when the fact ceases to exist or the event can no longer occur. The short point is that these are not three distinct and unrelated doctrines. Each is an instance of failure of condition.

1.48 This is not the only benefit of drawing the distinction between promises and conditions. Even in the case of promissory conditions, the distinction remains vital. It allows us to see that in cases involving breach of a 'promissory condition' (more accurately, the breach of a promise the performance of which is a condition), what discharges one party from their obligation to perform is not the breach of duty, but the non-occurrence of the condition of that party's obligation. Unfortunately, English law lost sight of

---

[80] Samuel Williston, *A Treatise on the Law of Contracts* (Walter HE Jaeger ed, 3rd edn, Baker, Voorhis & Co Inc 1962) vol 6, 131–132 §838.
[81] See, eg, *Jackson v Union Marine Insurance Co* (1874) LR 10 CP 125. See further [3.XX] and [6.XX].
[82] See, eg, *Taylor v Caldwell* (1863) 3 B & S 826, 122 ER 309. See [6.XX].
[83] See, eg, *Taylor v Caldwell* (1863) 3 B & S 826, 833; 122 ER 309, 312; *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377.
[84] See [6.XX] and [7.XX].
[85] See the discussion at [7.XX].

this distinction when it began talking about 'breach of a condition'.[86] Strictly speaking a condition cannot be breached; only a duty can be breached.[87]

1.49 Moreover, as we will see when discussing the substantial-benefit condition in Chapter 3, this is a condition which can fail in both cases involving breach and cases not involving breach. The reason it can do so is that, unlike promissory conditions, the substantial-benefit condition is not completely co-extensive with any particular duty. This means that the same duty can be breached in a way that does and in a way that does not cause the substantial-benefit condition to fail. And the substantial-benefit condition can fail in cases where there is no breach at all. This can only be seen, however, when a clear distinction is made between promises (duties) and conditions.

The meaning of 'discharge' and 'failure of condition'

1.50 In order to understand the sense in which 'discharge' and 'failure of condition' are used in this book, it is necessary to discuss the two possible effects of the non-occurrence of a condition precedent (or concurrent condition): 'The first effect always follows and the second often does.'[88] First, in all cases, unless the condition is waived, the non-occurrence of a condition will prevent the performance of the obligation from becoming due—ie it will prevent the immediate duty of performance from arising.[89] Where the condition might still occur, this is often referred to as the 'suspension' of the duty (although note that, in truth, the immediate duty of performance has not arisen in the first place). In these cases, the subsequent occurrence of the condition will cause the immediate duty of performance to arise.

1.51 Secondly, in some cases where the condition can no longer occur,[90] the condition can be said to have 'failed'—the performance of the obligation can never become due unless the condition is waived. In such cases, the party who was to perform the obligation is permanently 'discharged' for failure of the condition.[91] This is what is meant in this book when it is said that one party is discharged from their obligation to perform on account of the failure of a condition. 'Discharge' is reserved for cases where the condition has failed and so can no longer occur.

---

[86] See [2.XX].
[87] Corbin (n 71) 423.
[88] See American Law Institute (n 24) 165 §225 comment (a).
[89] ibid.
[90] The condition may be unable to occur because it is impossible for it to do so (eg in a contract for the delivery of goods where delivery is the condition precedent to payment and the goods have been destroyed) or because in some circumstances, namely the doctrine of anticipatory breach, one party says that they will not perform (renunciation) and the law permits the other party to hold the renouncing party to their word that they will not perform: see [8.XX].
[91] This is the language used in the second restatement: American Law Institute (n 24) 165 §225.

1.52 The above applies to conditions precedent and concurrent conditions. In the case of conditions subsequent, 'discharged' is used to refer to situations where an immediate duty of performance has arisen but is extinguished due to the occurrence of the event. Subject to the qualification at [1.XX] above, this can also be referred as discharge for failure of condition. It is simply a matter as to how one expresses a condition subsequent.

1.53 Further, although this book is concerned with the discharge of parties from their contractual obligations for reasons other than the performance of those obligations, something should be said about cases of 'discharge by performance'. When discharge is used in connection with performance, it means that the immediate duty of performance has fallen due, remains in existence, but the obliged party has complied with their general obligation by performing. Importantly, performance does not make the immediate duty of performance disappear; it simply means the party has complied with it (and the more general obligation to perform). The party is discharged from their contractual obligation because the obligation no longer requires anything from that party.

1.54 When discharge is used in connection with failure of condition, it means that the immediate duty of performance either has not fallen due or has fallen due but has subsequently been extinguished. In these cases, the obliged party does not comply with any immediate duty of performance—as no such duty exists—but they do nonetheless comply with their more general obligation to perform by *not* doing anything. As Dr Anthony Shea explained, in such cases, the obliged party 'refers to the terms of the contract, and upholds them, and relies upon them to say that he is not bound to go on with his performance. By doing nothing, he performs his promises'.[92] And so similar to cases of discharge by performance, the party here is discharged from their contractual obligation on account of the failure of a condition because, due to that failure, the obligation no longer requires anything from that party, now or in the future.

1.55 The language of 'discharge' for failure of condition admittedly is not perfect. But despite its imperfections, it is the most convenient and economical way of expressing the effect of a failure of condition—ie that one party need not perform. It is also the language used in the American Law Institute's *Restatement of the Law Second: Contracts 2d*[93] to describe the effect of the non-occurrence of a condition (where it can no longer occur), and it has a long pedigree in English law. In the first edition of *Anson's Law of Contract*, published in 1879, for example, Sir William Anson described 'discharge' in the context of

[92] Shea, 'Discharge from Performance of Contracts by Failure of Condition' (n 1) 625.
[93] American Law Institute (n 24) 165 §225.

breach as 'the right to consider oneself exonerated from any further performance under the contract'.[94]

WHY IT MATTERS

1.56 The final part of this chapter considers why any of this matters. A simple answer would be that the claims made in this book matter because they illuminate the relationships between seemingly disparate areas of contract law—discharge following breach, frustration, and common mistake—and provide a coherent and compelling explanation of each as well as how they relate to each other. A more sophisticated answer is that this book makes distinct contributions on a theoretical, analytical, and practical level. It also has implications for other areas of law, such as the law of restitution.

1.57 First, on a theoretical level, this book explains that each of these instances of discharge is a product of the parties' agreement and therefore justified by that agreement.[95] The reason that a party is discharged from their obligation to perform in the instances of discharge considered in this book is that their promise, objectively construed, was not absolute but conditional: 'He claims only that he agreed to perform in X circumstances, not in Y circumstances, and that he is under no liability to perform, X not having occurred.'[96] In this sense, the party arguing for discharge relies upon the scope of their promise to justify a refusal to perform.[97]

1.58 This theoretical contribution is particularly important in the context of discharge following breach because the justification for this phenomenon—in contrast with the justification for frustration and common mistake—has, 'for the most part, been ignored'.[98] Even in the context of frustration and common mistake, this book offers a compelling defence of the view that these are simply instances of the failure of (usually implied) conditions and not distinct doctrines in their own right.

1.59 Next, on an analytical level, this book also demonstrates that there is a 'synallagma' or 'mutuality' at the heart of contracting, which explains why it is that parties are usually taken to have intended their performances to be conditional upon receiving counter-performance.[99] It is not just the parties' mutual promises that are linked, but often their rights and duties, and

---

[94] Anson (n 73) 266.

[95] See in the context of discharge following breach: Reynolds, 'Discharge of Contract by Breach' (n 1) 542.

[96] Shea, 'Discharge from Performance of Contracts by Failure of Condition' (n 1) 625.

[97] ibid.

[98] Wilmot-Smith (n 4) 312. See also Reynolds, 'Warranty, Condition and Fundamental Term' (n 1) 550. Notable exceptions include: Wilmot-Smith (n 4); Christopher Langley and Rebecca Loveridge, 'Termination as a Response to Unjust Enrichment' [2012] Lloyd's Maritime and Commercial Law Quarterly 65.

[99] Andrew Hutchison, 'Reciprocity in Contract Law' (2013) 24 Stellenbosch Law Review 3, 3, 12–13.

consequently their performances too. As Professor Francis Dawson has explained about contracts of sale:

> It was one of the achievements of the early common lawyers that they recognised that in a bilateral contract parties enter into contracts in order to secure the performance of the return promise rather than bargain for a lawsuit and they were therefore prepared to find that in contracts of sale, the parties' promises of payment and delivery were implicitly conditioned on the concurrent tender of performance by the counterparty.[100]

1.60 Indeed, as we will see in Chapter 2, discharge following breach is deeply connected with the idea that in bilateral contracts the mutual promises of the parties are either 'independent' and unconditional or, as is more common, 'dependent' and therefore conditional.[101] In this sense, there is a principle of 'reciprocity'[102] in English contract law, which manifests in this particular context in the law relating to conditions.

1.61 Thirdly, from a practical perspective, this book has significant implications for how the rules of discharge actually work. Most importantly, this book claims that in cases involving breach it is not necessary in all cases for the innocent party to exercise a power to terminate in order to be discharged from their obligation to perform. This is because the innocent party is discharged immediately following the failure of a condition unless they choose to waive the condition. Modern orthodoxy, which tends to only focus on the issue of discharge following the exercise of a power to terminate and neglects the failure of condition model, instead suggests that the innocent party remains bound to perform and is discharged if, and only if, they exercise the power to terminate. In many cases, the consequences of these two different starting points will be the same. But the two models can pull apart. In *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)*,[103] for example, the House of Lords held that the 'effect of a breach of a promissory warranty is to discharge the insurer from liability as from the date of the breach'[104] even though there has been no election to terminate the contract. This case has always been difficult to explain on the orthodox approach, particularly because promissory warranties are understood to operate in the same way as promissory conditions.[105] But it makes perfect sense on a failure of

[100] Francis Dawson, 'Readiness and Willingness Under the Contractual Remedies Act' (2017) 23 New Zealand Business Law Quarterly 61, 65–66.
[101] See Reynolds, 'Discharge of Contract by Breach' (n 1) 542 ('It has long been clear that at common law such discharge is based on the interdependence of promises: hence the civilian term "synallagmatic," used from time to time by Lord Diplock, is useful in the explanation of the rules.').
[102] Hutchison (n 99) 12.
[103] [1992] 1 AC 233. See further discussion at [2.XX].
[104] ibid 263.
[105] *Behn v Burness* (1863) 3 B & S 751, 753; 122 ER 281, 282.

condition model. How to reconcile these two approaches is discussed in Chapter 2.

1.62 Another practical implication of the failure of condition model is that it can help solve the puzzle as to whether and how an express power to terminate can be distinguished from termination at law, especially given their different effects in relation to damages for the loss of the bargain.[106] As we will see in Chapter 2,[107] the current state of the law, which denies loss of bargain damages for termination pursuant to an express power but awards them for termination for 'breach of a condition',[108] is difficult to defend on the power to terminate model. On the failure of condition model, however, there is a clear difference between discharge following breach and pursuant to an express termination clause. For discharge following breach, failure of a condition results in the innocent party being discharged from their obligation to perform unless they waive the condition. For termination pursuant to an express power, the failure of performance does not of itself discharge the innocent party, but gives that party a power—in the sense of a capacity to change legal relations[109]—to terminate the parties' contractual obligations. Unless the innocent party is already discharged as a result of a failure of condition, it will be their act in exercising the express power to terminate that causes the loss of the bargain, not the defaulting party's breach.

1.63 Finally, as we will see in Chapter 9, the arguments set out in this book may also have implications for how we understand restitution for failure of condition in the law of unjust enrichment. In particular, this book explains why restitution for failure of condition does not contradict the law of contract in cases where there is an underlying valid contract and that contract, at first glance, appears to entitle the defendant to receive the performance in question. It is generally thought that a claim in restitution cannot 'override a valid and subsisting legal obligation of the claimant to confer the benefit on the defendant'.[110] The answer given is that the conflict between restitution and contract in these cases is more apparent than real. This is because where one party performs pursuant to an apparent obligation to do so and subsequently

---

[106] Edwin Peel, 'The Termination Paradox' [2013] Lloyd's Maritime and Commercial Law Quarterly 519, 522–25; Wilmot-Smith (n 4) 323–324; Edwin Peel, 'Loss of Bargain Damages' [2020] Lloyd's Maritime and Commercial Law Quarterly 442.

[107] See [2.XX].

[108] Compare *Financings Ltd v Baldock* [1963] 2 QB 104 with *Lombard North Central plc v Butterworth* [1987] QB 527.

[109] Hohfeld (n 25) 44–45.

[110] *Dargamo Holdings Ltd v Avonwick Holdings Ltd* [2022] 1 All ER (Comm) 1244, 1261–1262 [70]. See also *Kleinwort Benson Ltd v Lincoln City Council* [1999] 1 AC 349, 408; *Fairfield Sentry Ltd (in liq) v Migani* [2014] UKPC 9 [18]; *DD Growth Premium 2X Fund v RMF Market Neutral Strategies (Master) Ltd (Cayman Islands)* [2017] UKPC 36 [62]; *Bank of New York Mellon (International) Ltd v Cine-UK Ltd; London Trocadero (2015) LLP v Picturehouse Cinemas Ltd* [2022] EWCA Civ 1021 [144]–[146].

discovers that a condition precedent to that obligation had not been fulfilled there was, as it turns out, simply no immediate duty to perform. Moreover, obligations to perform in advance are often subject to a condition subsequent extinguishing the immediate duty of performance if the agreed exchange is not received. The effect of a condition failing is to create a localised absence of basis.

Conclusion

1.64 This chapter has armed the reader with an overview of the book, an explanation of the key concepts, and a sense of why any of it matters. In the succeeding chapters, the aim is to prove these claims by reference to history, authority, and principle. We begin first, in Chapter 2, with promissory conditions.