# DISCHARGE OF CONTRACTUAL OBLIGATIONS

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# ABSTRACT

Modern orthodoxy claims that the English law of contract recognises three distinct doctrines that discharge parties from their contractual obligations: (i) termination for breach, (ii) frustration, and (iii) common mistake. This thesis challenges the modern orthodoxy. It argues that each 'doctrine' is best explained as an instance of discharge for failure of condition. The reason one or both parties are discharged from their obligations is that their obligations are expressly or implicitly conditional upon the existence of particular facts or the occurrence of particular events that do not exist or have not occurred.

The central claim made in this thesis is not new. It is broadly consistent with how these 'doctrines' have been understood for hundreds of years. But the modern view is that the law has moved on. This thesis takes aim at this view and argues either that the law has not moved on or that where the law has moved on, it has taken a wrong turn.

In explaining these instances of discharge in this way, this thesis illuminates the relationships between seemingly disparate areas of contract law and provides a coherent and compelling explanation of each. It also grounds the justifications for these instances of discharge in the parties' agreement. Finally, this thesis shows how the failure of condition model can provide better answers to difficult questions that arise on the orthodox approach.

Ultimately, this thesis challenges current perceptions of contract law and demonstrates the lessons that are to be learnt from understanding the basis of discharge in these cases. It is the failure to appreciate the nature of the concepts

in play that has caused so many of the modern problems in the law of discharge of contractual obligations.

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# CHAPTER 1: INTRODUCTION



## 1.1 INTRODUCTION

This thesis 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 so-called frustration, and cases of so-called 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 are in fact instances of failure of condition. It will be argued that the best explanation for why one or both parties are discharged from their obligations to perform in such cases is that their obligations are expressly or implicitly conditional upon the existence of particular facts or the occurrence of particular events, which are 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).

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. And, as we shall see, this is the way 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

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[1] Most importantly, A M Shea, 'Discharge from Performance of Contracts by Failure of Condition' (1979) Modern Law Review 623; A M Shea, *Analytical Problems of Discharge of Contracts on Breach* (DPhil Thesis, University of Oxford 1977). See also Charles Morison, *Rescission of Contracts, A Treatise on the Principles Governing the Rescission, Discharge, Avoidance and Dissolution of Contracts* (Stevens & Haynes 1916) 5, 18–22; F M B Reynolds, 'Warranty, Condition and Fundamental Term' (1963) 79 Law Quarterly Review 534; Francis Dawson, 'Metaphors and Anticipatory Breach of Contract' [1981] Cambridge Law Journal 83, 87–90; F M B Reynolds, 'Discharge of Contract by Breach' (1982) 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] J C 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; C J Slade, 'The Myth of Mistake in the English Law of Contract' (1954) 70 Law Quarterly Review 385, 396–403; K O 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 (n 2); Smith, *Contract Theory* (n 2) 297–304; Morgan (n 2). For the similar, if not identical, view that it is a matter of the construction of the agreement see: P S Atiyah, '*Couturier v Hastie* and the Sale of Non-existent Goods' (1957) 73 Law Quarterly Review 340; P S Atiyah and F A R 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.

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.

This thesis 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 law has moved on—and in the context of frustration and common mistake this proposition will be debatable—it will be argued that the law has taken a wrong turn. Moreover, it will be seen that the departure has been either unintentional (in the case of discharge following breach) or on the basis of 'superficial'[6] reasons (in the cases of frustration and common mistake). Ultimately, this thesis sets out to prove that failure of condition remains the best explanation of these apparent doctrines and that many of the modern problems faced today arise only because of the failure to understand the basis of discharge in these cases.

## 1.2 THE THESIS IN OUTLINE

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

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

[6] Morgan (n 2) 561.

twist, the answer is produced'.[7] In that spirit, this first chapter aims to set out the overview of the thesis, explain the key concepts, and persuade the reader why the argument matters.

### 1.2.1 Discharge following breach

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 his or her 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, most controversially, argues that conditions should not be understood in the modern sense of an essential term the breach of which gives rise to a 'power to terminate'. At the very least, English law has taken a wrong turn in recognising such 'conditions'. The chapter makes this argument by showing how, historically, there was no difference between a 'promissory condition' and a 'promissory condition precedent' (or concurrent condition). Rather, properly understood, the phrase 'promissory condition' refers simultaneously to a promise to ensure that some event occurs (or that some fact exists) and to a condition that makes the other party's immediate duty to perform depend on that promise being performed. Where one party fails to perform such a promise, the non-occurrence of the condition prevents the performance of the other party's obligation falling due and, where the condition can no longer occur,

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[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 2010) 237, 238.

[8] On this loose and inaccurate phrase, see s 2.2.4.5.

the condition 'fails'. The result of this is that, unless the condition is waived,[9] the performance of the obligation can never become due and in this sense the party is 'discharged'[10] from his or her obligation to perform on account of the failure of the condition.

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*.[11] It argues that this is also 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 he [or she] should obtain as the consideration for performing those undertakings'.[12] This condition is sometimes referred to as the principle of 'failure of consideration'. As this chapter explains, this 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.

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[9] See Chapter 4.

[10] See s 1.3.2.

[11] [1962] 2 QB 26 (CA).

[12] ibid 66.

### 1.2.2 Waiver of conditions

A core claim of the thesis is that failure of a condition operates to discharge a party from his or her obligation to perform unless he or she waives (or has waived) the condition. Chapter 4 (Waiver of Conditions) therefore considers 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, this chapter makes the argument that there is a distinct area of law concerned with waiver of conditions that is broader than so-called 'waiver by election' and 'waiver by estoppel'. The chapter also argues 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. Finally, Chapter 4 argues that not all conditions can be waived, at least not for all purposes.

### 1.2.3 Frustration

Chapter 5 (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 5 responds to common objections to the implied condition view and argues that the implied condition view has often been misunderstood.

### 1.2.4 Common mistake

As the final chapter in this thesis, Chapter 6 (Common Mistake) argues that the apparent 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'.[13] It will be seen that the notion that there is a subjective doctrine of mistake is inconsistent with English law's objective approach to contract law formation and interpretation.

### 1.2.5 The distinction between promises and conditions

A recurring theme throughout this thesis 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.[14] 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 his or her

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[13] P S Atiyah and F A R Bennion, 'Mistake in the Construction of Contracts' (1961) 24 Modern Law Review 421, 427.

[14] See Samuel Williston, *The Law of Contracts* (Baker, Voorhis & Co Inc 1920) vol 2, 1282–1283 §665; Arthur Corbin, 'Supervening Impossibility of Performing Conditions Precedent' (1922) 22 Columbia Law Review 421, 423; Arthur Corbin, *Corbin on Contracts: A Comprehensive Treatise on the Rules of Contract Law* (West Publishing Co 1960) vol 3A, 25–36 §633–634; J L Montrose, 'Conditions and Promises' (1960) 23 Modern Law Review 434, 484–485.

obligation to perform.[15] This is because discharge 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.

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.[16] 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.

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

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[15] Sir William R Anson, *Principles of the English Law of Contract* (1st edn, Clarendon Press 1879) 266.

[16] This example is taken from seminars in the Commercial Remedies BCL/MJur course and is itself adapted from *Taylor v Caldwell* (1863) 3 B & S 826, 122 ER 309.

automatically gives rise to a power to terminate,[17] 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.[18]

(2) In the second scenario, the parties are discharged by the 'doctrine' of frustration.[19]

(3) In the third, the contract is said to be 'void' for common mistake.[20]

By contrast, on the failure of condition model put forward in this thesis, 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. In the first scenario, it failed due to a breach of duty by D. The only relevance of this 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.

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 he [or she] bargained for and need not perform.'[21] Note, however, that D is not discharged for the same reason. D is discharged either

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[17] See, eg, *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 (HL) 849.

[18] *Hongkong Fir* (n 11) 66.

[19] *Taylor v Caldwell* (n 16).

[20] *Bell v Lever Brothers Ltd* [1932] AC 161 (HL).

[21] Samuel Williston and Walter H E Jaeger (ed), *A Treatise on the Law of Contracts* (3rd edn, Baker, Voorhis & Co Inc 1962) vol 6, 131–132 §838.

because he or she expressly excepted such events from the scope of his or her contractual duty[22] or because D's obligation to perform was implicitly conditional upon it being possible to perform.[23]

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.[24] And in all three scenarios C would still be discharged from his or her obligation to perform on account of the failure of the substantial-benefit condition, unless C had also promised to perform absolutely.[25]

As for the second and third scenarios, the difference here is only a matter of timing.[26] 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

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[22] Eg *Jackson v Union Marine Insurance Co* (1874) LR 10 CP 125 (Exch Chamb). See further s 3.3.2 and s 5.2.2.

[23] Eg *Taylor v Caldwell* (n 16). See s 5.2.1.2.

[24] See, eg, *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377 (HCA) and *Taylor v Caldwell* (1863) 3 B & S 826, 833; 122 ER 309, 312.

[25] See s 5.2.4 and s 6.3.4.

[26] See the discussion in s 6.4.2.4.

is an instance of failure of condition. This can only be seen, however, when a clear distinction is made between promises (duties) and conditions.

### 1.2.6 Anticipatory breach

There is one instance of the discharge for a reason other than performance that is not considered directly in this thesis. That is the doctrine of anticipatory breach.[27] A coherent account of this doctrine would require another thesis in itself.[28] For this reason, it is only discussed tangentially in relation to this thesis. In Chapter 2, for example, we will see how the decision in *Heyman v Darwins Ltd*[29]—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'.[30] And in Chapter 4, we will see how 'long before the doctrine of anticipatory breach of contract was developed',[31] a renunciation or disablement by a promisor operated as a waiver of the conditions to that party's obligation.[32]

## 1.3 KEY CONCEPTS

Much of the difficulty now faced in this area has arisen due to 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

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[27] Eg *Hochster v De La Tour* (1853) 2 El & Bl 678, 118 ER 922.

[28] See, eg, Qiao Liu, *Anticipatory Breach* (Hart Publishing 2011).

[29] [1942] AC 356 (HL).

[30] See s 2.3.2.

[31] *Peter Turnbull & Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd* (1954) 90 CLR 235 (HCA) 246–247.

[32] Section 4.7.

concepts are deployed in this thesis. 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 thesis 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'.[33]

### 1.3.1 Condition: a chameleon-hued word

The word 'condition' can be used in a variety of senses, depending on the context.[34] To give just four possible meanings, 'condition' can be used to refer to: (i) the terms of the deal (ie the 'conditions of the contract');[35] (ii) the state or quality of goods (ie the goods are in excellent 'condition');[36] (iii) an important term breach of which gives rise to a 'power to terminate'[37] (albeit that this thesis

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[33] Corbin, *Corbin on Contracts* (n 14) 13 §627.

[34] Samuel J Stoljar, 'The Contractual Concept of a Condition' (1953) 69 Law Quarterly Review 485, 486–488.

[35] *Schuler AG v Wickman Machine Tools Sales Ltd* [1974] AC 235 (HL). See also Corbin, *Corbin on Contracts* (n 14) 11 §627.

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

[37] 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.

challenges this view); or (iv) an uncertain fact or event which qualifies an obligation (or multiple obligations) under a contract.[38] 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'.[39]

In order to avoid these dangers, this thesis will, unless otherwise stated, use the word condition 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.[40] This is a working definition, but four points of clarification must be made.

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'.[41] Accordingly, to be clear, the conditions with which we are concerned qualify obligations of performance under a contract: either an obligation to perform will not fall due (condition precedent or concurrent condition)[42] or if an obligation to perform has fallen due, the immediate duty of performance it

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

[39] Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale Law Journal 16, 35.

[40] See also to a similar, although not identical, effect: American Law Institute (n 38) 160 §224; Corbin, *Corbin on Contracts* (n 14) 11 §627.

[41] Williston (n 14) 1283 §666.

[42] See American Law Institute (n 38) 165 §225.

creates will be extinguished (condition subsequent), if the condition is not fulfilled.[43]

Secondly, the language of an 'immediate duty'[44] 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, 'it 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.'[45] 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.

The difference between the two is only in the level of abstraction at which the obligation is described. In this thesis, 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 immediate duty is simply shorthand for this latter concept. Moreover, as the

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[43] See s 1.3.2 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.

[44] For an example of this language see American Law Institute (n 38) 189 §230; Corbin, *Corbin on Contracts* (n 14) 5 §625.

[45] Corbin, *Corbin on Contracts* (n 14) 5 §625.

definition above makes clear, it is the existence of the immediate duty of performance which 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.

The third clarification is that '[n]ot infrequently a promise is subject to more than one condition'.[46] 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. 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.[47]

Fourth and finally, as the definition makes clear, when using the word 'condition' we are concerned with uncertain facts or events, and not facts which are known with certainty to exist at the time of contracting or events which 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

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[46] Williston (n 14) 1308 §677.

[47] *School Facility Management Ltd v Governing Body of Christ The King College & Isle of Wight Council* [2020] EWHC 1118 (Comm), [2020] PTSR 1913, 2021 [421]. See Frederick Wilmot-Smith, 'Reconsidering "Total" Failure' (2013) 72 Cambridge Law Journal 414, 432–434.

duty of performance'.[48] 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.[49]

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 key (and perhaps 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 thesis. 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.

#### *1.3.1.1 Conditions precedent, concurrent conditions, and conditions subsequent*

Conditions are often divided up into 'conditions precedent' and 'conditions subsequent'—as we shall see, there is a third category of 'concurrent conditions', but these are just a particular type of mutual conditions precedent. The words 'precedent' and 'subsequent' 'express a relationship in time'[50] between two things. We know that the first of these is the uncertain fact or event that constitutes the

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[48] American Law Institute (n 38) 161 §224 comment (b).

[49] Corbin, *Corbin on Contracts* (n 14) 7 §626.

[50] ibid 15 §628.

condition. The second, as 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.

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.[51] Thus Corbin, adopting a similar definition to that used here, once stated: '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…'[52] 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.[53] The seller's immediate duty to deliver the goods will not arise, absent waiver, unless the buyer opens a confirmed letter of credit.

In contrast, where a fact must exist or an event must occur after the immediate duty of performance has arisen for that duty to be extinguished, it can be referred to as a condition subsequent.[54] 'Such conditions are very rare'[55] and are not encountered frequently in this thesis. However, examples can be given. If a contract provides for a buyer of goods to return them, ordinarily there will be

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[51] Williston (n 14) 1284 §666a.

[52] Corbin, *Corbin on Contracts* (n 14) 16 §628.

[53] See *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 QB 297 (CA) 304 in s 1.3.1.2 below.

[54] Corbin, *Corbin on Contracts* (n 14) 17 §627.

[55] Williston (n 14) 1286 §667.

an immediate duty to pay upon receiving the goods (unless credit has been given), but this immediate duty can be extinguished upon return of the goods.[56]

It should be noted that insofar as conditions subsequent are uncertain facts or events which 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.

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 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'[57] 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'.[58] Accordingly, where the parties' obligations are concurrently conditional, each party's obligation

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[56] ibid.

[57] J W Carter and C Hodgekiss, 'Conditions and Warranties: Forebears and Descendants' (1976) 8 Sydney Law Review 31, 35.

[58] *Kingston v Preston* (1773) 2 Doug 689, 690–691; 99 ER 436, 437–438.

to perform is conditional upon the other party being ready, willing, and able to perform, rather than prior performance itself.[59]

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'.[60] In the foundational case, *Boone v Eyre*,[61] Lord Mansfield himself spoke of 'mutual conditions, the one precedent to the other'.

#### *1.3.1.2 Non-promissory conditions*

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'

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[59] See Corbin, *Corbin on Contracts* (n 14) 19 §629.

[60] American Law Institute, *Restatement of the Law of Contracts* (American Law Institute Publishers 1932) 363 §251, comment (a), quoted in Corbin, *Corbin on Contracts* (n 14) 19 §629 fn 21.

[61] (1777) 1 H BL 273n, 126 ER 160n. See also Williston (n 14) 1285 §666.

condition. Such conditions, sometimes referred to as 'contingent conditions',[62] operate only to prevent performance of an obligation falling due or to extinguish an existing immediate duty of performance—the non-occurrence or non-fulfilment of such conditions, not also being a breach of duty, does not operate to give a right of action for breach.[63]

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'.[64] Thus in *Trans Trust SPRL v Danubian Trading Co Ltd*,[65] 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.

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[62] See, eg, Jack Beatson, Andrew Burrows, and John Cartwright, *Anson's Law of Contract* (31st edn, Oxford University Press 2020) 148; Peel (n 37) 70 [2-105]; Mindy Chen-Wishart, 'The Agreement' in Hugh Beale (ed), *Chitty on Contracts* (34th edn, Sweet & Maxwell 2021) vol 1 257, 364 [4-195]. This has a long pedigree: see M D Chalmers, *The Sale of Goods Act, 1893, including The Factors Acts, 1889 & 1890* (William Clowes and Sons Ltd 1894) 165.

[63] Montrose, (n 14) 485; Reynolds, 'Discharge of Contract by Breach' (n 1) 547.

[64] Beatson, Burrows, and Cartwright (n 62) 148.

[65] *Trans Trust* (n 53) 304.

However, the analogy between these two ('subject to the opening of a credit' and 'subject to contract') is imperfect,[66] 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: '[t]he 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.'[67] In 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'.[68]

A 'case often cited'[69] for the proposition that the non-occurrence of a condition can in some cases prevent a contract from being formed is *Pym v Campbell*.[70] 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. 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

[66] 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.

[67] Williston (n 14) 1283–1284 §666.

[68] Reynolds, 'Warranty, Condition and Fundamental Term' (n 1) 536; Stoljar (n 34) 490.

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

[70] (1856) 6 El & Bl 370, 119 ER 903; cited for this proposition in Beatson, Burrows, and Cartwright (n 62) 148.

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'.[71]

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.[72] 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 anticipatory breach'.[73]

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

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

[72] As argued by Arthur Corbin, 'Conditions in the Law of Contract' (1919) 8 Yale Law Journal 739, 766–767; Stoljar (n 34) 492; Corbin, *Corbin on Contracts* (n 14) 111 §649; Smith (n 2) 410. See also Reynolds, 'Warranty, Condition and Fundamental Term' (n 1) 537, albeit equivocal on which view is correct.

[73] Stoljar (n 34) 492. See the similar argument in Smith (n 2) 410.

all is admissible'.[74] In light of this, *Pym v Campbell* is probably better understood as 'a striking example of yet another exception to the parol evidence rule'.[75]

Conditions to the formation of the contract are sometimes referred to as 'external conditions' in contrast to 'internal conditions', which are conditions that qualify obligations to perform.[76] In this thesis, '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',[77] 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 concerned are those which qualify obligations to perform, not the existence of the contract itself.

#### *1.3.1.3 Promissory conditions*

As noted above, all conditions, strictly speaking, are non-promissory. But sometimes a term of a contract may have a 'double operation'[78] and create both a duty and a condition. As Scrutton LJ explained in *Westacott v Hahn*,[79] '[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'. In

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

[75] Stoljar (n 34) 492. See also Corbin, 'Conditions in the Law of Contract' (n 72) 766–767.

[76] See the discussion in Stoljar (n 34) 489–492.

[77] ibid 489.

[78] Corbin, 'Conditions in the Law of Contract' (n 72) 745; Corbin, *Corbin on Contracts* (n 14) 28 §633.

[79] [1918] 1 KB 495 (CA) 513.

such cases, where the same term in the contract creates both a promise and a condition, it may conveniently be labelled a 'promissory condition'.[80]

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.

Even in the case of promissory conditions, however, it remains vital to distinguish between the promise and the condition. Drawing the distinction 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 his or her 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 this distinction when it began talking about 'breach of a condition'.[81] Strictly speaking a condition cannot be breached; only a duty can be breached.[82]

The distinction between promises and conditions is also important for another reason. As we will see when discussing the 'substantial-benefit condition'

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[80] Corbin, 'Conditions in the Law of Contract' (n 72) 745; Corbin, *Corbin on Contracts* (n 14) 28 §633.

[81] See s 2.2.4.5.

[82] Corbin, 'Supervening Impossibility of Performing Conditions Precedent' (n 14) 423.

in Chapter 3, this is a condition which can fail in 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.

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

In order to understand the sense in which 'discharge' and 'failure of condition' are used in this thesis, it is necessary to discuss the two possible effects of the non-occurrence of a condition precedent (or concurrent condition): '[t]he first effect always follows and the second often does'.[83] 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.[84] 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.

Secondly, in some cases where the condition can no longer occur, the condition can be said to have 'failed'—the performance of the obligation can

[83] See American Law Institute (n 38) 165 §225 comment (a).

[84] ibid.

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.[85] This is what is meant in this thesis when it is said that one party is discharged from his or her obligation to perform on account of the failure of the condition. Discharge is reserved for cases where the condition has failed and so can no longer occur.

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 in s 1.3.1.1 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.

Further, although this thesis is concerned with the discharge of parties from their contractual obligations for reasons other than 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 his or her 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 his or her contractual obligation because the obligation no longer requires anything from that party.

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[85] This is the language used in the second restatement: American Law Institute (n 38) 165 §225.

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 he or she does nonetheless comply with his or her more general obligation to perform by *not* doing anything. As Dr Anthony Shea has 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.'[86] And so similar to cases of discharge by performance, the party here is discharged from his or her 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.

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*[87] 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. Thus, in the first edition of *Anson's Law of Contract*, published in 1879,

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

[87] American Law Institute (n 38) 165 §225.

Sir William Anson described 'discharge' in the context of breach as 'the right to consider oneself exonerated from any further performance under the contract'.[88]

## 1.4 IMPLICATIONS OF THESIS

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

First, on a theoretical level, this thesis explains that each of these instances of discharge are a product of the parties' agreement and therefore justified by that agreement.[89] The reason that a party is discharged from his or her obligation to perform in the instances of discharge considered in this thesis is that his or her promise, objectively construed, was not absolute but conditional: '[h]e 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

[88] Anson (n 15) 266.

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

occurred'.[90] In this sense, the party arguing for discharge relies upon the scope of his or her promise to justify a refusal to perform.[91]

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'.[92] Even in the context of frustration and common mistake, this thesis 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.

Next, on an analytical level, this thesis 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.[93] It is not just the parties' mutual promises that are linked, but often their rights and duties, and 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

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

[91] ibid.

[92] Wilmot-Smith (n 4) 312; 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.

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

> 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.'[94]

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.[95] In this sense, there is a principle of 'reciprocity'[96] in English contract law, which manifests in this particular context in the law relating to conditions.

Thirdly, from a practical perspective, this thesis has significant implications for how the rules of discharge actually work. Most importantly, this thesis claims that in cases involving breach it is not necessary for the innocent party to exercise a 'power to terminate' in order to be discharged from his or her obligation to perform. This is because the innocent party is discharged immediately following the failure of a condition unless he or she chooses to waive the condition. Modern orthodoxy instead suggests that the innocent party remains bound to perform and is discharged if, and only if, he or she exercises the 'power to terminate.' In many cases, the consequences of these two different starting points will be the same. But the two views can pull apart. In *Bank of Novia Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)*,[97] for example, the House of Lords held that the 'effect of a breach of a

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[94] Francis Dawson, 'Readiness and Willingness under the Contractual Remedies Act' (2017) 23 New Zealand Business Law Quarterly 61, 65.

[95] See Reynolds, 'Discharge of Contract by Breach' (n 1) 542.

[96] Hutchison (n 93) 12.

[97] [1992] 1 AC 233 (HL). See further discussion in s 2.5.3.

promissory warranty is to discharge the insurer from liability as from the date of the breach'[98] 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.[99] But it makes perfect sense on a failure of condition model.

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.[100] As we will see in Chapter 2,[101] 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',[102] is difficult to defend on the orthodox approach. 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 his or her obligation to perform unless he or she waives 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

[98] ibid 263.

[99] *Behn v Burness* (1863) 3 B & S 751, 753; 122 ER 281, 282.

[100] Edwin Peel, 'Loss of Bargain Damages' [2020] Lloyd's Maritime and Commercial Law Quarterly 442; Wilmot-Smith (n 4) 323–324; Edwin Peel, 'The termination paradox' [2013] Lloyd's Maritime and Commercial Law Quarterly 519, 522–525.

[101] Section 2.5.3

[102] *Compare Financings Ltd v Baldock* [1963] 2 QB 104 (CA) with *Lombard North Central Plc v Butterworth* [1987] QB 527 (CA).

a power—in the sense of a capacity to change legal relations[103]—to terminate the parties' contractual obligations. Unless the innocent party is already discharged as a result of a failure of condition, it will be his or her act in exercising the express power to terminate that causes the loss of the bargain, not the defaulting party's breach.

Finally, although outside the scope of this thesis, the thesis may have implications for how we understand the doctrine of failure of consideration in the law of restitution or, as it is sometimes referred to today, restitution for 'failure of condition'.[104] In particular, it might explain 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 of the defendant'.[105]

It should be said that there is no apparent contradiction in cases where one party performs pursuant to an apparent obligation to do so and subsequently discovers that a condition precedent to that obligation had not been fulfilled.[106] There was, as it turns out, simply no immediate duty to perform. But there is an

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[103] Hohfeld (n 39) 44–45.

[104] Wilmot-Smith (n 47) 416.

[105] *DD Growth Premium 2X Fund v RMF Market Neutral Strategies (Master) Ltd (Cayman Islands)* [2017] UKPC 36, [2018] Bus LR 1595, 1612 [62]; *Dargamo Holdings Ltd v Avonwick Holdings Ltd* [2021] EWCA Civ 1149, [2022] 1 All ER (Comm) 1244, 1261–1262 [70]; *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].

[106] Eg *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 (HCA).

apparent contradiction where an obligation to perform is seemingly independent and restitution is nonetheless allowed, as is often the case with advance payments.

In *Stocznia Gdanska SA v Latvian Shipping Co*,[107] for example, the plaintiffs entered into six shipbuilding contracts, the price being payable in instalments by the defendant buyers. Work began on two of the ships, but the defendants failed to pay the second instalments, following which the plaintiffs exercised express powers to terminate. The plaintiffs subsequently commenced an action seeking to recover the second instalments. One way the defendants put their case was that even if there were an unqualified contractual right to the money, it would have been recoverable immediately for a total failure of consideration.[108] Ultimately, the argument failed because there had been no failure of consideration. But assuming that this way of putting the case was correct[109] it seems that in cases where recovery is allowed, the law of restitution directly conflicts with the law of contract.

However, it might be the case that even apparently independent obligations are not always necessarily independent. As Professor Samuel Williston argued:

> In fact, however, no promise in a bilateral contract the performance of which on one side is agreed upon as the equivalent exchange for performance on the other side, is wholly

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[107] [1998] 1 WLR 574 (HL).

[108] ibid 587.

[109] See consideration of the issue in *London Trocadero (2015) LLP v Picturehouse Cinemas Ltd* [2021] EWHC 2591 (Ch) [160]–[173]. The Court of Appeal did not consider whether restitution for failure of condition was a direct defence to (or denial of) the obligation to pay or whether it was a counter-claim, because the claim ultimately failed: *Bank of NY Mellon v Cine-UK; London Trocadero v Picturehouse* (n 105) [39]–[41].

> independent. Though performance of one promise may be due first, it is still true that the later performance is the agreed exchange, and if the court is satisfied that the agreed exchange will not be forthcoming, the first performance is excused.[110]

The idea here would be that even 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.[111] If this is correct, it would also help to resolve an important question in the law of restitution, namely, what exactly is 'conditional' in failure of condition cases. One possibility is that the 'title to retain the money' is 'conditional upon the subsequent completion of the contract',[112] but if this were true there should be a revesting of rights or, at least, a trust, which there is not.[113] Another is that the 'right to retain the payment is conditional upon performance … under the contract',[114] but this only raises the question as to what is the 'right to retain'—English law recognises no such concept.[115] A further possibility is that the 'payment is conditional' in the sense that the parties have (implicitly) agreed that if performance does not occur, the money is to be repaid, but if this is the case then it seems that 'the old "heresy" of "quasi-contracts" was far closer to the truth than many would now accept'.[116] By contrast, on the tentative approach being put forward here, it would be 'the

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[110] Williston (n 14) 1581 §828. See also Arthur Corbin, *Corbin on Contracts: A Comprehensive Treatise on the Rules of Contract Law* (West Publishing Co 1962) vol 6, 23–25 §1256.

[111] See, eg, *Jozovich v Central California Berry Growers* 183 Cal App 2d 216 (1960) (California CA), discussed in Corbin (n 110) 24 §1256 fn 23.

[112] *McDonald v Denny Lascelles Ltd* (1933) 48 CLR 457 (HCA) 477.

[113] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (HL) 689–690, 708–709.

[114] *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 (HCA) 351.

[115] Cf James Edelman and Elise Bant, *Unjust Enrichment* (2nd edn, Hart 2016) 166–167.

[116] Alexander Georgiou, 'Mistaken Payments, Quasi-Contracts, and the "Justice" of Unjust Enrichment' (2022) 42 Oxford Journal of Legal Studies 606, 606.

obligation to pay … [that] is conditional'.[117] The effect of the condition failing would be to create a localised absence of basis. But while this possibility merits further exploration, restitution is outside the scope of this thesis and the views expressed here are necessarily tentative.

## 1.5 SUMMARY

This chapter has armed the reader with an overview of the thesis, 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.

[117] *Baltic Shipping* (n 114) 385.

# CHAPTER 2: PROMISSORY CONDITIONS



## 2.1 INTRODUCTION

Lawyers are commonly told that in contract law a 'promissory condition', in its technical sense, is a contractual term breach of which gives rise to a power to terminate.[1] Breach of such a term does not prevent performance by the other party from falling due,[2] but it does give the innocent party the ability to terminate the contract and henceforth discharge both parties from their unperformed obligations. The precise justification for this 'power to terminate' remains unsettled,[3] but its existence is rarely questioned.

The problem is that conditions were not always thought of in this way. Traditionally, to say that a term of the contract was a 'promissory condition' was simultaneously to say (i) that one party had promised that some fact existed or

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[1] 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; Ewan McKendrick, 'Termination for Breach' in Hugh Beale (ed), *Chitty on Contracts* (34th edn, Sweet & Maxwell 2021) vol 1 1981, 1987 [27-016].

[2] See, eg, Frederick Wilmot-Smith, 'Termination after breach' (2018) 134 Law Quarterly Review 307, 308.

[3] ibid 311–312. See also Christopher Langley and Rebecca Loveridge, 'Termination as a Response to Unjust Enrichment' [2012] Lloyd's Maritime and Commercial Law Quarterly 65.

that some event would occur, and (ii) that the fulfilment or performance of that promise was a condition of the other party's obligation to perform. The effect of one party 'breaching'[4] a promissory condition was that an event, which was the condition of the innocent party's obligation to perform, had not occurred. The innocent party was therefore discharged immediately, unless he or she chose to waive the condition.[5]

This way of thinking about conditions has its origins in an approach which saw mutual promises as either dependent on, or independent of, performance by the other party. But on most accounts, the law has moved on.[6] Today, the language of 'promissory conditions' is said to obscure two distinct concepts: (i) a 'condition' in the sense of an uncertain fact or event upon which the existence of an immediate duty of performance depends; and (ii) a 'condition' in the sense of a term breach of which gives rise to a 'power to terminate'.[7] On the orthodox account, it is possible for a term to be a 'condition' in the second sense without being a 'condition' in the first sense.[8]

The central argument of this chapter is that there is no distinction—or ought not to be any such distinction—between a condition and condition precedent (or concurrent condition), even when both terms are used in their promissory sense. Specifically, this chapter rejects the notion that a promissory

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[4] An unfortunate, but ingrained, misuse of language: see s 2.2.4.5.

[5] *Bentsen v Taylor, Sons & Co* [1893] 2 QB 274 (CA).

[6] See, eg, Wilmot-Smith (n 2) 307–308.

[7] G H Treitel, '"Conditions' and 'Conditions Precedent"' (1990) 106 Law Quarterly Review 185, 185.

[8] ibid 188.

condition should be understood as a term breach of which gives rise to a power to terminate. It proceeds first by showing that, historically, there was no distinction between a promissory condition and a promissory condition precedent (or concurrent condition). It then proceeds to reject the more recent suggestion that a promissory condition should be understood in the second sense identified above. Finally, the chapter concludes by noting that the traditional understanding of the nature of promissory conditions remains the best explanation of the basis of discharge following 'breach of a condition'.[9]

## 2.2 INDEPENDENT AND DEPENDENT PROMISES

In order to understand the concept of a promissory condition, it is necessary to understand the 'old law' of independent and dependent promises.[10] The issue of distinguishing between the two arose where one party brought an action against the other for non-performance. If mutual promises were independent, then one party could sue for non-performance of the counterparty's promise without having to plead and prove performance of his or her own promise.[11] The parties' obligations to perform were unconditional. However, if mutual promises were dependent, then, in order to succeed, a party suing the other for non-performance had to plead and prove (i) performance of his or her own

[9] See s 2.2.4.5.

[10] See, generally, S J Stoljar, 'Dependent and Independent Promises: A Study in the History of Contract' (1957) 2 Sydney Law Review 217; J W Carter and C Hodgekiss, 'Conditions and Warranties: Forebears and Descendants' (1976) 8 Sydney Law Review 31.

[11] See the notes to *Pordage v Cole* (1669) 1 Wms Saund 319, 320; 85 ER 449, 451. See further, Carter and Hodgekiss (n 10) 32.

promise,[12] or (ii) in some cases, that he or she was at least ready, willing, and able to perform.[13] The parties' obligations to perform were conditional.

### 2.2.1 The beginning: promises independent unless expressly dependent

Originally, 'in the absence of an expressly stated condition, mutual promises were held to be independent of each other and unconditional'.[14] The justice of this was thought to be that each party had bargained for the other's promise (as opposed to their performance) and if either party wished to limit the scope of his or her obligation to perform then he or she could do so by express words.[15] Two cases that illustrate both sides of this coin are *Nichols v Raynbred*[16] and *Brocas's Case*.[17] In *Nichols v Raynbred*, the plaintiff promised to deliver to the defendant a cow in consideration for which the defendant promised to pay him 50 shillings. It was held in an action for assumpsit that the plaintiff did not need to plead the delivery of the cow in order to maintain the suit because 'it is promise for promise'.[18] The parties' respective promises were independent. By contrast in *Brocas's Case*, the lord of a manor covenanted to convey the freehold to his copyholder and 'in consideration for the same performed' the copyholder covenanted to pay a sum of money. It was held that because of this expressly

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[12] ibid.

[13] See J W Carter and Wayne Courtney, '"Ready and willing to perform": discharge for breach and damages' [2020] Lloyd's Maritime and Commercial Law Quarterly 251, 252–255.

[14] Arthur Corbin, *Corbin on Contracts: A Comprehensive Treatise on the Rules of Contract Law* (West Publishing Co 1960) vol 3A, 136 §654. See also Stoljar (n 10) 219; Carter and Hodgekiss (n 10) 33.

[15] Corbin (n 14) 136 §654.

[16] (1614) Hob 88, 80 ER 238.

[17] (1587) 3 Leo 219, 74 ER 644.

[18] *Nichols v Raynbred* (1614) Hob 88, 88; 80 ER 238, 238.

stated condition the copyholder was not obliged to pay the sum before the conveyance was made. The Court said the position would have been different if the words had been '[i]n consideration of the said covenant to be performed'.[19]

This approach was taken in connection with 'all kinds of bilateral contracts'.[20] But a side effect of it was that whether promises were dependent or independent turned on fine distinctions, such as whether the words 'pro'[21] or 'for said cause'[22] were used. As Serjeant Williams put it in his notes to Sir Edmund Saunders' report of *Pordage v Cole*,[23] decisions were made on 'artificial and subtle distinctions, without regarding the intent and meaning of the parties'.

### 2.2.2 Seventeenth century: shift towards a construction approach

The decision in *Pordage v Cole* represented a shift in focus away from the technical words used by the parties and, in this sense, marked a 'turning-point in contractual history'.[24] The defendant covenanted to give to the plaintiff '£775 for all his lands' with 'the money to be paid before Midsummer, 1668'.[25] The plaintiff

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[19] ibid.

[20] Corbin (n 14) 170 §661. See, eg, *Bettisworth v Campion* (1608) Yel 133, 80 ER 90; *Holder v Taylor* (1614) 1 Rolle Abr 518; *Le Spanish Ambassador v Gifford* (1616) 1 Rolle 336, 81 ER 526; *Caton v Dixon* (1639) 1 Rol Abr 415, pl 8; *Vivian v Shipping* (1639) 1 Rol Abr 415, pl 8; *Bragg v Nightingale* (1649) 1 Rolle Abr 416 pl 15; *Ware v Chappel* (1649) Style 186, 82 ER 663; *Gibbons v Prewde* (1657) Hardres 102. A number of these cases are collected and translated in: C C Langdell, *A Selection of Cases on the Law of Contracts with a Summary of the Topics Covered by the Cases* (2nd edn, Little Brown, and Company 1879) Part II, 619–625.

[21] *Pordage v Cole* (1669) 1 Wms Saund 319, 320; 85 ER 449, 450.

[22] See the notes to *Pordage v Cole* (1669) 1 Wms Saund 319, 320; 85 ER 449, 451, referring to *Anon* (1500) Y B 15 Hen VII 10 pl 17. See also Carter and Hodgekiss (n 10) 33; Stoljar (n 10) 219–220.

[23] (1669) 1 Wms Saund 319, 320; 85 ER 449, 451.

[24] Stoljar (n 10) 229; Carter and Hodgekiss (n 10) 33.

[25] *Pordage v Cole* (1669) 1 Wms Saund 319, 320; 85 ER 449, 450.

subsequently brought an action for the price.[26] The defendant resisted it on the grounds that the plaintiff did not plead that he had conveyed, or tendered a conveyance, of the title to the lands. The defendant argued 'that the word [for] made a condition in things executory'[27]—that the technical formula made the obligations dependent. The Court disagreed, holding that it was the intention of the parties that each should have a mutual remedy against the other on the covenant. The promises were therefore independent.

The effect of *Pordage v Cole* was 'to upset the basic legal tenets which had been current for over a century'[28] and to focus on the question of 'what construction would best serve the intention of the parties'[29] instead of the technical words used by the parties. Thus a year later, in *Hunlocke v Blacklowe*,[30] the Court rejected the argument that the words '[i]n consideration of the performance thereof'[31] amounted to a condition precedent because 'such a construction would entirely defeat the intention of the parties'.[32]

### 2.2.3 Eighteenth century: *Kingston v Preston* and *Boone v Eyre*

By the beginning of the eighteenth century, it was clear that whether promises were dependent or independent was to be determined by the proper construction

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[26] Less five shillings paid as a deposit.

[27] *Pordage v Cole* (1669) 1 Wms Saund 319, 320; 85 ER 449, 450.

[28] Stoljar (n 10) 229.

[29] Carter and Hodgekiss (n 10) 33.

[30] (1670) 2 Wms Saund 156; 85 ER 893.

[31] *Hunlocke v Blacklowe* (1670) 2 Wms Saund 156, 156; 85 ER 893, 895.

[32] *Hunlocke v Blacklowe* (1670) 2 Wms Saund 156, 157; 85 ER 893, 896.

of the contract.[33] It was these developments that allowed Lord Mansfield in *Kingston v Preston*[34] in to say that 'the depend[e]nce, or independ[e]nce, of covenants was to be collected from the evident sense and meaning of the parties' as opposed to the technical words they had used. The decision is also important due to Lord Mansfield's statement that there are three kinds of covenants:

(1) independent covenants, 'where either party may recover damages from the other, … and where it is no excuse for the defendant, to allege a breach of the covenants on the part of the plaintiff';

(2) dependent covenants, the performance of which are conditions, 'in which the performance of one depends on the prior performance of another'; and

(3) covenants 'which are mutual conditions, to be performed at the same time', where 'if one party was ready, and offered, to perform his part' he may 'maintain an action for the default of the other'.[35]

Lord Mansfield's judgment proved enormously influential, and provided 'a basis for the modern law'.[36] It should be noted that Lord Mansfield's third category was what we have referred to as 'concurrent conditions'.[37] Where both performances were to occur at the same time, the actual performance of each

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[33] See, eg, *Thorp v Thorp* (1702) 12 Mod 455, 460; 88 ER 1448, 1451.

[34] (1773) 2 Doug 689, 691; 99 ER 436, 438.

[35] *Kingston v Preston* (1773) 2 Doug 689, 690–691; 99 ER 436, 437–438.

[36] Francis Dawson, 'Metaphors and Anticipatory Breach of Contract' [1981] Cambridge Law Journal 83, 88.

[37] See s 1.3.1.1.

obligation could not be a condition precedent to the other obligation, for there would be an obvious 'stalemate'.[38] In *Jones v Barkley*,[39] Lord Mansfield (with whom Willes and Ashurst JJ agreed) said that in such cases '[t]he party must shew he was ready; but, if the other stops him on the ground of an intention not to perform his part, it is not necessary for the first to go farther, and do a nugatory act.' Justice Buller similarly observed that 'where something is to be performed by each party at the same time, he who was ready, and offered to do his part, may sue the other for not performing his.'[40]

The decided cases so far all appear to have dealt with problems relating to non-performance in executory contracts.[41] But what would happen in a case involving a partly executed contract? Could one party refuse to perform his or her obligations because what the defaulting party had done was compliant with some of that party's obligations but not all of them? This question was raised and answered in *Boone v Eyre*.[42] The plaintiff conveyed to the defendant the equity of redemption of a plantation in the West Indies, together with title to the slaves upon it, in consideration of £500 and an annuity of £160 per annum for his life. The plaintiff covenanted: (i) that he had good title to the plantation, (ii) that he was lawfully possessed of the slaves, and (iii) that the defendant would quietly

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[38] Carter and Hodgekiss (n 10) 35.

[39] (1781) 2 Doug 684, 694; 99 ER 434, 440. This passage has been construed as being about concurrent conditions: Carter and Hodgekiss (n 10) 34. But counsel in the case advanced two arguments, one based on concurrent conditions and the other based on waiver. Unfortunately, the Court did not make it clear which argument it was accepting: Dawson (n 36) 91. The passage may therefore equally be about waiver as discussed in s 4.7.2.1.

[40] *Jones v Barkley* (1781) 2 Doug 684, 695; 99 ER 434, 440.

[41] Carter and Hodgekiss (n 10) 34.

[42] (1777) 1 H BL 273n, 126 ER 160n.

enjoy. When the defendant failed to pay the annuity, the plaintiff sued. The defendant pleaded by way of defence that the plaintiff was not lawfully possessed of the slaves on the plantation. On a demurrer, the Court gave judgment for the plaintiff, Lord Mansfield saying:

> 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 [slave] not being the property of the plaintiff would bar the action.[43]

As we shall see in Chapter 3, there are at least three different interpretations of this passage each of which has offspring in the modern law.[44] For present purposes, the effect of Lord Mansfield's decision was that the plaintiff's failure to fulfil the promise that he was lawfully possessed of the slaves did not discharge the defendant from his obligation to pay the annuity because the fulfilment of this promise was not a condition precedent to that obligation.

On this interpretation, the significance of *Boone v Eyre* is that it demonstrated the need in cases where some but not all of A's promises had been performed or fulfilled to determine which of A's obligations were conditions precedent to B's obligations and which of A's obligation were not. This, as we shall see, formed the basis of the modern orthodox distinction between conditions and warranties.

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[43] ibid.

[44] See s 3.2.1.

### 2.2.4 Nineteenth century: development of the promissory condition

#### *2.2.4.1 The independency/dependency approach applied*

In the nineteenth century courts continued to build upon the approach in *Kingston v Preston* as developed in *Boone v Eyre*. In *Ritchie v Atkinson*,[45] the plaintiff master of a ship agreed with the defendant freighter to carry a cargo of clean hemp and iron. The plaintiff only delivered a little more than half of the quantity of hemp stipulated. The issue was whether delivery of a complete cargo was a condition precedent to payment. The plaintiff argued that he was entitled to recover a proportion of the freight. The Court (Lord Ellenborough CJ, Grose, Le Blanc, and Baylee JJ) agreed, holding that the delivery of a complete cargo was not a condition precedent to payment, in particular, because it was to be paid for by the ton. Similarly, in *Davidson v Gwynne*,[46] the same members of the Court—relying upon *Boone v Eyre* and *Ritchie v Atkinson*—held that a stipulation to sail with the first convoy was not a condition precedent. Lord Ellenborough CJ said that it was 'useless to go over the same subject again, which has been so often discussed of late'.[47]

The same approach can be seen in *Glaholm v Hays*.[48] A clause in a charterparty stated that the vessel was 'to sail from England on or before the 4th day of February next'. On an action by the shipowners against the defendant freighters for breach of their obligation to load the vessel with cargo, the

[45] (1808) 10 East 295, 103 ER 787.

[46] (1810) 12 East 381, 104 ER 149.

[47] *Davidson v Gwynne* (1810) 12 East 381, 389; 104 ER 149, 152.

[48] (1841) 2 M & G 257, 133 ER 743.

freighters pleaded by way of defence that the vessel had not sailed from England on or before 4 February. The Court ultimately found for the defendants and held that the fulfilment of this obligation was a condition precedent to the defendants' obligation to load the vessel with cargo.

Tindal CJ, delivering the judgment of the Court, did speak of the defendants being 'at liberty to throw up the charter'[49] or 'at liberty to abandon the contract'[50] following non-compliance with the condition precedent. It has been suggested that the Chief Justice here was no longer speaking of the dependency or independency of promises but simply 'distinguishing between breaches giving the right to terminate and those conferring only a right to damages'.[51] Dr John Stannard and Dr David Capper refer to *Glaholm v Hays* as a 'landmark case'[52] in the 'story … of how we got from using *condition* to mean something on which one party's contractual performance was dependent or conditional upon, to the concept of promissory condition'.[53] But, with respect, this is not the case. In addition to stating expressly 'that construing the words as a *condition precedent*, will carry into effect the intention of the parties, with more certainty', Tindal CJ also said that 'the obligation of the contract itself shall be made to depend upon the actual performance of the stipulation'.[54]

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[49] *Glaholm v Hays* (1841) 2 M & G 257, 265; 133 ER 743, 746.

[50] *Glaholm v Hays* (1841) 2 M & G 257, 266; 133 ER 743, 746.

[51] John Stannard and David Capper, *Termination for Breach of Contract* (Oxford University Press 2014) 35 [2.08].

[52] ibid.

[53] ibid 32 [2.02] (emphasis in original).

[54] *Glaholm v Hays* (1841) 2 M & G 257, 267–268; 133 ER 743, 747 (emphasis added).

Even as late as the mid-nineteenth century, the approach based upon the dependency or independency of promises continued to be applied. Thus in *Ellen v Topp*,[55] the plaintiff brought an action on an indenture against the father of an apprentice who had absented himself from the plaintiff's service. The plaintiff had stipulated in the indenture that he was an 'an auctioneer, appraiser and corn-factor', but he subsequently relinquished the trade of corn-factor, following which the apprentice left. The father argued that '[t]he exercise of the trades, or rather the non-abandonment of any one of them … [was] a condition precedent to the service of the apprentice'.[56] Chief Baron Pollock agreed. After noting that the argument was founded on the rules laid down in *Boone v Eyre*, Pollock CB said: 'To this particular covenant to serve, the relative duty to teach seems to us to be directly a condition precedent'.[57]

#### *2.2.4.2 The Common Law Procedure Act 1852: a shift in emphasis*

In the mid-nineteenth century, a shift in emphasis occurred. Until 1852, a plaintiff who brought an action for non-performance had to assert and prove that he or she had complied with all the conditions precedent to the defendant's obligation.[58] This required the plaintiff to identify, at his or her own risk, which facts or events were conditions, irrespective of whether they were express or

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[55] (1851) 6 Ex 424, 155 ER 609.

[56] *Ellen v Topp* (1851) 6 Ex 424, 430; 155 ER 609, 612.

[57] *Ellen v Topp* (1851) 6 Ex 424, 442; 155 ER 609, 616.

[58] Samuel Williston, 'Fashions in Law with Illustrations from the Law of Contracts' (1942) 21 Texas Law Review 117, 128; Dawson (n 36) 89 fn 27.

implied.[59] The Common Law Procedure Act 1852 changed this. In particular, s 57 provided:

> It shall be lawful for the Plaintiff or Defendant in any Action to aver Performance of Conditions precedent generally, and the opposite Party shall not deny such Averment generally, but shall specify in his Pleading the Condition or Conditions precedent the Performance of which he intends to contest.

The effect of this section was to make a general allegation of the performance of all conditions by the plaintiff sufficient.[60] The defendant then had to specify which condition he or she alleged had not been performed.

Importantly, s 57 did not change the substantive legal relations of the parties.[61] The underlying position remained the same, and the ultimate burden of proof still remained on the plaintiff.[62] However, the Act did change the emphasis. Whereas previously a plaintiff had to say 'I have complied with conditions X, Y, and Z of the defendant's obligation', a plaintiff could now simply say 'I have complied with all conditions of the defendant's obligation'. The defendant then had to say 'the plaintiff has broken this key stipulation, the performance of which was a condition precedent to my obligation'. As a result, the focus shifted to the particular term or promise that the defendant alleged had been breached.[63]

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[59] Williston (n 58) 128; Dawson (n 36) 89 fn 27.

[60] Until 1999 when the rules lapsed, RSC Ord 18, r 7(4) went further and implied an allegation of the performance or occurrence of all conditions precedent into the plaintiff's claim.

[61] ibid 129; Dawson (n 36) 89 fn 27.

[62] *Bentsen v Taylor* (n 5) 283; *Jefferson v Paskell* [1916] 1 KB 58 (CA). See also Williston (n 58) 129; Dawson (n 36) 89 fn 27.

[63] Dawson (n 36) 89 fn 27.

Unfortunately, this shift in emphasis, combined with loose language, led judges to begin to speak of conditions (rather than covenants or promises) being 'breached'. An example is *Graves v Legg*.[64] The plaintiff contracted to sell to the defendant 300 to 350 bales of white-washed fleece wool. A term of the contract provided that 'the names of the vessels to be declared as soon as the wools were shipped'. The defendant did not accept the wools and the plaintiff sued. Parke B (for the Court), after noting that the declaration had averred the performance of conditions precedent generally in accordance with s 57, said that 'the defendant proceeds in this plea to specify this condition of declaring the names of the vessels, as one on the breach of which he insists'.[65]

Nonetheless, the Common Law Procedure Act did not change the contemporary understanding of 'promissory conditions'. An illustrative case is *Bettini v Gye*.[66] The plaintiff singer was engaged by the defendant to perform at his theatre. The plaintiff agreed to be in London at least six days before the commencement of his engagement, but only arrived two days before his engagement. The defendant refused to accept the plaintiff's services and the plaintiff sued for breach for not doing so. The plaintiff pleaded that he had complied with conditions precedent generally,[67] but the defendant relied on the fact that the plaintiff had not been in London six days before commencement. On a demurrer, the plaintiff argued that attendance six days before

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[64] (1854) 9 Ex 709, 156 ER 304.

[65] *Graves v Legg* (1854) 9 Ex 709, 715–716; 156 ER 304, 306.

[66] (1876) 1 QBD 183 (QB).

[67] ibid 185.

commencement was not a condition precedent.[68] The Court ultimately agreed. Blackburn J said that the question was whether the plaintiff's failure to arrive six days prior 'justified the defendant in refusing to proceed with the engagement, and fulfil his, the defendant's part'.[69] He said the answer to this question:

> depends on whether this part of the contract is a condition precedent to the defendant's liability, or only an independent agreement, a breach of which will not justify a repudiation of the contract, but will only be a cause of action for a compensation in damages.[70]

The language here of a breach which may 'justify a repudiation of the contract'[71] might be taken to suggest that the claimant needs to 'repudiate' or 'terminate' before he or she is discharged. But it is clear from the context that this is not so. Indeed, Blackburn J spoke of a condition precedent 'to the defendant's liability' and contrasted this with an independent agreement. Moreover, immediately after this passage, Blackburn J noted that the 'numerous cases on the subject' were collected in Williams' notes to Saunders' report of *Pordage v Cole*,[72] which spoke in terms of the dependency or independency of promises. Blackburn J must have been using 'repudiate' merely in the sense of the defendant refusing to perform his side of the bargain.

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[68] ibid 186.

[69] ibid 187.

[70] ibid.

[71] This language was also used in the earlier case of *Behn v Burness* (1863) 3 B & S 751, 754; 122 ER 281, 283.

[72] (1669) 1 Wms Saund 319, 320; 85 ER 449, 451.

#### *2.2.4.3 Waiver of condition: the next step*

An important nineteenth-century case is *Bentsen v Taylor, Sons & Co.*[73] A charterparty described a ship as 'now sailed or about to sail'. In an action by the plaintiff shipowner against the defendant charterers for the freight under the charter party (after the defendants had refused to load the ship), the Court (Lord Esher MR, Bowen, and Kay LJJ) held that (i) the clause was a condition precedent not a 'mere warranty',[74] (ii) it had not been complied with, but (iii) the defendants had by their correspondence waived the condition and as such they were liable for the freight,[75] subject to their own ability to bring a claim for damages. In particular, after the ship had failed to sail, the defendants advised the plaintiff's brokers of their 'intention to load under protest, claiming damages for freight and increased insurance'.[76]

In reaching the conclusion that the condition had been waived, Lord Esher MR and Bowen LJ expressed themselves in different ways. Bowen LJ said:

> In order to succeed, the plaintiff must shew, either that he has performed the condition precedent, the onus being on him, or that the defendants have excused the performance of the condition, and we have to consider whether the plaintiff has sustained that burthen, so that no reasonable man could doubt that there has been a waiver of the condition or an excuse of its performance.[77]

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[73] *Bentsen v Taylor* (n 5).

[74] ibid 284.

[75] For the difficulties with the fact that this was a claim for the freight (ie the agreed sum), see s 4.7.2.2.

[76] *Bentsen v Taylor* (n 5) 276.

[77] ibid 283.

Bowen LJ held that the defendants 'did not intend to rely upon that as a failure of a condition precedent, but only as a breach of warranty'.[78]

On this approach, where one party fails to comply with a condition precedent to the other's obligation, the other party is discharged from his or her obligation to perform but can, notwithstanding, waive the condition by continuing to render or accept performance. In such a case, the innocent party will no longer be discharged from his or her obligation and so will be required to perform.

By contrast, Lord Esher MR said:

> She did not sail till a month afterwards, and there was a breach of the condition. The defendants then had a right to treat the contract as at an end, or they could, if they chose, treat it as still subsisting. But, if they intended to treat the contract as at an end, *it was their duty so to exercise their right* as not to lead the plaintiff to believe that he was still bound by the contract.[79]

On one reading of Lord Esher MR's judgment, while the defendants had a 'right' to treat the contract as at an end, they needed to exercise that right. This would mean that unless and until the right 'to treat the contract as at an end' is exercised, the innocent party remains bound. Moreover, the innocent party's failure to exercise that right could, in some circumstances, preclude him or her from later doing so on the basis that the right had been lost.

The difference between these two views is not a matter of semantics and indeed is at the heart of the dispute in this chapter. It is submitted, particularly in

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[78] ibid 284.

[79] ibid 279 (emphasis added).

light of the history canvassed thus far, that to the extent that the judgment of Lord Esher MR might be interpreted differently, the judgment of Bowen LJ is to be preferred. In any event, the better view is that the relevant parts of Lord Esher MR's judgment were simply loose language—he cannot have intended 'without so much as a backward glance, let alone an express acknowledgement of the *volte face*'[80] to depart from the understanding of the nature of promissory conditions and their relation to discharge which had developed over the past 300 years and had been expressly applied not twenty years before in *Bettini v Gye*.[81]

*Bentsen v Taylor*, however, is important for another reason. That is it may help us understand why modern lawyers, academics, and judges have come to think of the innocent party as having to 'elect to terminate' in order to bring about a discharge. In particular, the risk that the innocent party's inactivity may be found to be a waiver of the condition means that in many cases, practically speaking, he 'will be well advised to notify the other party that he treats himself as discharged'.[82] But as Charles Morison observed in 1916, 'such notice is not required for the purpose of completing a rescission, but only for the purpose of negativing waiver'.[83] It is only a small (mis)step to go from this proposition to the proposition that the innocent party must take steps to terminate. A misreading of

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[80] To borrow a phrase from: Keith Mason, 'Strong coherence, strong fusion, continuing categorical confusion: The High Court's latest contributions to the law of restitution' (2015) 39 Australian Bar Review 284, 318.

[81] *Bettini v Gye* (n 66).

[82] Dawson (n 36) 90.

[83] Charles Morison, *Rescission of Contracts, A Treatise on the Principles Governing the Rescission, Discharge, Avoidance and Dissolution of Contracts* (Stevens & Haynes 1916) 18.

*Bentsen v Taylor* is arguably the birthplace of the modern 'election theory' of termination.[84]

#### *2.2.4.4 Sale of Goods Act 1893*

The Sale of Goods Act 1893, which came into force on 1 January 1894,[85] has been identified as one possible cause of the supposed shift from 'promissory condition' as traditionally understood to 'condition' in the sense of an important term breach of which gives rise to a power to terminate.[86] The Act famously contrasted 'conditions' with 'warranties'. Section 11(1)(b) relevantly provided:

> Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages, but not a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract…

However, the Sale of Goods Act 1893 was '[a]n Act codifying the law relating to the Sale of Goods'. As Vaughan Williams LJ observed in *Wallis Son & Wells v Pratt & Haynes*,[87] it 'simply enact[ed] the law already established by the cases cited'. Likewise, it is clear that the draftsman of the Act, Sir Mackenzie Chalmers, did not intend to change the law. In his 1894 commentary to the Act, he wrote:

> The Act throughout, so far as it relates to England, draws a distinction between the terms 'condition' and 'warranty.' This

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[84] I am grateful to Professor Francis Dawson for pointing this out.

[85] See Sale of Goods Act 1893, s 63. The Act was, however, given Royal Assent on 20 February 1894.

[86] Wilmot-Smith (n 2) 308 fn 10.

[87] [1910] 2 KB 1003 (CA) 1010.

> distinction has often been insisted on, but seldom observed by judges and text writers. As used in the Act, 'condition' is the equivalent to the old term 'dependent covenant,', while 'warranty' is equivalent to the old term 'independent covenant.'[88]

It has been argued that Chalmers' 'use of the term "condition" was a misuse of the term "condition precedent"',[89] and that '[f]undamentally, Chalmers … failed to distinguish promises from conditions'.[90] The most serious charge levelled at Chalmers is that he 'simply misunderstood the previous law on this subject'.[91] These criticisms are largely unfair. While it is true that the word 'condition' confusingly was being used to refer to both the condition and the promise, Chalmers was acutely aware of this. In an appendix to his commentary, he explained:

> The term 'condition' as applied to contracts appears to mean indifferently (a) an uncertain event on the happening of which the obligation of the contract is to depend, and (b) the stipulation in the contract making its obligation depend on the happening of such event. Though the Act uses the term condition, it does not define it. The definition belongs to the general law of contract.[92]

While there are undoubtedly problems with using the same word to refer to these two different concepts, judges were already doing this prior to the Sale of Goods Act 1893. At most, Chalmers can be criticised for perpetuating this confusing use of language. A fairer criticism is found in the fifth edition of *Benjamin on Sale*:

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[88] M D Chalmers, *The Sale of Goods Act, 1893, including The Factors Acts, 1889 & 1890* (William Clowes and Sons Ltd 1894) 24–25. See also his discussion of the term 'warranty': 168.

[89] Carter and Hodgekiss (n 10) 43.

[90] ibid 44.

[91] Stannard and Capper (n 51) 37 [2.11].

[92] Chalmers (n 88) 164.

> It would have been, in the Editors' opinion, better to have used the word 'promises' in the Code in referring to conditions to be performed by the seller, with an independent statement that the performance of these promises is a condition precedent to the buyer's liability.[93]

As for Chalmers' use of the word 'warranty', this might be criticised because a warranty (in the sense of a guarantee)[94] can also amount to a condition precedent and many cases, especially in the insurance context, had used the word in that sense.[95] But Chalmers made clear that, when used in the Act, it was not being used in that sense; it was being used to denote an independent stipulation.[96] Moreover, this was not new. Indeed, in cases such as *Bentsen v Taylor*,[97] the language of condition precedent was contrasted with a 'mere warranty'. The inference to be drawn is that by the time of the Act, the language of 'warranty' had come to denote an independent promise. Sir William Anson, for example, writing some 15 years before the Act came into force, made precisely this distinction when contrasting 'subsidiary promises, or *warranties*' with '*conditions* or terms on which the right to performance depends'.[98]

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[93] Walter Charles Alan Ker and Arthur Reginald Butterworth, *A Treatise on the Law of Sale of Personal Property with references to the American Decisions and to the French Code and Civil Law* (5th edn, Sweet & Maxwell 1906) 557–558 fn 6.

[94] See Chalmers (n 88) 169.

[95] *Behn v Burness* (1863) 3 B & S 751, 753; 122 ER 281, 282.

[96] Chalmers (n 88) 168.

[97] *Bentsen v Taylor* (n 5).

[98] Sir William R Anson, *Principles of the English Law of Contract* (1st edn, Clarendon Press 1879) 284 (emphasis in original). The use of the term in this way possibly originates from *Chanter v Hopkins* (1838) 4 M & W 399, 150 ER 1484: see Anthony Beck, 'The Doctrine of Substantial Performance: Conditions and Conditions Precedent' (1975) 38 Modern Law Review 413, 420.

#### *2.2.4.5 State of the law at the end of the nineteenth century*

At least until the end of the nineteenth century, the word 'condition', even when used in its promissory sense, bore its natural meaning: one party's obligation to perform was conditional. However, by the end of the nineteenth century, the word 'condition' had begun to be used to refer to the term itself (ie the promise). Strictly speaking, however, it was, and still is, the performance of A's promise that was a condition precedent to (or concurrent condition of) B's obligation.[99] As Professor Robert Bradgate noted, the words 'condition precedent' were simply 'a shorthand to describe a term whose *performance* is a condition precedent to the other party's obligation to perform. To describe such a term as a "condition" is merely a further contraction'.[100]

One problem with this approach, however, is that it led parties and courts to start talking about 'breach of a condition'. The potential for confusion was that, logically speaking, one cannot breach a condition if 'condition' is understood to refer to an uncertain fact or event upon which the existence of one party's immediate obligation to perform depends. Professor Arthur Corbin noted this when he said:

> [I]n many cases it is said that there has been a 'breach of the condition' by the defendant (clearly a misuse of the word

[99] Robert Bradgate, 'Termination for Breach' in John Birds, Robert Bradgate, and Charlotte Villiers (eds), *Termination of Contracts* (Wiley Chancery 1995) 15, 40. See also Carter and Hodgekiss (n 10) 38.

[100] Bradgate (n 99) 42 (emphasis in original).

> condition). The defendant has in fact committed a breach, but it is a breach of *duty*, not a breach of condition.[101]

The use of this language by English lawyers was criticised, particular by American writers,[102] but it was not because promissory conditions were not conditions in the strict sense. The problem was that the language of condition failed to distinguish between the condition and the promise; it simply referred to both.[103]

## 2.3 TWENTIETH-CENTURY DEVELOPMENTS

### 2.3.1 The immediate aftermath of the Sale of Goods Act

We have seen that the Sale of Goods Act 1893 did not set out to change the nature of promissory conditions. Nonetheless, did the subsequent interpretation of the Act cause our understanding to change? The short answer is that it did not. However, one early case which, if read out of context, might suggest the contrary is the decision of the Court of Appeal in *Wallis, Son & Wells v Pratt & Haynes*[104]—specifically, the dissenting judgment of Fletcher Moulton LJ, which was unanimously adopted on appeal to the House of Lords.[105]

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[101] Arthur Corbin, 'Supervening Impossibility of Performing Conditions Precedent' (1922) 22 Columbia Law Review 421, 423.

[102] Eg Samuel Williston, *The Law of Contracts* (Baker, Voorhis & Co 1920) vol 2, 1282–1283 §665; ibid. See also J L Montrose, 'Conditions and Promises' (1960) 23 Modern Law Review 434, 484–485; F M B Reynolds, 'Discharge of Contract by Breach' (1982) 97 Law Quarterly Review 541, 542.

[103] F M B Reynolds, 'Warranty, Condition and Fundamental Term' (1963) 79 Law Quarterly Review 534, 536.

[104] *Wallis v Pratt* (n 87).

[105] *Wallis, Son & Wells v Pratt & Haynes* [1911] AC 394 (HL).

The defendants sold seed by sample to the plaintiffs. The relevant description on the back of the sale note described the seeds as 'common English sainfoin'. As it turned out, neither the sample nor the seed sold was common English sainfoin. A term on the back of the note provided: 'Sellers give no warranty express or implied as to the growth, description, or any other matters'. It was held that although it was a condition precedent that the goods match the description, as the plaintiffs had accepted and resold the seed they could only treat it as a warranty entitling them to damages.[106] However, the majority of the Court of Appeal also held that the sellers had excluded any such liability. This latter aspect of the decision was overturned on appeal to the House of Lords. The important passage for present purposes is from the dissenting judgment of Fletcher Moulton LJ in which he contrasted obligations described as 'conditions' with obligations described as 'warranties' and said:

> Both classes are equally obligations under the contract, and the breach of any one of them entitles the other party to damages. But in the case of the former class he has the alternative of treating the contract as being completely broken by the non-performance and (*if he takes the proper steps*) he can refuse to perform any of the obligations resting upon himself and sue the other party for a total failure to perform the contract.[107]

The reference to 'if he takes the proper steps' appears, at first glance, to be a reference to taking steps in order to bring about a discharge. However, a proper reading of Fletcher Moulton LJ's judgment reveals that this is not the case. Rather, he was referring to the need to take proper steps to reject the goods, so as not to be barred from relying the condition (ie so as to negate any waiver).

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[106] Relying upon s 11(1)(c) of Sale of Goods Act 1893 and the cases from which the section was derived.

[107] *Wallis v Pratt* (n 87) 1010 (emphasis added).

This instance of waiver was found in s 11(1)(c) of the Sale of Goods Act 1893,[108] which provided:

> Where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof … the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated…

The section was based in part on Serjeant Williams' observations of *Boone v Eyre*.[109] We have already seen the first interpretation of that decision, namely, that fulfilment of the promise that the plaintiff had good title to all the slaves was not a condition precedent. The second interpretation, which assumes that fulfilment of the promise was a condition precedent, arose from Serjeant Williams' comment that:

> where a person has received a *part* of the consideration for which he entered into the agreement, it would be unjust that because he had not had the *whole*, he should therefore be permitted to enjoy that part without either paying or doing any thing for it.[110]

Prior to the Sale of Goods Act, the cases had interpreted this comment as giving rise to a rule that where a party received the 'whole or any substantial part of the consideration for the promise on his part' that party could no longer rely upon the non-performance of the condition precedent.[111] In *Ellen v Topp*,[112] Pollock CB adopted the rule, although observed that it was 'remarkable' that a contract could be construed 'ex post facto' and that 'that which is a condition

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[108] See now, Sale of Goods Act 1979, s 11(4).

[109] *Pordage v Cole* (1669) 1 Wms Saund 319, 320; 85 ER 449, 453.

[110] ibid (emphasis in original).

[111] *Behn v Burness* (1863) 3 B & S 751, 755; 122 ER 281, 283.

[112] (1851) 6 Ex 424, 155 ER 609.

precedent when the deed is executed may cease to be so by the subsequent conduct of the covenantee in accepting less.'[113] However, subsequent cases explained that it was not a case of construing the contract ex post facto (so that what was a condition precedent was no longer so), but rather one where, because of the party's conduct, he or she could no longer rely upon the non-performance of a condition precedent.[114] In short, it appears to have been an instance of waiver.[115]

It is clear then that, notwithstanding the fact that a failure of a condition precedent by a seller would discharge the buyer from his or her obligation to pay the price, he or she must reject the goods in order to avoid being barred from relying upon the condition. And Fletcher Moulton LJ made exactly this point in *Wallis* when he said:

> But in the case of a breach of a condition he has the option of another and higher remedy, namely, that of treating the contract as repudiated. But, as I have said, he must act promptly if he desires to avail himself of this higher remedy, and in s. 11, sub-s 1 (c), two cases are given in which he will be deemed as a matter of law to have elected to content himself with his right to damages…[116]

In other words, the simple point Fletcher Moulton LJ is making is that, in this context, the buyer needs to take steps so as to avoid accepting, and receiving the benefit of, the goods, and therefore to avoid being barred from relying upon

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[113] *Ellen v Topp* (1851) 6 Ex 424, 441–442; 155 ER 609, 616. This suggestion was viewed 'with repugnance' by Lord Shaw in *Wallis v Pratt* (n 105) 400.

[114] *Graves v Legg* (1854) 9 Ex 709, 717; 156 ER 304, 307; *Behn v Burness* (1863) 3 B & S 751, 755; 122 ER 281, 283.

[115] Morison (n 83) 100–105; Beck (n 98) 418–419.

[116] *Wallis v Pratt* (n 104) 1013.

the condition precedent. He was not suggesting that the nature of conditions had changed, indeed he said exactly the opposite, noting that 'the Act adopts the well-settled law that existed at the date when it was passed'.[117]

### 2.3.2 *Heyman v Darwins Ltd*

One significant case, which has contributed to the modern orthodoxy that following 'breach of a condition' the innocent party is given a 'power to terminate', is the decision in *Heyman v Darwins Ltd.*[118] That case, however, had nothing to do with conditions (promissory or otherwise). It was concerned with the effects of a 'repudiation' in the particular sense of a 'renunciation':[119] where one party 'evinces an intention no longer to be bound by the contract … or shows that he intends to fulfil the contract only in a manner substantially inconsistent with his obligations and not in any other way'.[120] This is a form of anticipatory breach. A 'repudiation' may also refer to circumstances where one party disables himself or herself from performing;[121] another form of anticipatory breach. And sometimes the language of 'repudiation' or 'repudiatory breach' is used to refer to cases of actual breaches of duty, where that breach of

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[117] ibid.

[118] [1942] AC 356 (HL).

[119] ibid 397. See also *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115 (HCA) 135 [44].

[120] *Shevill v Builders Licensing Board* (1982) 149 CLR 620 (HCA) 625–626. See also *Heyman v Darwins* (n 118) 379; *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 (HCA) 33, 40; *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) 166 CLR 623 (HCA) 634, 643; *Koompahtoo* (n 119) 135 [44].

[121] *Universal Cargo Carriers Corp v Citati* [1957] 2 QB 401 (QB) 436–438.

duty gives rise to a discharging event.[122] This latter use generally should be avoided, however, for it only obscures the true ground of discharge.[123]

In *Heyman v Darwins*, the appellants, who were selling agents of the respondent steel manufacturers, alleged that following a dispute about remittance of moneys due under their contract, the respondents had 'repudiated and/or evinced an intention not to perform'.[124] They commenced an action in the High Court. The respondents sought for the action to be stayed on the basis that there was an arbitration clause in the contract and the dispute fell within its scope. The House of Lords agreed with this argument. However, in responding to 'the view that an agreement is automatically terminated if one party "repudiates" it'[125] various members of the House of Lords made statements which, if not confined to circumstances involving repudiation (in the sense of renunciation), would suggest that one must always 'accept' a breach (ie exercise a 'power to terminate') before they can be discharged from their obligation to perform. Viscount Simon LC, for example, said:

> [T]he other party may rescind the contract, or (as it is sometimes expressed) 'accept the repudiation'… But repudiation by one party standing alone does not terminate the contract. It takes two to end it, by repudiation, on the one side, and acceptance of the repudiation, on the other.[126]

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[122] *Heyman v Darwins* (n 118) 397. See also *Koompahtoo* (n 119) 135–136 [44].

[123] See generally J W Carter, Wayne Courtney, and Gregory Tolhurst, 'The detrimental impact of "repudiatory breach" on discharge for breach of contract' (2020) 4 Journal of Business Law 287; J W Carter, *Carter's Breach of Contract* (2nd edn, Hart 2019) 289 [7-07].

[124] *Heyman v Darwins* (n 118) 358.

[125] ibid 361.

[126] ibid.

The proposition that in order for a repudiation (renunciation) to operate as a discharging event it must be 'accepted'[127] is undoubtedly correct. An 'acceptance' is required because a statement by one party in advance of performance that they will not perform, on its own, does not discharge the other party from his or her obligation to perform. To quote the time-honoured phrase of Asquith LJ in *Howard v Pickford Tool Co Ltd*,[128] '[a]n unaccepted repudiation is a thing writ in water and of no value to anybody: it confers no legal rights of any sort or kind.'[129]

But the language of 'repudiation', as already outlined, can be used in different senses. In *Heyman v Darwins*, Lord Porter said that '[a]ll these acts [actual failure of performance, renunciation, and disablement] may be compendiously described as repudiation, though that expression is more particularly used of renunciation before the time for performance has arrived'.[130] This is a recipe for confusion: 'repudiation' in one sense involves actual breach but in another sense (renunciation or disablement) it is a form of anticipatory breach. The situation is also made more complex because sometimes the conduct to infer a renunciation

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[127] For criticism of this language see, J C Smith, 'Anticipatory Breach of Contract' in E Lomnicka and C Morse (eds), *Contemporary Issues in Commercial Law: Essays in Honour of A G Guest* (Sweet & Maxwell 1997) 175, 184–188.

[128] [1951] 1 KB 417 (CA) 421.

[129] See also ibid 420–421 (Evershed MR); *Golding v London & Edinburgh Insurance Co Ltd* (1932) 43 Ll L Rep 487 (CA) 488. It should, however, be noted that this statement, unqualified, is misleading: Sir Michael Mustill, 'Anticipatory Breach of Contract: The Common Law at Work' in *Butterworth Lectures 1989–90* (Butterworths 1990) 61–62. See further s 4.7.

[130] *Heyman v Darwins* (n 118) 397.

of future obligations is in fact the way in which a present obligation is breached.[131]

All of this appears to have led to a situation where although *Heyman v Darwins* was a decision concerned with repudiation in the sense of renunciation (ie anticipatory breach), the statements in it were taken by some to be applicable to discharge following actual breach. Earlier textbook writers had drawn a distinction between the rules applicable to each form of discharge,[132] but post-*Heyman v Darwins* statements relying upon the case for propositions about discharge following actual breach could be found. Geoffrey Cheshire and Cecil Fifoot, for example, wrote the following, relying upon the case:

> It must be observed, however, that a contract cannot be terminated unilaterally. Therefore, if one party commits a breach sufficiently serious to constitute a discharge, this does not automatically abrogate the mutual obligations, but merely gives the other party an option either to ignore the breach and to insist upon performance when due, or to accept the repudiation and treat himself as free from further liability.[133]

This was undoubtedly a mistake, but it can be seen how this thinking would come to influence the modern lawyer's understanding of the nature of promissory conditions. When combined with the loose language referring to 'breaches of conditions' and the misstep from the practical steps needed to negate any allegation of waiver, the assumption of modern lawyers that 'conditions' are simply important terms breach of which does not of itself

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131 *Suisse Atlantic Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 (HL) 435. See also McKendrick, 'Termination for Breach' (n 1) 2003 [27–039]; Peel (n 1) 978 [18-038]; *Koompahtoo* (n 119) 135 [44].

132 A good example is Morison (n 83) 8.

133 G C Cheshire and C H S Fifoot, *The Law of Contract* (5th edn, Butterworth & Co 1960) 491.

discharge either party, but gives the innocent party a 'power to terminate', becomes easier to understand. It is a misstep that has been contributed to by applying rules about the need for an acceptance of a repudiation in the sense of renunciation (a form of anticipatory breach) to situations involving discharge following actual breach (so-called repudiatory breach).[134] It must be stressed, however, that *Heyman v Darwins Ltd* itself said nothing about the nature of promissory conditions.

### 2.3.3 *Hongkong Fir*

Another candidate for the definite shift in thinking about promissory conditions is *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd.*[135] In that case, the claimant shipowners chartered the *Hongkong Fir* to the defendants. By clause 1 of the charterparty, the owners contracted to deliver the vessel 'she being in every way fitted for ordinary cargo service' (the 'seaworthiness obligation'). The vessel sailed from Liverpool to Osaka but there were insufficient members of the engine room to maintain the vessel's old machinery and the chief engineer was a drunk, both of which caused serious breakdowns. Sometime after the vessel arrived in Osaka, the charterers renounced their obligations under the charterparty. The owners brought an action for wrongful repudiation. The charterers in their defence alleged that the owners had breached the seaworthiness obligation, the performance of which they argued was a condition of the contract, or, alternatively, the charterparty was 'frustrated' by reason of the

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[134] Similar statements to those found in *Heyman v Darwins* (n 118) can be found in *Hirji Mulji v Cheong Yue Steamship Co* [1926] AC 497 (PC) 509–510.

[135] [1962] 2 QB 26 (CA).

breakdowns, repairs and delay. The Court of Appeal (Sellers, Upjohn, and Diplock LJJ) held that the seaworthiness obligation was not a condition, and that the delays caused by the breakdowns and repairs were not so great as 'frustrate' the commercial purpose of the charterparty. Our focus here is on the first aspect; the second aspect is discussed in detail in Chapter 3.[136]

In explaining why the seaworthiness stipulation (or its performance) was not a condition, Sellers LJ said:

> It would be unthinkable that all the relatively trivial matters which have been held to be unseaworthiness could be regarded as conditions of the contract or conditions precedent to a charterer's liability and justify in themselves a cancellation or refusal to perform on the part of the charterer.[137]

It is possible here that Sellers LJ was drawing a distinction between two different concepts. The first is that of a 'condition', which justifies a 'cancellation'. The second is that of a 'condition precedent', which justifies a 'refusal to perform'. However, in the remainder of his judgment this distinction (if it were intended to be one) disappeared in favour of the latter concept. Indeed, in the dispositive part of his judgment, Sellers LJ stated: 'it is not open to the charterers to rely on the obligation of seaworthiness as a condition precedent to the obligation on the charterers to pay freight or hire.'[138]

Upjohn LJ's judgment is even clearer. He said:

> A condition, or a condition precedent, to give it its proper title under the old system of pleading, was a condition performance

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[136] See s 3.4.2.

[137] *Hongkong Fir* (n 135) 56.

[138] ibid 58 (emphasis added).

> of which had to be averred by the plaintiff in the declaration in order to establish his claim against the defendant.[139]

Upjohn LJ then went on to say that 'the stipulation as to seaworthiness is not a condition in the strict sense'.[140] At no point did he consider whether the seaworthiness obligation was a condition in any other sense.

As for Diplock LJ's judgment, his central point was that it was an event, rather than the breach itself, which relieved one party of his or her undertakings under the contract.[141] Speaking of 'conditions precedent', he said that 'the non-performance by one party of an undertaking of this class was an event which excused the other party from the performance of his corresponding undertaking'.[142] Furthermore, after referring to a number of the cases discussed above, Diplock LJ observed:

> The fact that the emphasis in the earlier cases was upon the breach by one party to the contract of his contractual undertakings, for this was the commonest circumstance in which the question arose, tended to obscure the fact that it was really the event resulting from the breach which relieved the other party of further performance of his obligations…[143]

Subject to the qualification that, strictly speaking, it is the non-occurrence of an event which discharges the innocent party, this is consistent with the history of promissory conditions as traditionally understood.

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[139] ibid 63.

[140] ibid 64.

[141] A point made in Donal Nolan, '*Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha* Ltd, *The Hongkong Fir* (1961)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in the Law of Contract* (Hart Publishing 2018) 269, 286.

[142] *Hongkong Fir* (n 135) 67.

[143] ibid 68.

Diplock LJ, however, sought to go further than the observation that it is an event which discharges the party. He said that '[t]he test whether the event relied upon has this consequence is the same whether the event is the result of the other party's breach of contract or not'.[144] He expressed it thus:

> [D]oes the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?[145]

In this, Diplock LJ sought to identify a single event the occurrence of which discharges a party from his or her obligation to perform both in cases of breach (whether of a condition or not) and frustration.[146] The purpose of this was to explain why the so-called condition/warranty dichotomy was non-exhaustive: in relation to some terms, 'all that can be predicated is that some breaches will and others will not give to [such] an event'.[147] And in seeking to bring conditions into this framework, Diplock LJ said that a condition was a term:

> of which it can be predicated that every breach of such an undertaking must give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract.[148]

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[144] ibid 69.

[145] ibid 66.

[146] ibid 69.

[147] ibid 70.

[148] ibid 69.

As a preliminary matter, we can note that this definition was not 'entirely correct',[149] and in *Photo Production Ltd v Securicor Transport Ltd*,[150] Lord Diplock (as he had then become) retreated from it. As Lord Roskill explained in *Bunge Corp, New York v Tradax Export SA, Panama*:[151]

> [I]t is beyond question that there are many cases in the books where terms, the breach of which do not deprive the innocent party of substantially the whole of the benefit which he was intended to receive from the contract, were nonetheless held to be conditions…

But more importantly, and unlike the other two members of the court, Diplock LJ appears to have departed from the traditional understanding in two respects. First, by focusing on a single event that would discharge a party from his or her obligation to perform, Diplock LJ appears to have thought that, today, the discharge of that party could be explained in terms of a rule of law and need not be explained, as it historically was explained, in terms of conditions. Thus, speaking of the tendency to describe cases of 'frustration' and cases of discharge following breach of a warranty[152] as resting upon an implied condition, he said:

> [I]t does not clarify, but on the contrary obscures, the modern principle of law where such an event *has* occurred as a result of a breach of an express stipulation in the contract, to continue to add the now unnecessary colophon 'Therefore it was an implied *condition* of the contract that a particular kind of breach of an express *warranty* should not occur.' The common law evolves not

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[149] Sir Guenter Treitel, *Some Landmarks of Twentieth Century Contract Law* (Oxford University Press, 2002) 116.

[150] [1980] AC 827 (HL) 849.

[151] [1981] 1 WLR 711 (HL) 724.

[152] This is not how most lawyers would use the term 'warranty' today, but see s 3.4.3 and the text accompanying n 146 in that section.

> merely by breeding new principles but also, when they are fully grown, by burying their progenitors.[153]

Secondly, Diplock LJ did subsequently speak of 'an event which relieves the charterer of further performance of his undertakings *if he so elects*',[154] and he referred to 'where one party to a contract relies upon a breach by the other party as giving him a right to *elect* to rescind the contract'.[155]

The judgment of Diplock LJ in *Hongkong Fir* then does mark another shift towards the modern view that 'breach of a condition' gives rise to a 'power to terminate'. But Diplock LJ is the only judge to have expressed himself in that way and his proposed way of bring promissory conditions into his new framework was later abandoned. He certainly drew no clear distinction between 'conditions precedent' and 'promissory conditions'. And his judgment still contains a crucial insight for the traditional view, namely, that it is not the breach of a promise that discharges the innocent party from his or her obligation to perform, but the (non-)occurrence of an event. That is consistent with the traditional understanding of promissory conditions.

In sum, when read as a whole, the judgments in *Hongkong Fir* give little support to the suggestion that a 'promissory condition' had anything other than its historical meaning. As Lord Wilberforce later recorded in *Schuler AG v Wickman Machine Tools Sales Ltd*,[156] '[n]othing in the judgments [in *Hongkong*

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[153] *Hongkong Fir* (n 135) 71 (emphasis in original).

[154] ibid 71 (emphasis added).

[155] ibid 72 (emphasis added).

[156] [1974] AC 235 (HL) 262.

*Fir*] cast any doubt upon the meaning or effect of 'condition' where that word is technically used' and the 'development of the term through 19th-century cases… to present time' was not reversed by *Hongkong Fir*.

### 2.3.4 A period of confusion

The position up to and including the decision in *Hongkong Fir*, generally speaking, appears to have been that there was no difference between a 'condition precedent' and a 'condition' when used in their promissory sense.[157] One inescapable truth, however, is that a number of cases in the second half of the twentieth century spoke about the innocent party having an 'election' following breach of a condition.[158]

The first judgment which might suggest that there is a distinction between a 'condition precedent' and a 'condition' when both those terms are used in their promissory sense is that of Lord Denning MR in the Court of Appeal in *Wickman Machine Tool Sales Ltd v L Schuler AG*.[159] In discussing the various senses of the word 'condition', Lord Denning MR contrasted a 'condition' in the sense of 'a prerequisite to the very existence of the agreement' with a 'condition' in the sense of a 'prerequisite to the right to recover on the agreement' and a condition the breach of which:

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[157] This understanding also appears to have been maintained by at least some academics. See Reynolds (n 103) 535; Kenneth William Wedderburn, *Sutton and Shannon on Contacts* (6th edn, London Butterworths 1963) 277–278.

[158] See, eg, *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH (The Mihalis Angelos)* [1971] 1 QB 164 (CA) 193 (Lord Denning MR), 205 (Megaw LJ); *Schuler v Wickman* (n 156) 251 (Lord Reid), 265 (Lord Simon), 271 (Lord Kilbrandon), but cf 259 (Lord Morris), 262 (Lord Wilberforce; dissenting on the facts); *Photo Production* (n 150) 849 (Lord Diplock), but cf 844 (Lord Wilberforce).

[159] [1972] 1 WLR 840 (CA) 850–851.

> gives the other party a right to be quit of his future obligations and to sue for damages: unless he, by his conduct, waives the condition, in which case he is bound to perform his future obligations, but can sue for the damages he has suffered.[160]

It is not entirely clear what distinction Lord Denning MR was seeking to draw. It is possible in respect of the latter two senses that Lord Denning MR was only intending to distinguish between a non-promissory condition and a promissory one. To add to the confusion, in discussing the latter, Lord Denning MR noted that this 'use of the word 'condition' goes back at least to 1841 in *Glaholm v Hays*'.[161] As we have noted above, this was a case about the dependency of promises. He also observed that this use 'was given statutory sanction by Parliament in the Sale of Goods Act 1893 and by the House of Lords in *Wallis, Son & Wells v Pratt & Haynes*',[162] which again suggests no distinction between a promissory condition precedent and a promissory condition.

The traditional understanding of promissory conditions was restated subsequently in *Cehave NV v Bremer Handelsgesellschaft mbH (The Hansa Nord)*.[163] In that case, Lord Denning MR traced the development of the law from *Pordage v Cole* to *Hongkong Fir*. He did not refer to termination or rescission but instead spoke of 'a "condition" strictly so called, in which any breach entitled the other to be discharged from further performance'[164] and later 'a condition strictly

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[160] ibid.

[161] ibid 851.

[162] ibid.

[163] [1976] QB 44 (CA).

[164] *The Hansa Nord* (n 163) 59.

so called, that is, a stipulation such that, for any breach of it, the other party is entitled to treat himself as discharged.'[165]

By the 1980s, however, the language of 'election' appears to have taken hold. In *Photo Production*,[166] Lord Diplock famously stated that a breach of a condition 'entitle[s] the other party to elect to put an end to all primary obligations of both parties remaining unperformed.'[167] But even in this case Lord Wilberforce (with whom Lords Salmon, Keith, and Scarman agreed) spoke in different terms. He said that 'when one speaks of "termination" what is meant is no more than the innocent party or, in some cases, both parties, are excused from further performance'[168] and that expressions such as 'discharge, rescission, [and] termination' simply refer to 'situations where a breach has been committed by one party of such a character as to entitle the other party to refuse further performance'.[169] This is at least consistent with the view which has been put forward in this chapter.

The fact that the position was being obscured by loose language was observed by Professor Francis Dawson in 1981. He explained how traditionally 'because the defaulting party could not enforce the contract [upon the failure of a

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165 ibid 60.

166 *Photo Production* (n 150).

167 ibid 849 (emphasis added).

168 ibid 844.

169 ibid.

condition], the innocent party could treat himself as excused from further performance.'[170] He added:

> Although this is all that is meant when a modern lawyer says that the innocent party is entitled to bring the contract to an end, it is often said that the innocent party is in addition required to elect to bring the contract to an end and to communicate that election if he is to be excused from further performance on a repudiation. Strictly speaking this is not the position… 'he need do nothing except refrain from performance or receiving performance until he is sued.'[171]

It was also around this time that Dr Anthony Shea wrote an important article in which he argued that 'the reason that the party not in breach is excused from performance by reason of the other party's breach is *failure of condition*'.[172] In particular, he argued that '[f]ailure of condition … may occur in cases in which there is a breach, but is distinct from the breach in the sense that the promisee is discharged not by the breach but by the *event* which is or may be a consequence of the breach.'[173] The approach taken by Shea is consistent with the meaning of promissory condition as it has been used in this chapter.

The final decision to mention is the decision in *Bunge Corp, New York v Tradax Export SA, Panama*.[174] The issue in that case was whether a clause requiring the buyers to give at least 15 days' notice of the ship's readiness to load the goods was a 'strict condition' or an 'innominate' or 'intermediate' term.[175] The

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[170] Dawson (n 36) 89.

[171] ibid 89–90.

[172] A M Shea, 'Discharge from Performance of Contracts by Failure of Condition' (1979) Modern Law Review 623, 623 (emphasis in original).

[173] ibid 624 (emphasis in original).

[174] *Bunge v Tradax* (n 151).

[175] ibid 714.

House of Lords held that the clause was a condition. Lord Roskill, who delivered the leading speech, said:

> [W]hen a term has to be performed by one party as a condition precedent to the ability of the other party to perform another term, especially an essential term such as the nomination of a single loading port, the term as to time for the performance of the former obligation will in general fall to be treated as a condition.[176]

Professor Michael Bridge, writing shortly after *Bunge v Tradax*, identified the possibility that a term may be a 'condition' in the modern sense of a term which gives rise to a 'power to terminate', but not also in the traditional sense. He wrote that it was 'hard to see any logical reason why this should not be possible' but noted that such an analysis, while not inconsistent with *Bunge v Tradax*, had not been considered by the House of Lords or Court of Appeal.[177]

### 2.3.5 Summary of the position so far

It should now be clear that historically no distinction was drawn between the concept of a 'condition' and a 'condition precedent' when both these terms were used in their promissory sense. By the latter half of the twentieth century, however, a number of cases began to speak of an 'election to terminate'. This would, at first glance, appear to suggest that a condition is not something which upon its failure discharges the innocent party (subject to waiver), but simply an important term breach of which gives rise to a 'power to terminate'. But these cases are at best ambiguous and at worst confused, and none seriously suggests a

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[176] ibid 729.

[177] Michael G Bridge, 'Discharge for Breach of the Contract of Sale of Goods' (1983) 28 McGill Law Journal 867, 904.

distinction between 'conditions' and 'conditions precedent'. Indeed, it appears that the modern position—that 'breach of a condition' gives rise to a 'power to terminate'—has been arrived at largely by accident.

The root cause of this confusion appears to (i) a misstep flowing from the practical steps which often need to be taken in order to negate any suggestion of waiver of the condition,[178] (ii) applying statements about needing to 'accept' a repudiation to cases of actual breach, and (iii) loose language when speaking about 'conditions'.

## 2.4 TREITEL ON 'CONDITIONS' AND 'CONDITIONS PRECEDENT'

Treitel famously argued that 'the concept of promissory condition is used in two senses': the first relates to the *order* of performance and the second relates to the *conformity* of the performance rendered with that promised.[179] He said that when speaking of the order of performance 'condition precedent' was to be contrasted with 'concurrent condition' and 'independent covenant'.[180] But when speaking of the conformity of performance, 'condition' was to be contrasted with 'warranty' (and 'intermediate term' or 'innominate term').[181]

Treitel was well-aware that historically this distinction had not been drawn. Indeed, he noted that 'references to "condition precedent" were formerly

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[178] See the discussion of *Bentsen v Taylor* (n 5) in s 2.2.4.3 above.

[179] Treitel (n 7) 185.

[180] ibid 185–186.

[181] ibid.

common in discussions of the condition-warranty distinction'.[182] But he argued that today such references in discussions of the condition-warranty distinction were less common and moreover:

> [T]hey are misleading in that 'condition precedent' (when used in relation to the order of performance) refers to an *event* (ie the *performance* of one party's obligation) while 'condition' (when used in relation to the conformity of performance) refers to a *term* of the contract (or to the *content* of one party's obligation).[183]

It should be apparent that the claim made by Treitel is directly at odds with the account given thus far of the nature of promissory conditions. In this section, therefore, we consider a number of issues. First, is there a distinction between the order of performance and the conformity of performance? Secondly, can the examples given by Treitel and others be explained on the traditional basis? And finally, did the authority on which Treitel relied in fact support the distinction he sought to draw?

### 2.4.1 Is there a distinction between order and conformity?

At the heart of Treitel's argument is the idea that the concept of a 'condition precedent' is concerned with the order of performance, while the language of 'condition' is concerned with the conformity of the performance rendered with that promised. It is submitted that while seemingly intuitive, this bright-line distinction between order and conformity is a false one to draw. The flaw lies in the assumption that the cases said to be concerned with the order of performance are not concerned with conformity.

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[182] ibid 186.

[183] ibid (emphasis in original).

## 2.4 TREITEL ON 'CONDITIONS' AND 'CONDITIONS PRECEDENT'

It was noted above that, prior to the decision in *Boone v Eyre*,[184] the reported cases had all dealt with problems relating to non-performance in executory contracts.[185] *Boone v Eyre*, however, was not concerned with a case where the defaulting party had completely failed to perform all of his or her promises, but rather with a case where the defaulting party had performed only some of his or her promises. This has led some to argue, in line with the distinction Treitel sought to draw, that the cases pre-*Boone v Eyre* 'had been dealing with problems posed by the proper order of performance',[186] whereas *Boone v Eyre* was dealing with 'the problem posed by defective performance by a party of his obligations under a contract'.[187] While in a loose sense this is true, there are a number of problems with this supposed distinction between 'order' and 'conformity'.

First, although *Boone v Eyre* can be described as a case of 'defective performance' or a case about 'conformity', it is not true to say that the earlier cases were not concerned with conformity. After all, failing to perform any of one's obligations is the most extreme form of non-conformity—the failure to render any promised performance.

Secondly, the language of 'defective performance' is often used to suggest that one party has performed, but simply performed badly. But as Professor Edwin Peel notes, '[t]he phrase "defective performance" arguably

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[184] *Boone v Eyre* (n 42).

[185] See s 2.2.3.

[186] Carter and Hodgekiss (n 10) 34.

[187] ibid.

contains an element of self-contradiction, in the sense that a person who promises to do one thing does not perform if he does another'.[188] To establish a breach of contract, one party cannot simply alleged that the other performed badly. One needs to point to a particular promise that was not performed, whether express or implied. Understood in this way, cases of so-called 'defective performance' are really cases in which one party has performed some of his or her obligations but failed to perform all of them.

Take the example of building a house. A general promise to build a house is comprised, at a lower level of abstraction, of several distinct promises (to build the house, to exercise reasonable care, that the house will be of a certain size or shape, or of reasonably quality, and so on), and once this is appreciated, it becomes clear that many cases of defective performance are really cases, like *Boone v Eyre*, in which some, but not all, of the party's promises have been performed. As Sir William Anson put it: '[t]he promise is in fact regarded as a number of promises to do a number of similar acts, and a breach of one of these does not discharge the promisee'.[189] For the purposes of discharge following failure of a 'promissory condition'—as opposed to discharge following failure of the 'substantial-benefit condition', which is dealt with in Chapter 3—the question then becomes whether performance of the particular obligation the

[188] Peel (n 1) 932 [17-056].

[189] Anson (n 98) 278.

promisor has failed to perform was a condition precedent the failure of which will discharge the other party.[190]

Finally, the reasoning in *Boone v Eyre* was a logical extension of the principles which had hitherto been applied to the so-called 'order of performance' cases. If the performance or fulfilment by A of A's promises is, at least in some circumstances, a condition precedent to B's obligation(s) to perform, then the question must arise as to which of A's promises are such that their performance or fulfilment are conditions precedent to B's obligation(s). The previous cases had not had to consider this issue because, on the state of the pleadings, the plaintiff had totally failed to perform.

### 2.4.2 Can the examples given be explained

A number of examples have been given to explain the apparent distinction between the two senses of a 'promissory condition'. All these examples are explicable on the traditional understanding.

#### *2.4.2.1 Example 1: sale of goods by sample*

One example given by Treitel was the seller of goods by sample who agrees to give credit:

> A seller of goods by sample who has agreed to give credit may deliver the goods before being paid and so perform a 'condition precedent,' but if the goods turn out not to correspond with the sample he will be in breach of 'condition'.[191]

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[190] See also discussion in s 2.4.2.2 and s 2.4.2.3.

[191] G H Treitel, *The Law of Contract* (8th edn, Sweet & Maxwell 1991) 690. See now See also Peel (n 1) 982 [18-044].

### 2.4 TREITEL ON 'CONDITIONS' AND 'CONDITIONS PRECEDENT'

On Treitel's analysis, the obligation to deliver the goods is a 'condition precedent', while the obligation that the goods correspond with the description is a 'condition'. Accordingly, it is possible to perform the condition precedent while at the same time being in 'breach of a condition'.

However, this is to misdescribe the relevant condition(s). The condition precedent to the buyer's obligation to pay is that the seller deliver goods that correspond with the sample. Alternatively (although it amounts to the same thing), it can be said that there are two conditions precedent to the seller's obligation to pay: (i) that the buyer deliver the goods, and (ii) that the goods correspond with the sample. In any case, the effect is the same: if the seller delivers goods that do not correspond with the sample, then he or she has not performed a condition precedent to the buyer's obligation to pay.

Of course, practically speaking, the buyer will need to take steps to reject the goods in order to negate any suggestion of waiver of the condition. This rule, found in s 11(4) of the Sale of Goods Act 1979,[192] was discussed above.[193] But this does not detract from the fact that (absent waiver) the buyer's obligation to pay simply never fell due because delivery of goods that correspond with the sample was a condition precedent to that obligation.

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[192] Originally Sale of Goods Act 1893, s 11(1)(c).

[193] See s 2.3.1.

#### *2.4.2.2 Example 2: 'defective' building work*

Professor Ewan McKendrick has also given the example of a builder who carries out building work but does so 'defectively':

> [A] builder may enter into a contract with a householder to carry out some building work. Payment is to be made on completion of the work. Completion of the work is a condition precedent to the obligation of the householder to pay for the work. … But suppose that the builder completes the work defectively. In such a case the builder may have breached a promissory condition of the contract but here the condition relates not to the order of performance but to the quality of that performance.[194]

It is first necessary to clarify that it is not completion of the work simpliciter that is a condition precedent to the obligation to pay but rather substantial completion or performance of the work: 'something less than full and exact performance of that duty'.[195] This is not the same thing as a 'promissory condition' with which we have been concerned hitherto. As we will see in Chapter 3, this is an example of the substantial-benefit condition.[196] Unlike in the case of a promissory condition, in this case the condition and the duty are not identical. The promise or duty of the builder is to perform the contract exactly—it is no defence to an action for damages that he 'substantially performed'.[197] But the condition of the householder's duty to pay is 'substantial performance' by the builder—it is not exact performance. In *Hoenig v Isaacs*,[198] Denning LJ implicitly

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[194] McKendrick, *Contract Law: Text, Cases, and Materials* (n 1) 743.

[195] Corbin (n 14) 315 §702. See, eg, *Hoenig v Isaacs* [1952] 2 All ER 176 (CA).

[196] See s 3.6.

[197] Corbin (n 14) 315–316 §702.

[198] *Hoenig v Isaacs* (n 195) 180–181.

recognised this point when he said '[t]he promise to complete the work is, therefore, construed as a term of the contract, but not as a condition.'

Putting aside this clarification, the core problem with this example is that whether the term that is breached is a 'condition', in the modern sense of a term breach of which gives rise to a 'power to terminate', would appear to have no legal significance on these facts. It has no impact here on the measure of damages. In both cases the builder will still have breached his or her contractual duty. The only live issue is whether the non-performance of the promise discharges the householder from his or her obligation to pay. And, on the assumption that the builder substantially completed the work but 'breached a condition', the 'power to terminate' is simply irrelevant. This is because, unless performance of that promise is also a condition precedent, the builder's right to payment will have already accrued and the householder's subsequent termination—on the orthodox approach—can only operate for the future and would not divest the builder of rights 'which have already been unconditionally acquired'.[199]

The only relevant question in this example then is which of the several distinct promises comprised in the general promise to build a house are 'promissory conditions' in the traditional sense. It is possible that the agreement between the parties may have made the householders' obligation to pay conditional upon the performance by the builder of all of his promises. This is

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[199] *Johnson v Agnew* [1980] AC 367 (HL) 396, quoting *McDonald v Dennys Lascelles Ltd* (1933) 4 CLR 457 (HCA) 476–477.

sometimes referred to by the suggestion that 'entire performance [is] a condition precedent to payment'.[200] But 'courts lean against a construction of the contract that would deprive the contractor of any payment at all simply because there are some defects or omissions';[201] the 'fulfilment of every term is not necessarily a condition precedent in a contract for a lump sum'.[202]

The more likely position is that the obligation of the householder will be conditional upon performance by the builder of some of his or her promises, namely, those that are promissory conditions. Suppose that the builder completes the work, but, in breach of contract, paints the house grey instead of white. If the obligation to paint the house white is not a promissory condition in the traditional sense, then the householder will be required to pay for the work (although he or she will be able to set up a cross-claim for damages). This is because the builder has performed all conditions precedent to payment.

Now suppose that both parties knew that it was essential to the householder that the house be white, and the parties had described the obligation to paint the house white as a 'condition'. Subject to arguments about labelling,[203] the effect of this would be to make it a condition precedent to the householder's obligation to pay that the builder paint the house white. If the builder were to fail to paint the house white, he or she would commit a breach of contract but additionally the non-compliance with the condition would mean that an event

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[200] *Hoenig v Isaacs* (n 195) 180 (Denning LJ).

[201] ibid.

[202] ibid 178 (Somervell LJ).

[203] *Schuler v Wickman* (n 156).

which was the condition of the householder's obligation to pay had not occurred and, if the builder refused to, or could not, cure the defect, the condition would fail. The householder would therefore be discharged from his or her obligation to pay.

#### *2.4.2.3 Example 3: failure to tender the price*

Another example given by Treitel was that of a buyer of goods who fails to tender the price on time:

> [I]f A, a buyer of goods, fails to perform the concurrent condition of paying or tendering the price, the seller, B, is prima facie justified in refusing to deliver; but it again does not follow that B is, merely on account of the failure, entitled to rescind the contract: he may, for example, still be bound to deliver if A tenders the price on the day after that fixed by the contract.[204]

Treitel was correct to note that A's failure to tender the price will mean that B's obligation to deliver the goods does not fall due. He was also correct to note that in some cases, though not all, A's subsequent tender of the price, even if late, will cause B to come under an immediate duty to deliver the goods. However, by resorting to the 'power to terminate' analysis, Treitel failed to distinguish between situations where the condition simply has not yet occurred and situations where the condition has failed because it can no longer occur. This distinction was explained in Chapter 1.[205] Nor did Treitel acknowledge that there may be more than one type of condition in play. To understand this, it is

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[204] G H Treitel, *The Law of Contract* (7th edn, Sweet & Maxwell 1987) 581. See now Peel (n 1) 912 [17-024].

[205] See s 1.3.2.

necessary to distinguish between two situations: where 'time is of the essence' and where it is not.

Where time is of the essence, what is really meant is that B's obligation to deliver the goods is conditional upon A paying or tendering the price at the specified time[206]—this is a promissory condition. If A is ten minutes late in tendering the purchase price, the condition has failed and B is discharged.[207] A cannot unwind the clock and comply with the condition, whose time for compliance has now passed, though of course B can waive the condition, in which case B will be required to deliver the goods. The condition of B's obligation to deliver the goods was not simply that A tender the price, but that A tender the price at the specified time. Whether this is expressed as two concurrent conditions or one does not change the analysis. The condition fails at the time at which it can no longer occur, which was when A failed to tender the price on the day fixed by the contract.

Where time is not of the essence, the position is more complex. Here, the failure of A to tender the price will operate to suspend B's duty, but it may not bring about a permanent discharge. Whether or not the failure to tender the price does operate as a permanent discharge of B's obligation to deliver the goods depends upon 'two matters which … have often been confused in the case law'.[208]

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[206] Corbin (n 14) 137 §654 fn 4.

[207] *Union Eagle Ltd v Golden Achievement* [1997] AC 514 (HL).

[208] *Urban 1 (Blonk Street) Ltd v Ayres* [2013] EWCA Civ 816, [2014] 1 WLR 756, 767 [44].

The first is that the delay by A may be 'such as in all the circumstances to deprive the other party of substantially the benefit it was intended he or she should obtain from the contract'.[209] In such circumstances, the delay will bring about a permanent discharge of B's obligation to deliver the goods. This is because B's obligation to deliver, in addition to being conditional upon A tendering the price, is conditional upon such performance as gives B substantially the whole benefit of the contract.[210] There are thus two conditions in play. And while A may seek to satisfy the former condition by tendering the price, A's delay has been such that the latter condition has failed and can no longer occur. The result is that B is discharged from his or her obligation to perform unless the condition is waived.

Secondly, the circumstances of A's delay in tendering the price may be such as to indicate that A can no longer perform due to disablement or that A has demonstrated an intention not to fulfil the contract, or to do so in a manner substantially inconsistent with A's obligations (renunciation).[211] In such a case, B is discharged from the duty to deliver the goods (following 'acceptance' in the latter case) in accordance with the doctrine of anticipatory breach.

In sum, the examples given lend no support to the supposed distinction between 'conditions' and 'conditions precedent'. Each example fails to identify accurately the condition(s) upon which the innocent party might seek to rely. And

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[209] ibid.

[210] *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904 (HL) 928.

[211] *Urban 1 (Blonk Street)* (n 208) 768 [44]; *Federal Commerce & Navigation Co Ltd Respondents v Molena Alpha Inc* [1979] AC 757 (HL) 778–779. See also the authorities in n 120.

each example is explicable on the traditional understanding, indicating that there is no need for the concept of a condition in the modern sense of a term breach of which gives rise to a 'power to terminate'.

### 2.4.3 Does the authority relied upon support the distinction?

Treitel also claimed that support for the distinction between the two senses of 'promissory condition' was provided by the decision of the Court of Appeal in *State Trading Corp of India Ltd v M Golodetz & Co Inc Ltd*.[212] He had in his previous work drawn the distinction between 'conditions' and 'conditions precedent',[213] but the decision in *Golodetz* prompted Treitel to write a new section in his text on the 'Nature of the distinction'[214] in which he argued that '[m]odern authority accordingly recognises the distinction between the two concepts'.[215] That section, and the authority relied upon—*Golodetz*—remains substantially unaltered by the current author of that text today.[216]

The dispute in *Golodetz* arose out of a contract for the sale of 12,600 tonnes of sugar on 11 December 1985. Payment was to be made by an irrevocable letter of credit which was to be opened by the buyers within seven days of the conclusion of the contract (18 December). The sellers agreed to give (i) a performance bond guarantee immediately after conclusion of the contract, and (ii) a 'counter-trade' guarantee, within seven days of the conclusion of the

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[212] [1989] 2 Lloyd's Rep 277 (CA).

[213] Treitel (n 204) 581.

[214] Treitel (n 191) 690–691.

[215] ibid 690.

[216] Peel (n 1) 982–983 [18-044].

contract (also 18 December). The buyers failed to open the letter of credit by 18 December. The sellers had opened the performance bond guarantee, but had failed to open the counter-trade guarantee.

The sellers treated the buyers' failure to open the letter of credit as a breach which had the effect of discharging them from their obligation to perform and claimed damages equal to the price of the sugar. The buyers in turn claimed the sellers' failure to provide the counter-trade guarantee by 18 December excused the buyer's breach in failing to open the letter of credit—an obligation that was admitted to be a 'condition'.[217] The buyers also counter-claimed for damages.

Two issues were said to arise. First, whether the sellers' obligation to provide a counter-trade guarantee was in the nature of a 'condition'. Secondly, if it were, whether 'this excused [the buyer's] breach in failing to open the letter of credit'.[218] The Court of Appeal found in favour of the sellers on both issues. On the first issue, Kerr LJ (with whom Lloyd and Butler-Sloss LJJ agreed) said that he could see no basis for concluding that the sellers' obligation 'had the character of a condition, let alone of condition precedent to [the buyers'] obligation'.[219] While Kerr LJ did appear to distinguish between 'conditions' and 'conditions precedent', because the sellers' obligation was neither any possible distinction between them did not, strictly speaking, arise.

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[217] *Golodetz* (n 212) 279.

[218] ibid.

[219] ibid 284.

Although the second issue did not arise, Kerr LJ was of the view that, even if both parties had been in 'breach of a condition', this made no difference. He said:

> If A is entitled to treat B as having wrongfully repudiated the contract between them and does so, then it does not avail B to point to A's past breaches of contract, whatever their nature. … B would have to show that A, being in breach of an obligation in the nature of a condition precedent, was therefore not entitled to rely on B's breach as repudiation. … But this is not the position here. … Since both obligations are (assumedly) in the nature of conditions, both parties had an equal right, so long as the other party's obligation remained unperformed, to treat the other party as having wrongfully repudiated.[220]

These obiter comments undoubtedly support Treitel's view. On the assumption that both obligations were in the nature of a 'condition' breach of which gives rise to a power to terminate, the buyers' defence could only have succeeded if performance of the obligation to open the counter-trade guarantee were also a 'condition precedent'. As Treitel explained, 'it was not enough for [the buyers] to establish that the sellers were merely in breach of "condition".'[221]

But these comments are difficult to reconcile with the earlier House of Lords decision in *Bremer Vulkan v South India Shipping Company*.[222] The plaintiffs, who were respondents to an arbitration, sought an injunction to restrain the defendants from continuing with the arbitration. The plaintiffs argued that the defendants, by their 'inordinate and inexcusable' delay in prosecuting the claim, had committed a breach of the arbitration agreement entitling the plaintiffs to

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[220] ibid 286.

[221] Treitel (n 7) 191.

[222] [1981] AC 909 (HL).

'terminate'. Lord Diplock (with whom Lord Edmund-Davies and Lord Russell agreed) was of the view that it was a 'necessary implication' from the arbitration agreement 'that both parties … [were] under a mutual obligation to one another to join in applying to the arbitrator for appropriate directions to put an end to the delay'.[223] However, in allowing the appeal, and holding that no injunction ought to be granted, Lord Diplock said:

> [B]oth claimant and respondent were in my view in breach of their contractual obligations to one another; and neither can rely upon the other's breach as giving him a right to treat the primary obligations of each to continue with the reference as brought to an end. Respondents in private arbitrations are not entitled to let sleeping dogs lie and then complain that they did not bark.[224]

In *Golodetz*, Kerr LJ made no reference to *Bremer Vulkan*.[225] Treitel noted this point and observed 'the difficulty of squaring this assumption' in *Golodetz*—that 'where both parties are in breach of condition, *both* can rescind'—'with the reasoning of the *Bremer Vulkan*'.[226]

Ultimately, Treitel argued that 'logic and policy favour the assumption made in [*Golodetz*] '.[227] Certainly, if the concept of a 'condition' is distinct from a 'condition precedent', logic would favour the result in *Golodetz*. But this is to beg the very question. If there is no distinction, then logic would favour the result in *Bremer Vulkan*. As for policy, it might be said that allowing either party to

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[223] ibid 986.

[224] ibid 988.

[225] Cf the decision at first instance where it was distinguished on the basis that the obligations in *Golodetz* were not 'concurrent, or dependent, or complementary' as they were in *Bremer Vulkan*: *State Trading Corp of India Ltd v M Golodetz & Co Inc Ltd* [1988] 2 Lloyd's Rep 182 (Com Ct) 189 (Evans J).

[226] Treitel (n 7) 190 (emphasis in original).

[227] ibid.

'terminate' promotes certainty, but against this are other considerations.[228] First, the 'orthodox rule is that only the terminating party is entitled to damages for future performance lost due to the termination of the contract' (ie damages for the 'loss of the bargain').[229] If, as *Golodetz* suggests, each is given a power to terminate for the other's breach of a promissory condition, 'there may be in some situations a race to terminate the contract, the winner being an accident of fate'.[230] A savvy commercial party may even terminate simply for the 'strategic advantage of denying the *other* party … the right to terminate and claim damages for the loss of the bargain'.[231] Secondly, and relatedly, 'if only one of the parties affirms the contract, the other then presumably may still terminate and claim loss of bargain damages'.[232] In addition to producing an unsatisfactory result, it provides a perverse incentive to terminate or remain inactive so as to avoid the risk of being the only one to have affirmed and therefore being vulnerable to the other party terminating in any event.

As a matter of precedent, the answer is clear.[233] The ratio in *Golodetz* is that the sellers' obligation to open the counter-trade guarantee was not a condition. The ratio in *Bremer Vulkan* is that where both parties have committed a so-called 'repudiatory breach'[234]—whether because the breach is a 'breach of a

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[228] See generally, Wayne Courtney, 'Termination by a Party in Breach (2008) 3 Journal of Business Law 226, 243–244.

[229] ibid 243.

[230] ibid 243–244.

[231] ibid 244 (emphasis in original).

[232] ibid.

[233] ibid 234.

[234] For criticism of this language, see n 123.

condition' or a breach which deprives the other party of substantially the whole benefit of the contract[235]—neither can 'terminate'. Although the comments in *Golodetz* certainly support Treitel's view, they are not part of the ratio of the case. Moreover, they are inconsistent with over three centuries of cases at all levels which, as Treitel himself acknowledged, did not draw the distinction between these supposedly different concepts.

## 2.5 DEFENDING THE TRADITIONAL UNDERSTANDING

Whatever the position may be with respect to the twentieth century, it needs to be conceded that the authorities in the twenty-first century assume that a condition is an important term breach of which gives rise to a power to terminate.[236] The final part of this chapter therefore argues that English law, to the extent that it has, should not have departed from the traditional understanding of the nature of promissory conditions. In addition to having arrived at the modern position by a series of unintentional missteps, there are a number of reasons why the traditional model is to be preferred.

### 2.5.1 Not a logical incompatibility

There is no logical incompatibility between the two approaches. It is possible for a legal system to have both the concept of a 'promissory condition' in the traditional sense, and a 'condition' in the sense of a term breach of which gives rise to a power to terminate. But the experience of other legal systems that

[235] The case did not make clear which it was.

[236] See, eg, *Grand China Logistics Holding (Group) Co Ltd v Spar Shipping AS* [2016] EWCA Civ 982, [2017] 4 All ER 124, 130 [16].

unequivocally do have both concepts is that the former will often be necessary 'to achieve results which are more consistent with practical and just outcomes of contractual disputes'.[237]

For example, in New Zealand, Parliament expressly adopted the power to terminate model in the Contractual Remedies Act 1979.[238] The relevant provisions of that Act, which have since been incorporated into the Contract and Commercial Law Act 2017, took effect in place of the rules of the common law governing the circumstances in which a party could treat a contract as discharged for repudiation or breach.[239] But despite Parliament having adopted the power to terminate model, the New Zealand Supreme Court has, on no less than five[240] occasions:

> resolved contractual disputes involving breach and non-performance by reference to reasoning based on readiness and willingness and failure of condition precedent rather than by reference to … the discharge of a contractual obligation consequent on the cancellation of the contract.[241]

Of course, it might be said in response that all this shows is that the two concepts can co-exist. Moreover, no one has argued to the contrary, or that in some cases a failure to perform a 'condition precedent', as opposed to a breach

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[237] Francis Dawson, 'Readiness and Willingness under the Contractual Remedies Act' (2017) 23 New Zealand Business Law Quarterly 61, 64.

[238] ibid 61; Francis Dawson, 'Essential terms and condition precedent' (2017) 133 Law Quarterly Review 183, 183.

[239] Contractual Remedies Act 1979 (NZ) (CRA), s 7(1); Contract and Commercial Law Act 2017 (CCL), s 40(1).

[240] *Bahramitash v Kumar* [2005] NZSC 39, [2006] 1 NZLR 577; *Property Ventures Investments Ltd v Regalwood Holdings Ltd* [2010] NZSC 47, [2010] 3 NZLR 231; *Ingram v Patcroft Properties Ltd* [2011] NZSC 49, [2011] 3 NZLR 433; *Kumar v Station Properties Ltd* [2015] NZSC 34, [2016] 1 NZLR 99; *Kawarau Village Holdings Ltd v Ho Kok Sun* [2017] NZSC 150, [2018] 1 NZLR 378.

[241] Dawson (n 238) 187. The first four are discussed in Dawson (n 237).

of a 'condition', may not be more beneficial to the innocent party.[242] Nonetheless, one striking proposition which emerges from these cases is that a party in breach of an essential term is unable to cancel the contract for the innocent party's subsequent non-performance,[243] either on the basis that the obligations are mutually dependent[244] or on the basis that the party in breach was repudiating the contract.[245] Thus in *Kumar v Station Properties Ltd*,[246] Arnold J said:

> A party who is in breach of an essential term of a contract is not entitled to enforce its rights under the contract (assuming the other party has not affirmed the contract despite the breach). This is particularly so where the obligations of the parties are mutually dependent and concurrent, as in contracts for the sale of land.

Such statements drive a coach and horses though the analysis in *Golodetz* where it was said that where both parties are in 'breach of a condition' either party can terminate.

### 2.5.2 Conceptually awkward

A further difficulty is that the existence of both models 'would be conceptually awkward',[247] in that it would be difficult to differentiate between discharge for the failure of a condition and the termination of contractual obligations following breach.[248] This problem is exacerbated by the fact that English law appears to

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[242] Indeed, Treitel argued the opposite: Treitel (n 7) 191–192.

[243] *Kumar* (n 240) 131 [94]; *Kawarau* (n 240) 410 [108].

[244] *Regalwood* (n 240) 264 [82], quoting *Foran v Wight* (1989) 168 CLR 385 (HCA) 417.

[245] *Ingram* (n 240) 443 [31]–[41].

[246] *Kumar* (n 240) 131 [94].

[247] Bridge (n 177) 904 fn 191.

[248] ibid. Bridge referred to the difficulty in distinguishing between the 'suspension and the termination of a contract' but the same point applies mutatis mutandis.

have the same test for determining whether an obligation is a 'condition' breach of which gives rise to a power to terminate and for determining whether performance of an obligation is a 'condition precedent'. Outside of cases where the parties have expressly agreed that a particular obligation is a 'condition', the court must consider whether the parties have expressed an intention 'by necessary implication from the nature, purpose and circumstances of the contract'.[249] And, as Lord Roskill observed in *Bunge v Tradax*,[250] the 'basic and long standing rules for determining whether a particular term in a contact is or is not a condition … are enshrined in the oft quoted judgment of Bowen LJ in *Bentsen v Taylor*', where he said:

> There is no way of deciding that question except by looking at the contract in the light of the surrounding circumstances, and then making up one's mind whether the intention of the parties, as gathered from the instrument itself, will best be carried out by treating the promise as a warranty sounding only in damages, or as a condition precedent by the failure to perform which the other party is relieved of his liability.[251]

This passage has been described as 'well known'[252] and 'well recognised'[253] and is quoted in this connection in the current edition of *Chitty on Contracts*.[254] The problem for the power to terminate model is that Bowen LJ was speaking of 'conditions precedent' in the traditional sense, not of the modern 'condition'. In explaining why he had 'no hesitation in saying' that he believed the 'now sailed or

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[249] *Golodetz* (n 212) 282. See also McKendrick, 'Termination for Breach' (n 1) 1989 [27–019].

[250] *Bunge v Tradax* (n 151) 725.

[251] *Bentsen v Taylor* (n 5) 281.

[252] *Bunge v Tradax* (n 151) 725 (Lord Roskill); *Golodetz* (n 212) 282 (Kerr LJ).

[253] *Hongkong Fir* (n 135) 60 (Sellers LJ).

[254] McKendrick, 'Termination for Breach' (n 1) 1989 [27–019].

about to sale' phrase to be a 'condition precedent', he said: 'It is a representation the accuracy of which is made a condition precedent, though I do not doubt that the fulfilment of a promise maybe equally made a condition precedent.'[255] There can be no doubt that Bowen LJ here is speaking of a 'condition precedent' in the sense of a representation or promise, the truth or fulfilment of which qualifies the other party's obligation to perform.

For those who argue that the concepts of a 'condition' and a 'condition precedent' are distinct even when used in their promissory sense, this surely creates conceptual confusion and overlap. It will mean that the same obligation (or its performance) is both a 'condition' and a 'condition precedent'. And if this is the case, numerous questions arise. When, if at all, is it necessary to terminate if one is already discharged from the obligation to perform? Is it possible to waive the condition precedent but still terminate for breach of the condition? These complex questions simply do not arise once it is realised that they are one and the same concept.

### 2.5.3 Additional problems

The concept of a promissory condition breach of which gives rise to a power to terminate also produces a number of problems, which do not arise on the traditional model. First, as noted above when discussing *Golodetz*, the power to terminate model has given rise to conflicting answers to a 'deceptively simple' question: 'can A at law terminate the contract for B's serious breach or

[255] *Bentsen v Taylor* (n 5) 283.

repudiation, if A is, at the same time, in breach of the contract?'[256] This issue is 'not yet authoritatively settled'.[257] *Golodetz* would suggest the answer is yes, while *Bremer Vulkan* would suggest the answer is no. On the view put forward in this thesis, the answer is clear: if A has breached a promise the performance of which is condition precedent (a promissory condition) or the non-performance of which deprives B of substantially the whole benefit of the contract (the substantial-benefit condition) then, absent waiver of the condition, B's subsequent conduct is not a breach. If A and B's relevant promises are concurrent conditions, then neither party is in breach while the other party is not performing.

Secondly, the power to terminate model has had a difficult time explaining the traditional effect of 'promissory warranties' in insurance contracts.[258] It has long been the case that in insurance contracts a 'promissory warranty' is synonymous with a 'promissory condition'.[259] What, then, is the position if an insured breaches a 'promissory warranty' and before the insurer exercises the supposed power to terminate, an insurable event occurs? Is the insurer liable to pay? On the power to terminate model, it would seem that unless and until the insurer terminates the contract, they are bound to perform. Yet in *Bank of Novia Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good*

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[256] Courtney (n 228) 226.

[257] ibid 244.

[258] See J W Carter, 'Discharge as the Basis for Termination for Breach of Contract' (2012) 128 Law Quarterly Review 283, 294.

[259] *Behn v Burness* (1863) 3 B & S 751, 753; 122 ER 281, 282.

*Luck)*,[260] the House of Lords held that the 'effect of a breach of a promissory warranty [was] to discharge the insurer from liability as from the date of the breach'[261] even though there had been no election to terminate the contract. Although the decision was concerned with the wording of s 33(3) of the Marine Insurance Act 1906, the wording of that section merely gave effect to the position at law that predated it.[262] On the power to terminate model, this case has to be put down as an exception—unique to insurance contracts—to the general rule that both parties are bound to perform unless and until the power to terminate is exercised.[263] On the traditional failure of condition model, however, this represents the general rule, not an exception to it.[264] There is a law of contract, not a law of contracts.

### 2.5.4 Solving the 'loss of bargain' damages puzzle

Another reason not to depart from the traditional model is that it can help us resolve one of the 'most intractable'[265] issues that arises on the orthodox model. That is, whether and how the exercise of an express power to terminate can be distinguished from termination at law, particularly in light of the apparently

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[260] [1992] 1 AC 233.

[261] ibid 263.

[262] See the authorities cited in argument: ibid 238.

[263] Peel (n 1) 961–962 [18-008].

[264] The law has now been amended by the Insurance Act 2015. See Peel (n 1) 962–963 [18-009].

[265] Wilmot-Smith (n 2) 323.

conflicting decisions in *Financings Ltd v Baldock*[266] and *Lombard North Central Plc v Butterworth*,[267] concerning the availability of loss of bargain damages.[268]

In *Financings Ltd v Baldock*, Mr Baldock entered into a vehicle hire-purchase agreement with Financings Ltd. The agreement expressly provided that if he should fail to pay any instalment within ten days of it falling due, Financings could terminate the hiring. Although Mr Baldock paid the first instalment, he failed to pay the next two instalments, with the result that Financings exercised its express power to terminate. The Court of Appeal (Lord Denning MR, Upjohn, and Diplock LJJ) held that, there being no repudiation of the obligation to pay future rentals, the company was not entitled to damages for loss of the bargain and, moreover, that a minimum payment clause, which entitled the company to two-thirds of the total hiring cost, was a penalty. Lord Denning MR said:

> [I]f there is no repudiation, and simply, as here, a failure to pay one or two instalments (the failure not going to the root of the contract and only giving a right to terminate by virtue of an express stipulation in the contract), the owners can only recover the instalments in arrear, with interest, and nothing else: for there was no other breach in existence at the termination of the hiring.[269]

In *Lombard North Central Plc v Butterworth*, Mr Butterworth entered into a lease agreement for a computer with the plaintiff finance company. Although he

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[266] [1963] 2 QB 104 (CA).

[267] [1987] QB 527 (CA).

[268] See generally Edwin Peel, 'Loss of Bargain Damages' [2020] Lloyd's Maritime and Commercial Law Quarterly 442; Wilmot-Smith (n 2) 323–324; Edwin Peel, 'The termination paradox' [2013] Lloyd's Maritime and Commercial Law Quarterly 519, 522–525.

[269] *Financings* (n 266) 113.

made the first two payments, he struggled to make the subsequent payments. This caused Lombard to give notice of termination under the contract and to retake possession of the computer pursuant to the contract's express terms. However, this time a clause in the contract described punctual payment of each rental instalment as being 'of the essence' of the agreement. The Court of Appeal (Mustill, Nicholls, and Lawton LJJ) held that the effect of this 'time of the essence' clause was to make punctual payment a 'condition', with the result that following termination the plaintiff was 'entitled to claim damages for loss of the whole transaction'.[270]

The apparent inconsistency between these two cases is that in *Financings*, the plaintiff was unable to recover loss of bargain damages, yet in *Lombard* the plaintiff was able to recover loss of bargain damages simply by making punctual payment a condition. In neither case did the defendant's conduct amount to a repudiation (in the sense of a renunciation) of his contractual obligations. Nicholls LJ, despite feeling bound to reach this result in *Lombard*, felt 'considerable dissatisfaction' with it because in his view the difference between this case and *Financings* was 'one of drafting form, and wholly without substance'.[271]

The problem is exacerbated by the fact that, on the orthodox approach, 'the best justification of the power to terminate following breach of a promissory

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[270] *Lombard* (n 267) 546.

[271] ibid. See also 540 (Mustill LJ).

condition is almost certainly agreement-based'.[272] This is the same justification for termination pursuant to an express termination clause. And at least in cases where the breach does not deprive one party of substantially the whole benefit of the bargain:

> there seems to be no principled distinction between the breach of promissory condition case and the express termination case: in both situations the claimant is given a power to terminate following a trivial breach; in both situations, the justification of the power to terminate is the parties' agreement.[273]

Attempts to reconcile these cases on the orthodox approach have usually led to suggestions that one of them is wrongly decided. It has been argued first, that loss of bargain damages should only be available where the breach deprives the innocent party of substantially the whole benefit of the bargain[274] and that they should not be available merely because an obligation has been designated a condition. On this view, *Lombard* is wrongly decided.

A second argument is that loss of bargain damages should be available both where there has been a breach of condition and following termination after breach pursuant to an express termination power.[275] On this view, *Financings* is wrongly decided.

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[272] Wilmot-Smith (n 2) 324.

[273] ibid.

[274] G H Treitel, 'Damages on Rescission for Breach of Contract' [1987] Lloyd's Maritime and Commercial Law Quarterly 143. See also Peel, 'Loss of Bargain Damages' (n 268) 458–459; ibid 324–325.

[275] Brian R Opeskin, 'Damages for Breach of Contract Terminated Under Express Terms' (1990) 106 Law Quarterly Review 293. See also Peel, 'Loss of Bargain Damages' (n 268) 459–461.

A third argument, advanced by Professor Edwin Peel, is that the current state of the law is correct.[276] As he says:

> [T]he justification for treating contractual termination and termination for breach of condition differently is simply: *that is what the parties have agreed*. In the case of a contractual power, the parties have agreed only that the contract may be terminated for the breach, or breaches, identified. Where the parties have agreed that a term is a condition, they have agreed that the contract may be terminated if the term is breached *and* that the claimant may recover loss of bargain damages.[277]

Of course, the immediate difficulty with this view is that in *Financings* the minimum payment clause, which expressly conferred a right to lost future rentals, was held to amount to a penalty. And in *Lombard* the same view was expressed about the validity of a similar clause insofar as it applied to the case where there had been no breach of a condition.[278] Why should a clause which achieves recovery of lost future rentals indirectly (by designating it as a condition) be enforceable, but a clause which, in effect, achieves it directly (by expressly stating so) be unenforceable? Peel's response is that the law on penalties has changed following the decision of the Supreme Court in *Cavendish Square Holding BV v Makdessi*[279] and that, applying the current test for what amounts to a penalty, such clauses should no longer be regarded as penalties today.[280]

This is a clever argument and perhaps the best one available on the orthodox 'power to terminate' model. But it stands or falls on the success of the

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[276] Peel, 'Loss of Bargain Damages' (n 268) 449.

[277] ibid 461 (emphasis in original).

[278] *Lombard* (n 267) 541–543.

[279] [2015] UKSC 67, [2016] AC 1172.

[280] Peel, 'Loss of Bargain Damages' (n 268) 468–471.

penalty argument. If, consistent with these cases, a court were to find that such express agreements to confer loss of bargain damages are penalties, then the argument falls away.

On the account given in this thesis, however, the differing results in *Financings* and *Lombard* are explicable on the basis that there is a very significant difference in the nature of discharge following breach and pursuant to an express termination clause, even though both are based upon the parties' agreement. The difference, flowing from the different starting point of each, is that for discharge following breach, failure of a condition results in the innocent party being discharged immediately unless he or she waives the condition. In contrast, 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[281]—to terminate the parties' contractual obligations. But unless and until it is exercised, both parties remain bound to perform.

This means that in cases where the defendant has breached a duty the performance of which is a condition to the innocent party's obligation to perform, 'the claimant has *in fact* lost his bargain'[282] as a result of the defendant's breach and loss of bargain damages ought to be payable. The effect of the defendant's breach is that a condition has failed and the claimant is discharged from his or her obligation to perform. The only sense in which it could be said

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[281] Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale law Journal 16, 44–45.

[282] Peel, 'Loss of Bargain Damages' (n 268) 451 (emphasis in original).

that the claimant caused the loss of the bargain is by refusing to waive the condition and continue to perform and insist upon performance. By contrast, in cases where the claimant terminates pursuant to an express power, unless that claimant is already discharged for failure of a condition, it will be his or her act in exercising the express power to terminate that causes the loss of the bargain, not the defendant's breach.[283] Loss of bargain damages therefore should not be payable.

### 2.5.5 The relation to other instances of discharge

A further reason that English law should not depart from the traditional understanding of promissory conditions is that an understanding of their true nature assists in understanding the basis of the discharge of contractual obligations more generally. As this thesis will demonstrate, discharge following breach, so-called cases of frustration, and so-called cases of common mistake are all instances of discharge for failure of condition. To repeat the claim, where a party breaches a duty, the performance of which is a condition (a promissory condition) the innocent party is discharged because the condition fails. A party may also breach other duties, the precise performance of which is not a condition, in a way that causes the 'substantial-benefit' condition to fail. The same concept—failure of condition—also explains the apparent doctrines of frustration and common mistake. That is how these doctrines were traditionally understood.[284] The key difference is that in these cases the condition fails without

[283] This does mean, however, that *Phones 4U Limited (in administration) v EE Limited* [2018] EWHC 49 (Comm), [2018] 2 All ER (Comm) 315 is wrongly decided.

[284] See Chapters 5 and 6.

a breach of duty—that is because there is an important distinction between the promise and the condition.[285]

## 2.6 CONCLUSION

This chapter has been concerned with the nature of promissory conditions. Modern orthodoxy suggests that the language of 'condition', even when used in its promissory sense, is used in two senses. In one sense, a condition is a promise the fulfilment of which is a condition of the other party's obligation to perform. Where the condition fails, the other party is discharged from the obligation to perform unless he or she waives the condition. In another sense, a condition is simply an important or essential term, breach of which does not prevent an immediate duty of counter-performance from arising, but gives rise to a power to terminate. Unless and until the power is exercised, the innocent party remains bound to perform.

The aim of this chapter has been to reject the suggestion that a promissory condition should be understood in the second of these two senses. In particular, it has been argued that the modern orthodoxy that 'breach of a condition' gives rise to a power to terminate is ahistorical, unnecessary, and, all things considered, inferior to the traditional model. It seems that the nature of promissory conditions has been misunderstood due to loose language and a series of missteps. While it is probably a 'cry for the moon'[286] to insist that

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[285] See s 1.2.5.

[286] *Photo Production* (n 150) 844.

lawyers abandon misleading phrases such as 'breach of condition',[287] we can at least attempt not to lose sight of the true nature of the concepts in play, their effects, and consequently how seemingly disparate areas of contract law fit together.

[287] See text accompanying n 101.

# CHAPTER 3: THE SUBSTANTIAL-BENEFIT CONDITION



## 3.1 INTRODUCTION

The previous chapter focused on promissory conditions in order to reveal a fundamental proposition about contract law, namely, that the reason an innocent party is discharged following breach is because of the failure of a condition. The purpose of this chapter is to demonstrate that the same propositions holds true for the discharge of parties from their contractual obligations following the breach of so-called 'innominate' or 'intermediate' terms. This is the form of discharge associated with the decision in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*.[1] The chapter argues that the best explanation of discharge in such cases is the failure of what is termed the 'substantial-benefit condition': the condition that renders one party's obligation to perform conditional upon that party receiving 'substantially the whole benefit which it was the intention of the parties as expressed in the contract that he [or she] should obtain as the consideration for performing those undertakings'.[2]

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[1] [1962] 2 QB 26 (CA).

[2] ibid 66.

As will be demonstrated in this chapter, despite suggestions that this instance of discharge was 'invented' or 'discovered' in *Hongkong Fir*,[3] the substantial-benefit condition in fact significantly predates it,[4] and can be traced to the decision in *Boone v Eyre*[5] and the cases thereafter, where it ran under the label of 'failure of consideration' and, later, 'frustration'.[6] In the 150 years before *Hongkong Fir*, the substantial-benefit condition had been applied in cases involving breach and cases not involving breach, in the context of instalment contracts, and also in the context of the so-called doctrine of substantial performance. On closer inspection, *Hongkong Fir* was nothing more than an orthodox application of this long line of authorities that had in fact been applied only five years earlier in *Universal Cargo Carriers Corp v Citati*.[7] Moreover, as will be seen, the irony of the modern focus on the tripartite classification of conditions, warranties, and innominate terms is that it goes against the whole tenor of Diplock LJ's judgment in *Hongkong Fir*, which was to focus on the 'event' rather than the breach of duty itself. That focus is a symptom of larger disease in English contract law: the failure to distinguish the promise from the condition.[8]

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[3] See, eg, Sir Guenter Treitel, *Some Landmarks of Twentieth Century Contract Law* (Oxford University Press 2002) 113.

[4] A point made in Donal Nolan, '*Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha* Ltd, *The Hongkong Fir* (1961)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in the Law of Contract* (Hart Publishing 2018) 269.

[5] (1777) 1 H BL 273n, 126 ER 160n. See David Harvey Peek, 'The History of Conditions in the English Law of Contract' (LLM Thesis, University of Tasmania 1976) 204; Michael G Bridge, 'Discharge for Breach of the Contract of Sale of Goods' (1983) 28 McGill Law Journal 867, 927.

[6] Roy Granville McElroy and Glanville L Williams, *Impossibility of Performance: A Treatise on the Law of Supervening Impossibility of Performance of Contract, Failure of Consideration, and Frustration* (Cambridge University Press 1941) 122.

[7] [1957] 2 QB 401 (QB).

[8] See s 1.2.5.

## 3.2 THE ORIGIN OF THE SUBSTANTIAL-BENEFIT CONDITION

### 3.2.1 Three interpretations of *Boone v Eyre*

It will be recalled from Chapter 2 that in *Boone v Eyre* the plaintiff conveyed the equity of redemption of a plantation in the West Indies as well as the titles to the slaves who worked upon it in consideration of £500 and an annuity of £160 per annum. The defendant failed to pay the annuity and resisted the action by the plaintiff for non-payment by pleading that the plaintiff was not lawfully possessed of the slaves. Lord Mansfield, giving judgment for the plaintiff, said:

> 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 [slave] not being the property of the plaintiff would bar the action.[9]

This statement, which is the entirety of the reported reasoning, has formed the foundation of much of the modern law on the discharge of parties from their contractual obligations. The irony is that the statement itself gave rise to at least three different interpretations, the veracity of which are difficult to ascertain due in part to the fact that 'the words quoted above are probably the words of the reporter or commentator and not the words of Lord Mansfield'.[10] Each of these three interpretations, however, has given birth to its own line of authority and the offspring are now firmly rooted in the modern law.

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[9] *Boone v Eyre* (n 5).

[10] Arthur Corbin, *Corbin on Contracts: A Comprehensive Treatise on the Rules of Contract Law* (West Publishing Co 1960) vol 3A, 128 §659. A point made in J W Carter and C Hodgekiss, 'Conditions and Warranties: Forebears and Descendants' (1976) 8 Sydney Law Review 31, 34 fn 24.

The first interpretation formed the bedrock of the argument advanced in the previous chapter about the nature of promissory conditions. On that interpretation, the plaintiff's failure to fulfil the promise that he was lawfully possessed of the slaves did not discharge the defendant from his obligation to pay the annuity because the fulfilment of this promise was not, on a proper construction of the contract, a condition precedent to that obligation. On this view, Lord Mansfield was concerned with the construction of the contract,[11] and whether performance of a particular promise exactly was a condition precedent to the other party's obligation. This interpretation, and the line of authorities following it, formed the basis for the modern law of promissory conditions.

The second interpretation was also touched upon in Chapter 2 in discussing the rule now found s 11(4) of the Sale of Goods Act 1979.[12] On that interpretation of *Boone v Eyre*, although the performance of the covenant to convey title to the slaves was a condition precedent, the defendant's conduct in accepting title to some of the slaves and the conveyance of the equity of redemption precluded him from relying upon the condition.[13] While its basis was initially unclear, with some cases suggesting that which was originally a condition precedent somehow ceased to be so,[14] later cases quickly established that it was,

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[11] Anthony Beck, 'The Doctrine of Substantial Performance: Conditions and Conditions Precedent' (1975) 38 Modern Law Review 413, 416; Carter and Hodgekiss (n 10) 35.

[12] See originally Sale of Goods Act 1893, s 11(1)(c).

[13] *Ellen v Topp* (1851) 6 Ex 424, 441–442; 155 ER 609, 616; *Graves v Legg* (1854) 9 Ex 709, 717; 156 ER 304, 307; *Behn v Burness* (1863) 3 B & S 751, 755; 122 ER 281, 283; *Wallis, Son & Wells v Pratt & Haynes* [1910] 2 KB 1003 (CA) 1013; [1911] AC 394 (HL) 400.

[14] Eg, *Ellen v Topp* (1851) 6 Ex 424, 441–442; 155 ER 609, 616.

in fact, simply an instance of waiver.[15] Waiver of conditions is discussed in Chapter 4.

The third interpretation, which is our focus, was that Lord Mansfield was focusing on 'the nature of the breach'[16] and 'arguing that if the breach of contract was minor it would be unreasonable to allow this to be a bar to recovery'.[17] On this view, Lord Mansfield was concerned with the effect of the breach and whether this caused a failure of consideration, ie deprived one party of substantially the whole benefit of the contract. Thus, in *Davidson v Gwynne*,[18] a case which appears to be based on the first interpretation,[19] but has been referred to in the context of the third,[20] Lord Ellenborough CJ said:

> The principle laid down in *Boone v Eyre* has been recognized in all the subsequent cases, that unless the non-performance alleged in breach of the contract goes to the whole root and consideration of it, the covenant broken is not to be considered as a condition precedent, but as a distinct covenant, for the breach of which the party injured may be compensated in damages.[21]

### 3.2.2 Two separate questions

As the quote above illustrates, the cases post-*Boone v Eyre* did not always draw a clear distinction between the first and third interpretations and appeared sometimes to meld them together. This has led some to argue that Lord

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[15] Charles Morison, *Rescission of Contracts, A Treatise on the Principles Governing the Rescission, Discharge, Avoidance and Dissolution of Contracts* (Stevens & Haynes 1916) 100–105; Beck (n 11) 418–419.

[16] Beck (n 11) 416.

[17] Carter and Hodgekiss (n 10) 35 (emphasis removed).

[18] (1810) 12 East 381, 104 ER 149.

[19] See the discussion of this case in s 2.2.4.1.

[20] See, eg, *MacAndrew v Chapple* (1866) LR 1 CP 643 (Comm Pleas) 648.

[21] *Davidson v Gwynne* (1810) 12 East 381, 389; 104 ER 149, 152.

Mansfield was stating that 'the nature of the breach as a matter of law could alter what at the outset was intended to be a condition precedent'.[22] And putting the same proposition the other way around, Sir William Anson once suggested that '[i]t is possible therefore that a promise which is independent so that a partial breach does not affect the contract, may, if wholly broken, change its character and become a condition'.[23]

That this language has been used by the courts cannot be doubted. However, an analysis of the cases demonstrates that there were in fact two separate questions being asked: (i) was performance of the precise covenant alleged to have been breached a condition; and (ii) if not, were the effects of the alleged breach such as to deprive the other party of substantially the whole benefit of the contract? That this is the case is readily illustrated by three nineteenth-century cases which considered both questions: *Havelock v Geddes*,[24] *Tarrabochia v Hickie*,[25] and *MacAndrew v Chapple*.[26]

In *Havelock v Geddes*, the plaintiff owner of a ship covenanted in a charterparty that the ship would be 'made tight, staunch, and strong' and would be 'well and sufficiently equipped, manned, and fitted' for a voyage of twelve months. Almost eleven months into the voyage, the ship caught fire and was lost. The plaintiff sued for unpaid freight alleging that the defendant had not paid the

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[22] Beck (n 11) 416.

[23] Sir William R Anson, *Principles of the English Law of Contract* (1st edn, Clarendon Press 1879) 293.

[24] (1809) 10 East 555, 103 ER 886.

[25] (1856) 1 H & N 183, 156 ER 1168.

[26] *MacAndrew v Chapple* (n 20).

third instalment of freight due at the end of 10 calendar months. The defendant charterers in their defence said that the ship was not sufficiently tight, staunch, and strong etc and argued that because the performance of this covenant 'was a condition precedent and not performed they [were] not liable to pay any thing.'[27] The defendants' argument was rejected and judgment given for the plaintiff.

Lord Ellenborough CJ thought that it was clear, as a matter of construction, that performance of the covenant was not a condition precedent. In words which would be picked up over 150 years later in *Hongkong Fir*[28] and repeated by law students in tutorials and seminars ever since, he said:

> [T]o be sure, if this were a condition precedent, the neglect of putting a single nail for a single moment after the ship ought to have been made tight, staunch, [etc] would be a breach of the condition, and a defence to the whole of the plaintiff's demand.[29]

However, after referring to the rule in *Boone v Eyre*, Lord Ellenborough CJ went on to identify an alternative basis upon which it might have been said that the defendant was discharged. He said:

> Had the plaintiff's neglect here precluded the defendants from making any use of the vessel, it would have gone to the whole consideration and might have been insisted upon as an entire bar; because the consideration for the defendants to pay the freight would then have failed in toto; but as the defendants have had some use of the vessel, notwithstanding the plaintiff's neglect, the plaintiff's covenant is to be considered as going to a part only; the consideration has not wholly failed; and the covenant cannot be looked upon as having raised a condition precedent…[30]

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[27] *Havelock v Geddes* (1809) 10 East 555, 563; 103 ER 886, 889.

[28] *Hongkong Fir* (n 1) 58, 62.

[29] *Havelock v Geddes* (1809) 10 East 555, 563; 103 ER 886, 889.

[30] *Havelock v Geddes* (1809) 10 East 555, 564; 103 ER 886, 890.

The second case that illustrates this distinction is *Tarrabochia v Hickie*. On 22 April 1854, the plaintiff entered into a charterparty with the defendant, under which the plaintiff covenanted that his ship was 'tight, staunch, and strong, and every way fitted for the voyage' and that it would sail 'with all convenient speed' to Cardiff to load a cargo of coal from the defendant. Owing to a series of delays and weather conditions, the ship did not set sail until 19 May 1854, and did not arrive in Cardiff until 16 August 1854, at which point the defendant refused to load. The plaintiff sued the defendant for damages for breach.

At trial, a verdict was returned for the defendant on the basis of the jury's finding that the ship was not 'not tight, staunch, or strong' and that it 'did not with all convenient speed, or in a reasonable time, sail and proceed to Cardiff'. This was so even though the jury had answered the judge's second question—'whether the object of the voyage was thereby frustrated'—in the negative. But the Court of Exchequer (Pollock CB, Martin B, and Bramwell B) set aside this verdict and found for the plaintiff. Pollock CB said:

> The first plea alleges that the vessel was not tight, staunch, or strong, and that by 'reason thereof the object of the charter-party and of the voyage was wholly frustrated.' The latter is a material allegation, and the jury have found it in the negative. The question then is, whether the fact of the vessel not being tight, staunch, or strong, is a condition precedent to the performance by the defendant of his contract. I think not.[31]

Again, this illustrates that there were two questions being considered. The jury had rejected any suggestion that the effects of the breach were to deprive the defendant of substantially the whole benefit of the contract or 'wholly frustrate'

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[31] *Tarrabochia v Hickie* (1856) 1 H & N 183, 184–185; 156 ER 1168, 1169.

the voyage. The only question then was whether the parties had made precise performance of the relevant covenants conditions precedent, which the Court held they had not.

The third and final case that illustrates this distinction is *MacAndrew v Chapple*. The plaintiff owners of a ship agreed with the defendants that the ship, 'being tight, staunch, and strong, and every way fitted for the voyage', should proceed 'with all convenient speed' to Alexandria to load a cargo of cotton and return to London or Liverpool. The ship deviated to unload cargo at various ports causing it to be a few days late. The defendants refused to load at Alexandria and the master of the vessel had to obtain cargo elsewhere, obtaining only a small freight. The plaintiffs sued for damages for the defendants' alleged breach in refusing to load the ship.

The issue for the Court of Common Pleas was whether the plaintiffs' delay was sufficient for the defendants to refuse to load at Alexandria. The Court (Erle CJ, Willes, Byles, and Montague Smith JJ) gave judgment for the plaintiffs, holding that the deviation was not an answer to the action.

Demonstrating once again that these are two distinct issues, three out of four of the justices (Erle CJ, Byles, and Montague Smith JJ) expressly stated that it was unnecessary to consider whether the whole object of the voyage had been frustrated because it was admitted that the present case was not such a case.[32]

[32] *MacAndrew v Chapple* (n 20) 647 (Erle CJ), 648 (Byles J), 649 (Montague Smith J). Willes J did consider the issue: see 648.

Instead, each based their judgment on whether precise performance of the term was a condition precedent. Erle CJ said:

> The present case turns only on the construction of the charterparty; and I think the clause in question amounts to a stipulation for the breach of which the remedy is by cross action, and not to a condition precedent. It is unnecessary to go into the cases which have been cited with reference to the doctrine that where the whole object of the voyage has been frustrated there is an answer to the action, as it is admitted that such was not the case in the present instance.[33]

In sum, while the language did not always make it clear, courts were asking two different questions: first, whether precise performance of the term broken was a condition (a promissory condition); and secondly, whether the breach that had in fact occurred had deprived the other party of substantially the whole benefit of the contract (the substantial-benefit condition).

## 3.3. THE SUBSTANTIAL-BENEFIT CONDITION APPLIED

As will be seen in this section, the substantial-benefit condition has been applied in several different contexts. It has been applied in cases involving breach, in cases not involving breach, in the context of instalment contracts and in connection with the so-called doctrine of substantial performance.

### 3.3.1 Cases involving breach

Throughout the nineteenth century, in addition to the cases mentioned above, the substantial-benefit condition was applied and developed in a number of cases

[33] ibid 647.

involving breach. In *Freeman v Taylor*,[34] for example, the plaintiff shipowner agreed to proceed to the Cape of Good Hope to deliver goods there and then to proceed 'with all convenient speed' to Bombay to load cargo of cotton from the defendant's agents. But, upon arriving at the Cape, the plaintiff delayed his departure by eight days and instead of proceeding directly to Bombay, proceeded via Mauritius, which caused the ship to arrive six or seven weeks later than it would have if it had sailed direct. The defendant's agents refused to load the ship. The plaintiff sought damages for the defendant's failure to load. At trial, Tindal CJ directed the jury that an ordinary deviation would not have entitled the defendant to refuse to load, but:

> [I]f the deviation 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 the freighter had in view in chartering the ship, in that case the contract might be considered at an end…[35]

The jury found for the defendant, following which the plaintiff sought to set aside the verdict. Tindal CJ refused and said that the jury had found that 'the deviation was of such a nature and description as to deprive the freighter of the benefit of the contract'.[36] The defendant was therefore under no obligation to provide a cargo.

Similarly, in *Stanton v Richardson*,[37] the owner of a ship had agreed to sail to Manila in order to fulfil orders to load a cargo of sugar in bags, hemp, and/or

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[34] (1831) 8 Bing 124, 131 ER 348.

[35] *Freeman v Taylor* (1831) 8 Bing 124, 132; 131 ER 348, 351–352.

[36] *Freeman v Taylor* (1831) 8 Bing 124, 138; 131 ER 348, 354.

[37] (1872) LR 7 CP 421 (Comm Pleas); affirmed on appeal (1874) LR 9 CP 390 (Exch Chamb).

measurement goods at nearby ports. The ship did in fact load a cargo of 'wet sugar' at Iloilo, but a very large quantity of moisture drained from the cargo and by the time the full cargo had been loaded molasses (viscous product from the sugar) had accumulated in the ship's hold. Although the pumps on the ship were of a usual kind for a vessel of that size, they were insufficient to deal with the drainage. As a result, the cargo was unloaded at Iloilo, following which the charterer refused to provide another cargo. Cross-actions for damages were brought by both parties.

The Court of Common Pleas (Bovill CJ, Byles, and Brett JJ) ultimately found for the charterer, who it held was under no obligation to provide a cargo. Bovill CJ referred to Lord Ellenborough CJ's statement of the principle in *Havelock v Geddes*[38] and said: 'It appears to me, therefore, in the present case, that the object of the voyage was frustrated, the charterer was not bound to load a cargo.'[39] The Court also found that the owner was in breach because he was bound to supply a vessel fit to carry the cargo that the charterer had undertaken to put on board. The judgment was affirmed on appeal.[40]

### 3.3.2 Cases not involving breach

The cases above were all concerned with instances of breach. It is perhaps this feature which has contributed to the lack of a clear distinction between the

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[38] See text to n 30.

[39] *Stanton v Richardson* (n 37) (Comm Pleas) 432–433. See also 437 (Brett J).

[40] *Stanton v Richardson* (n 37) (Exch Chamb).

breach of duty and the failure of the condition.[41] However, two cases decided in the 1870s show that the distinction between the two remains of vital importance: *Jackson v Union Marine Insurance Co*[42] and *Poussard v Spiers & Ponds Ltd.*[43] This is because it is possible for the substantial-benefit condition to fail in circumstances which do not amount to a breach of duty. The failure to notice this has led to much confusion about the relationship between discharge following breach and the so-called doctrine of frustration.[44]

In *Jackson v Union Marine Insurance Co*,[45] the plaintiff owner of a vessel agreed to proceed from Liverpool to Newport with all possible dispatch—'dangers and accidents of navigation'[46] excepted—in order to collect a cargo of iron rails for delivery to San Francisco. The rails were needed in San Francisco for the construction of a railway. The vessel set sail from Liverpool on 2 January 1872, but ran aground on 3 January[47] and had to be taken to a place of safety on 18 February. In the meantime, however, the charterer had, on 16 February, renounced their obligations under the charterparty and chartered another ship to carry the rails, while refusing to pay freight. The plaintiff's ship was later sold by auction and at the time of trial, on 16 August 1872, was still being repaired.

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[41] Diplock LJ made a similar point in *Hongkong Fir* (n 1) 68.

[42] (1874) LR 10 CP 125 (Exch Chamb).

[43] (1876) 1 QBD 410 (QB).

[44] See s 3.5 below and generally Chapter 5.

[45] *Jackson v Union Marine Insurance* (n 42).

[46] *Jackson v Union Marine Insurance Co* (1873) LR 8 CP 572 (Comm Pleas) 572.

[47] *Jackson v Union Marine Insurance* (n 42) 126. The first instance decision actually says it was on 4 January: ibid 575.

The plaintiff sought to recover his loss of freight on an insurance policy which insured against loss of freight 'by perils of the sea'.[48] The defendant insurers denied liability on the basis that any loss suffered was not caused by the perils insured against, but rather the wrongful refusal of the charterer.[49] The plaintiff, however, argued that upon the damage being caused to the ship, the charterer was no longer obliged to provide any cargo, with the result that the right to earn the freight was lost as an immediate consequence of the peril insured against.[50] The issue thus turned upon whether the damage to the ship was an event which discharged the charterer from its obligation to provide a cargo.

At trial, the jury found that the time necessary for repairing the vessel was 'so long as to put an end in a commercial sense to the commercial speculation entered upon by the ship-owner and charterers'.[51] Nonetheless, the trial judge found in favour of the defendants on the basis the plaintiff had 'a right to repair his ship however long it might take'[52] and to insist that the charterers provide a cargo. The loss, therefore, had been caused by the charterer's (wrongful) refusal to supply a cargo and not by the perils of the sea. However, when the matter was heard again in the Court of Common Pleas, and on appeal to the Court of Exchequer Chamber, judgment was given for the plaintiff and it was held that the charterer was discharged.

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[48] *Jackson v Union Marine Insurance* (n 46) 577.

[49] ibid 576.

[50] ibid 577.

[51] ibid 573.

[52] ibid 575.

### 3.3. THE SUBSTANTIAL-BENEFIT CONDITION APPLIED

The primary judgment in the Court of Exchequer Chamber was given by Bramwell B (with whom Blackburn, Mellor, Amphlett, and Lush JJ agreed; Cleasby B dissenting). There are three points worth making about this judgment. The first is that unfortunately, 'the expression "failure of consideration" [which is synonymous with failure of the substantial-benefit condition] is not used. Otherwise the ground of decision might have been made clearer.'[53] Instead, Bramwell B spoke of implying a condition precedent that the ship should arrive in Newport in time for the voyage, or alternatively, within a reasonable time.[54] On the latter, Bramwell B said that '[w]here no time is named for the doing of anything, the law attaches a reasonable time' and here the charterer was discharged 'because the implied condition to arrive in a reasonable time was not performed'.[55]

As Dr Roy McElroy and Professor Glanville Williams have noted, this had the unfortunate consequence that 'the ground of decision itself has been misunderstood'.[56] However, as we shall see below, that failure of consideration (which is synonymous with failure of the substantial-benefit condition) is the true ground of the decision is made clear in the judgment of Blackburn J in *Poussard v Spiers*, where the eminent judge, who was also a member of the Court in both cases, discusses *Jackson v Union Marine Insurance Co.*

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[53] McElroy and Williams (n 6) 137.

[54] *Jackson v Union Marine Insurance* (n 42) 143–144.

[55] ibid 144.

[56] McElroy and Williams (n 6) 136.

The second point is that throughout the judgment, Bramwell B made tolerably clear that there was a distinction between the promise and the condition. He said:

> The shipowner, in the case put, expressly agrees to use all possible dispatch: that is not a condition precedent; the sole remedy for and right consequent on the breach of it is an action. He also impliedly agrees that the ship shall arrive in time for the voyage: that *is* a condition precedent as well as an agreement; and its non-performance not only gives the charterer a cause of action, but also releases him. Of course, if these stipulations, owing to excepted perils, are not performed, there is no cause of action, but there is the same release of the charterer.[57]

Moreover, in discussing the effect of the 'excepted perils' clause, Bramwell B said:

> Suppose it was not there, and not implied, the shipowner would be subject to an action for not arriving in a reasonable time, and the charterers would be discharged. … The words are there. What is their effect? I think this: they excuse the shipowner, but give him no right. The charterer has no cause of action, but is released from the charter. When I say *he* is, I think *both* are.[58]

Bramwell B was thus making clear that the only relevance of the 'excepted perils' clause was as to whether the owner was in breach. It had no impact on the question of discharge because the only matter relevant to that question was the failure of the condition, and whether the excepted perils clause was there or not the charterer would be discharged.

The third point, which arises from the last sentence of the quote extracted immediately above, is that despite initial appearances, it is clear from the other parts of his judgment that Bramwell B was not suggesting that both parties

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[57] *Jackson v Union Marine Insurance* (n 42) 143 (emphasis in original).

[58] ibid 144 (emphasis in original).

were discharged for the same reason.[59] This point is discussed in s 3.5 below. For now, it suffices to note that the charterer was discharged because the ship did not 'arrive in time for the voyage'; the 'implied condition' had failed. The owner on the other hand was discharged because he made his duty expressly conditional upon the excepted perils not taking place.[60] As McElroy and Williams have noted, '[h]ad there been no express exception it can hardly be doubted that the shipowner would *not* have been excused.'[61] The only difference between this case and the cases considered in the previous sub-section applying the substantial-benefit condition is that here there was no breach of duty.

The second case to illustrate the application of the substantial-benefit condition in a case not involving breach is *Poussard v Spiers*,[62] which was decided some 16 months later. The defendant's manager had made a contract with the plaintiff's wife,[63] Madame Poussard, for her to sing and play in an opera at the defendant's theatre. Madame Poussard fell ill and was unable to attend the final week of rehearsals, or to perform on the opening night and the first three days of the following week. The defendant in the meantime had hired a replacement. Madame Poussard recovered and sought to tender her services, which the defendant refused to accept. The plaintiff brought an action for wrongful dismissal. The Court (Blackburn, Quain, and Field JJ) held that 'the failure on the

[59] McElroy and Williams (n 6) 138–139. Cf Arnold D McNair, 'Frustration of Contract by War' (1940) 56 Law Quarterly Review 173, 182 fn 40; Arnold D McNair, *Legal Effects of War* (Cambridge University Press 1920) 82.

[60] See *Jackson v Union Marine Insurance* (n 42) 144.

[61] McElroy and Williams (n 6) 139 (emphasis in original).

[62] *Poussard v Spiers* (n 43).

[63] The husband was the plaintiff due to the old doctrine of 'coverture', abolished by the Married Women's Property Act 1882.

plaintiff's part went to the root of the matter and discharged the defendants.'[64] Blackburn J observed:

> This inability having been occasioned by sickness was not any breach of contract by the plaintiff, and no action can lie against him for the failure thus occasioned. But the damage to the defendants and *the consequent failure of consideration* is just as great as if it had been occasioned by the plaintiff's fault, instead of the wife's misfortune. The analogy is complete between this case and that of … *Jackson v Union Marine Insurance Co*.[65]

It is clear from this passage that Blackburn J saw *Poussard v Spiers* as directly analogous to *Jackson v Union Marine Insurance Co*. The plaintiff was not in breach of any contractual duty due to Madame Poussard falling ill—her obligation to perform was conditional upon it being possible to do so[66]—but this was irrelevant to the question whether the substantial-benefit condition had failed. That is because the defendant was discharged by the failure of condition, not any breach of duty.

Both these cases therefore show that while the failure of the substantial-benefit condition might be brought about as a result of a breach of duty, it can also occur where there is no breach of duty at all. In neither case is the defendant discharged for breach; the defendant is discharged for the failure of a condition.[67]

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[64] *Poussard v Spiers* (n 43) 415.

[65] ibid 414 (emphasis added).

[66] See s 5.2.1

[67] See, eg, A M Shea, 'Discharge from Performance of Contracts by Failure of Condition' (1979) Modern Law Review 623, 624.

### 3.3.3 Instalment contracts

The substantial-benefit condition has also been applied in the context of instalment contracts.[68] The reason that this has not always been clear is two-fold. First, cases involving instalment contracts will often involve promissory conditions as well. Secondly, in such cases, renunciation in the sense of anticipatory breach has not been delineated clearly from failure of the substantial-benefit condition. An example of the conflation between the two concepts can be seen in *Freeth v Burr*,[69] where Lord Coleridge CJ said that '[w]here by the non-delivery of part of the thing contracted for the whole object of the contract is frustrated, the party making default renounces on his part all the obligations of the contract.'

A case which illustrates this overlap is *Mersey Steel and Iron Co Ltd v Naylor, Benzon & Co.*[70] The respondents agreed to buy from the appellant company 5,000 tons of steel, to be delivered in batches of 1,000 tons per month, commencing January 1881. Two deliveries were made in January and February, but each fell short. The total amount shipped was around half of one instalment. Shortly before payment for these deliveries was due, a petition to wind up the company was presented. The buyers were advised, incorrectly, that they could not without leave the Court pay the company pending the petition, upon which they asked the company to obtain a court order sanctioning their payment. The company treated

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[68] Nolan (n 4) 275–276.

[69] (1874) LR 9 CP 208 (Comm Pleas) 214; cited with approval in *Maple Flock Co Ltd v Universal Furniture Products (Wembley) Ltd* [1934] 1 KB 148 (CA) 155.

[70] (1884) 9 App Cas 434 (HL).

this as a refusal to pay. The company was subsequently wound up and the liquidator refused to make any further deliveries, instead commencing an action to recover the price of what had been delivered. The buyers admitted that the amounts were due, but counter-claimed for damages for non-delivery. The company argued that the non-payment had operated to discharge the company from its obligation to deliver.

The House of Lords, affirming the decision of the Court of Appeal, found in favour of the buyers. Lord Selborne LC rejected the argument of the company that payment for one instalment was a condition precedent to each subsequent instalment.[71] Instead, the Lord Chancellor said that the relevant question was whether there was conduct that 'amounts to a renunciation, an absolute refusal to perform the contract',[72] relying upon *Freeth v Burr*.[73] Ultimately, he refused to ascribe to the buyers conduct 'the character of a renunciation of the contract',[74] on the basis that the buyers were seeking to fulfil the contract.

Lord Blackburn delivered a concurring speech. He agreed that the case did not fall within the principle in *Freeth v Burr*, which he identified as being based upon the same principle as *Hochster v De La Tour*,[75] namely renunciation in the

[71] ibid 439.

[72] ibid.

[73] *Freeth v Burr* (n 69) 214.

[74] *Mersey Steel* (n 70) 441.

[75] (1853) 2 El & Bl 678, 118 ER 922.

sense of anticipatory breach.[76] Having dismissed that argument, Lord Blackburn then went on to say:

> The rule of law, as I always understood it, is that where there is a contract … if you see that the failure to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a good defence to say, 'I am not going on to perform my part of it when that which is the root of the whole and substantial consideration for my performance is defeated by your misconduct.'[77]

Lord Blackburn was here relying upon failure of consideration reasoning.[78] Ultimately he held that the breach was not one that went to the root of the contract.[79]

Unfortunately, subsequent cases have not distinguished between these two different ideas (renunciation and failure of the substantial-benefit condition). Thus, in the leading decision of *Maple Flock Co Ltd v Universal Furniture Products (Wembley) Ltd*,[80] which was concerned with defects found in instalments delivered, the Court of Appeal (Lord Hewart CJ, Lord Wright, and Slesser LJ) quoted the test for renunciation set out by Lord Selborne LC in *Mersey Steel*, but then, relying upon Lord Coleridge CJ in *Freeth v Burr*,[81] said the question was 'the relation in

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[76] *Mersey Steel* (n 70) 443.

[77] ibid 443–444.

[78] Nolan (n 4) 276 fn 39. See too Carter and Hodgekiss (n 10) 41.

[79] The approach in *Mersey Steel* based upon renunciation subsequently found expression in the Sale of Goods Act 1893, s 31(2) (now the Sale of Goods Act 1979, s 31(2)), despite apparently being based on the quote from Lord Blackburn, which was concerned with failure of consideration; see M D Chalmers, *The Sale of Goods Act, 1893, including The Factors Acts, 1889 & 1890* (William Clowes and Sons Ltd 1894) 64.

[80] *Maple Flock* (n 69).

[81] *Freeth v Burr* (n 69) 214.

fact of the default to the whole purpose of the contract'.[82] Indeed, the test posited by the Court of Appeal appears to conflate the two ideas. The Court said that the following must be considered: 'first, the ratio quantitatively which the breach bears to the contract as a whole, and secondly the degree of probability or improbability that a breach will be repeated'.[83]

It is submitted that in order to make sense of the law, a proper understanding of the conditions at play is needed. Subject always to the proper construction of the contract, the following general rules might be stated. First, in a contract for the sale of goods by instalments, delivery of each instalment is likely to be a promissory condition to payment for that instalment. Equally, it is a condition of the buyer's obligation to accept delivery, and hence to pay, that he or she receives substantially the whole benefit of that instalment.[84] Secondly, it is possible that if the performance rendered by one party is such as to deprive the buyer of substantially the whole benefit of the contract, he or she is discharged from the obligation to accept delivery of all instalments of the goods. An example of this might be where the subsequent instalments are rendered otiose without the prior instalments, such as a contract for the delivery in instalments of parts to build a machine. This, however, is likely to be an exceptional case, particularly where performance has already commenced. Thirdly, the conduct of one party, in line with *Mersey Steel* and *Maple Flock*, may be such as to indicate an

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[82] *Maple Flock* (n 69) 156.

[83] ibid 157.

[84] See the authorities referred to in J W Carter, G J Tolhurst, and Elisabeth Peden, 'Developing the Intermediate Term Concept' (2006) 22 Journal of Contract Law 268, 279–281. See further, Corbin (n 10) 332 §708.

intention not to perform in the future or an inability to do so—these are cases of renunciation or disablement and are forms of anticipatory breach. The risk of confusion arises because, as we noted in Chapter 2, sometimes the conduct to infer a renunciation of future obligations is in fact the way in which a present obligation is breached.[85] The key to removing the confusion is to distinguish between actual non-performance and merely anticipated non-performance.[86]

### 3.3.4 The so-called doctrine of 'substantial performance'

The substantial-benefit condition has also travelled under another name: the so-called doctrine of 'substantial performance'. This apparent doctrine, which 'has been chiefly applied to building contracts',[87] was explained in the following way by Geoffrey Cheshire and Cecil Fifoot:

> According to this doctrine, which dates back to Lord Mansfield's judgment in *Boone v Eyre* in 1779, if there has been substantial though not perhaps an exact and literal performance by the promisor, the promisee cannot treat himself as discharged.[88]

Despite the fact that it traces its lineage to the same decision, it appears to have gone largely unnoticed that the substantial performance 'doctrine' is simply an instance of the substantial-benefit condition.[89] In every case where it is said to apply, the question is whether the promisee has received substantially the whole benefit that it was intended he or she should obtain from the contract. To ask

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[85] See s 2.3.2 and the text accompanying n 131 in that section.

[86] ibid.

[87] Edwin W Patterson, 'Constructive Conditions in Contracts' (1942) 42 Columbia Law Review 903, 927. See also F M B Reynolds, 'Discharge of Contract by Breach' (1982) 97 Law Quarterly Review 541, 543.

[88] G C Cheshire and C H S Fifoot, *The Law of Contract* (5th edn, Butterworth & Co 1960) 447.

[89] Cf Beck (n 11).

whether the promisee has 'substantially performed' is simply another way of expressing the question.

That this is the case is illustrated by the well-known decision in *Hoenig v Isaacs*.[90] The plaintiff had been hired to decorate and furnish the defendant's flat. The contract price was £750 to be paid 'net cash, as the work proceeds; and balance on completion'.[91] The defendant paid £400 but refused to pay the balance of £350 on the ground that the work was done defectively. It was found that a door of wardrobe required replacing and that a bookshelf was too short and would need to be remade, thus requiring additional alterations to a bookcase. The plaintiff brought an action for the balance. The Court of Appeal (Somervell, Denning, and Romer LJJ) held that the plaintiff was entitled to recover the contract price, subject to a counter-claim for damages.

The issue, simply put, was what constituted the condition precedent to payment.[92] The defendant argued that the contract was an 'entire contract', meaning, in this context, that full and exact performance of the promise to decorate the flat was required before the obligation to pay fell due. This argument was rejected.

Somervell LJ expressly referred to *Boone v Eyre* for '[t]he principle that fulfilment of every term is not necessarily a condition precedent in a contract for

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[90] [1952] 2 All ER 176 (CA).

[91] ibid 177.

[92] ibid 180.

a lump sum'.[93] He said that 'if there was a substantial compliance with the contract' then 'the price must be paid subject to set-off or counterclaim'.[94] Denning LJ was also of the view that because the contract was 'substantially performed' the plaintiff was entitled to recover.[95] He said:

> [T]he first question is whether, on the true construction of the contract, entire performance was a condition precedent to payment. … When a contract provides for a specific sum to be paid on completion of specified work, the courts lean against a construction of the contract which would deprive the contractor of any payment at all simply because there are some defects or omissions. The promise to complete the work is, therefore, construed as a term of the contract, but not as a condition. It is not every breach of that term which absolves the employer from his promise to pay the price, but only a breach which goes to the root of the contract, such as an abandonment of the work when it is only half done. Unless the breach does go to the root of the matter, the employer cannot resist payment of the price.[96]

Denning LJ's judgment is particularly instructive because it proceeds in the same two stages we have seen in s 3.2.2 above. First, it asks whether performance of the promise to decorate the flat exactly was a condition precedent to payment (ie a promissory condition). Secondly, it asks, notwithstanding, whether the breach is such as to go to the 'root of the contract'. And this question was answered in the negative by Denning LJ stating that the plaintiff had 'substantially performed'. The question is simply another way of asking whether the substantial-benefit condition has failed, and it is part of the

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[93] *Hoenig v Isaacs* (n 90) 178.

[94] ibid 179.

[95] ibid 181.

[96] ibid 180–181.

same two-stage analysis that judges had been engaging in at this stage for over 140 years.[97]

When seen in this light, it also becomes apparent that there is no 'doctrine' of substantial performance, insofar as this suggests the existence of a rule that a condition will be taken to have been satisfied if it is 'substantially performed'. Nor, to state the obvious, is it a defence to an action for breach of duty for the promisor to say that he or she has 'substantially performed'.[98] The so-called 'doctrine' of substantial performance is simply a matter of ascertaining the relevant conditions precedent to payment. It would therefore be a mistake to say that there will be no failure of a condition 'where the condition is substantially performed'.[99] Conditions are binary. They are either performed or they are not. The true position in cases where substantial performance will enliven the duty to pay is that "'substantial performance" *is* the condition—the fact that must exist before payment is due.'[100]

## 3.4 THE DECISION IN *HONGKONG FIR*

As the previous section has shown, the substantial-benefit condition, though famously associated with the decision in *Hongkong Fir*, significantly pre-dates it, and has been applied in a range of different contexts. Indeed, while it has been said that *Hongkong Fir* represents 'the most important judicial contribution to

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[97] See, eg, the discussion of *Havelock v Geddes* (n 24) in s 3.2.2 above.

[98] Corbin (n 10) 315–316 §702.

[99] Frederick Wilmot-Smith, 'Reconsidering "Total" Failure' (2013) 72 Cambridge Law Journal 414, 428.

[100] Corbin (n 10) 314 §701 (emphasis in original).

English contract law in the past century',[101] its importance is not in establishing new principles, but in shedding 'a new light on old and accepted principles'.[102]

### 3.4.1 The authorities before *Hongkong Fir*

In the first half of the twentieth century, the substantial-benefit condition 'flourished'[103] in cases where there was no breach. But in cases where there was a breach the focus on promissory conditions appears to have taken centre stage.[104] Nonetheless, the substantial-benefit condition did not fall completely into disuse and, in addition to the 'substantial performance' cases discussed above, a number of cases continued to apply it.[105]

The most important is the decision in *Universal Cargo Carriers Corp v Citati*.[106] A ship had been chartered to load a quantity of scrap iron at Basrah for carriage to Buenos Aires. The ship arrived at Basrah in due course but the charterer failed to nominate an effective shipper or loading birth, and failed to provide a cargo. Three days before the lay-days had expired, the shipowners rechartered the vessel to another party and the issue, on a special case from the arbitrator, was whether they were entitled to do so. A large part of the case focused on renunciation and disablement (both forms of anticipatory breach),

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[101] Treitel (n 3) 113.

[102] *Bunge Corp, New York v Tradax Export SA, Panama* [1981] 1 WLR 711 (HL) 715. Nolan skilfully advances this very claim: Nolan (n 4).

[103] Nolan (n 4) 275.

[104] ibid.

[105] See, eg, *Inervkip Steamship Co Ltd v Bunge & Co* [1917] 2 KB 193 (CA); *Aerial Advertising Co v Batchelor's Peas Ltd* [1938] 2 All ER 788 (KB); *Universal Cargo Carriers* (n 7). And see Nolan (n 4) 275–276.

[106] *Universal Cargo Carriers* (n 7).

and on these issues it was held that on the findings of the arbitrator, it had not been shown that the charterer had evinced an intention not to perform the charterparty (renunciation), but that the matter should be remitted to the arbitrator to determine whether the charterer was 'willing and able to perform the charterparty within such time as would not have frustrated the commercial object of the adventure' (disablement).[107]

On the issue of actual breach, the Court first considered whether any of the breaches by the charterer were of 'a condition of the charterparty as distinct from a warranty'.[108] The Court held that none of them was a condition.[109] But secondly, the Court went on to say that the delay could not go on indefinitely, and that '[w]hen the delay becomes so prolonged that the breach assumes a character so grave as to go to the root of the contract, the aggrieved party is entitled to rescind.'[110]

On this second inquiry, an issue arose as to 'the yardstick by which this length of delay [was] to be measured'.[111] Counsel for owners, Mr Ashton Roskill QC,[112] had argued that the yardstick was not one of 'frustration', but rather a 'reasonable time'.[113] The Court rejected this argument and held that the

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[107] ibid 455.

[108] ibid 429.

[109] ibid.

[110] ibid 430.

[111] ibid.

[112] Not to be confused with his younger brother Eustace Roskill, who later became Lord Roskill.

[113] See, eg, *Universal Cargo Carriers* (n 7) 417.

former had been 'settled as the correct one by a long line of authorities'[114]—specifically, the authorities discussed earlier in this chapter. And as the arbitrator had found that the delay when the owners rechartered the vessel had not become so long as to frustrate the object of the voyage, this ground of discharge could not be relied upon.

Importantly, this two-staged approach to discharge is exactly the same analysis we have seen in earlier sections of this chapter. Indeed, the Court made the astute observation that the term 'frustration' 'was used in relation to breach of contract well before the doctrine was declared in 1870 or thereabouts'.[115] And in terms which make it clear that the Court was talking about failure of consideration (ie failure of the substantial-benefit condition), it said:

> To bring a contract to an end by breach of warranty[116] there had to be a failure of consideration, that is to say, the breach had to be such as to *deprive the plaintiff in effect of the benefit of his contract*. Various metaphors came into use for describing the character of such a breach, such as 'going to the whole root and consideration of the contract' and 'frustrating the object of the voyage'.[117]

It is perhaps surprising that this decision, albeit only a decision at first instance, has not been given more attention on the issue of discharge following actual breach. As will be seen in the next-subsection, the case itself formed the basis of the arguments advanced in *Hongkong Fir* and clearly formed an important

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[114] ibid 430.

[115] ibid.

[116] This is not how most lawyers would use the term 'warranty' today, but see the text accompanying n 146 below.

[117] *Universal Cargo Carriers* (n 7) 431 (emphasis added).

part of each justice's reasoning.[118] Indeed, aside from further exposition of the substantial-benefit condition, it is difficult to see what, if anything, the judgments in *Hongkong Fir* added to the explanation given in *Universal Cargo Carriers*. Nonetheless, there can be no doubting that the decision in *Hongkong Fir*, especially the judgment of Diplock LJ, has been by far the most influential and, consequently, it has been said (inaccurately) that the 'credit for this invention or discovery belongs to Diplock LJ'.[119]

### 3.4.2 *Hongkong Fir*

The facts of the *Hongkong Fir* were summarised in the previous chapter, but bear repeating. The claimant shipowners chartered the *Hongkong Fir* to the defendants for a period of 24 months. By clause 1 of the charterparty, the owners contracted to deliver the vessel 'she being in every way fitted for ordinary cargo service' (the 'seaworthiness obligation'). On 13 February 1957, the vessel sailed from Liverpool to Osaka, but there were insufficient members of the engine room to maintain the vessel's old machinery, and the chief engineer was a drunk, both of which caused serious breakdowns. Almost fourteen and a half weeks later, on 25 May, the vessel reached Osaka, where it was discovered that the main engine and auxiliaries were in a damaged state and needed repairs. A further 15 weeks were required to make the vessel ready for sea. On 6 June 1957, the charterers renounced their obligations under the charterparty. The owners brought an action seeking damages for the charterers' (alleged) wrongful repudiation. The

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[118] *Hongkong Fir* (n 1) 61 (Sellers LJ), 65 (Upjohn LJ), 69 (Diplock LJ).

[119] Treitel (n 3) 113.

charterers in their defence argued that the owners had breached the seaworthiness obligation, the performance of which they argued was 'a condition precedent to the charterer[s'] liability under the charterparty'[120] or, alternatively, that the charterparty was frustrated by reason of the breakdowns, repairs and delay.

At first instance, Salmon J held that the owners were in breach of the seaworthiness stipulation,[121] but that its performance was not a condition.[122] This meant that the charterers could not succeed 'unless the delay in making the vessel seaworthy was or appeared likely at the date of the repudiation to be so great as to frustrate the commercial purpose of the charter'.[123]Advancing the argument that he had made unsuccessfully in in *Universal Cargo Carriers*, counsel for the charterers, Mr Roskill QC, again argued that it was enough if the delay was unreasonable, and that it was not necessary in cases of breach for the delay to amount to 'frustration'.[124] Salmon J rejected this submission, and ultimately concluded that the charterparty had not been 'frustrated'.[125]

The charterers then appealed to the Court of Appeal and ran the exact same arguments that had been put before Salmon J. In particular, contrary to the picture often painted of *Hongkong Fir* (which suggests that it invented or rediscovered this form of discharge), there was no doubt whatsoever that a party

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[120] *Hongkong Fir* (n 1) 35.

[121] ibid 34.

[122] ibid 38.

[123] ibid.

[124] ibid.

[125] ibid 40.

could be discharged in circumstances where the term breached (here, the seaworthiness stipulation) was not a 'promissory condition'. The argument advanced on behalf of the charterers was simply that the standard by which the delay was to be measured was an 'unreasonable delay from the point of view of the charterers' rather than 'such delay as is necessary to frustrate the contract'.[126]

The Court of Appeal (Sellers, Upjohn, and Diplock LJJ) dismissed the charterers' appeal, holding that the charterers had not been entitled to renounce their obligations under the charterparty because (i) performance of the seaworthiness obligation was not a condition, and (ii) the delays caused by the breakdowns and repairs were not so great as to frustrate the commercial purpose of the charterparty (expressly rejecting Mr Roskill QC's submission that it was enough if the delay was unreasonable).

Sellers LJ specifically stated that the charterers would be discharged if the delay were 'so long in fact, or likely to be so long in reasonable anticipation, that the commercial purpose of the contract would be frustrated'.[127] Moreover, he noted that the argument as to the standard by which the delay was to measured was a 'similar argument' to that which Mr Roskill QC had advanced in *Universal Cargo Carriers*[128] and, for the reasons given by the Court in that case, Sellers LJ rejected it.[129]

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[126] ibid 41.

[127] ibid 57.

[128] ibid 61.

[129] ibid 60–61.

Upjohn LJ also rejected this argument, stating that '[the judge in *Universal Cargo Carriers*] came to clearly the right conclusion after an exhaustive review of the authorities'.[130] Upjohn LJ thought that it would be 'wrong to introduce the idea that the innocent party can treat the contract as at an end for delays which… fall short of a frustration of the contract',[131] and stated that 'the question to be answered is, does the breach of the stipulation go so much to the root of the contract that it makes further commercial performance of the contract impossible, or in other words is the whole contract frustrated?'[132]

Turning to Diplock LJ's judgment, as we noted in Chapter 2, his central point was that it was an event rather than the breach itself, which relieved one party of his or her undertakings under the contract. He said:

> The test whether an event has this effect or not has been stated in a number of metaphors all of which I think amount to the same thing: does the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?[133]

Diplock LJ's statement of the test is an apt way of describing the substantial-benefit condition—each party's obligation to perform is conditional upon that party receiving substantially the whole benefit of the contract.[134]

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[130] ibid 65.

[131] ibid.

[132] ibid 64.

[133] ibid 66.

[134] See also Reynolds (n 87) 542.

Unsurprisingly, Diplock LJ also expressly rejected the argument that a different test ought to be applied in cases of discharge following breach and in cases of so-called 'frustration', stating that '[t]he test … is the same whether the event is the result of the other party's breach of contract or not, as [was] pointed out in *Universal Cargo Carriers*'. [135] Diplock LJ said that the 'fallacy' in Mr Roskill QC's argument stemmed from 'a failure to view the cases in their historical context'.[136] After referring to a number of those cases, he said:

> The fact that the emphasis in the earlier cases was upon the breach by one party … tended to obscure the fact that it was really the event resulting from the breach which relieved the other party of further performance of his obligations. … It was not, however, until *Jackson v Union Marine Insurance Co Ltd* that it was recognised that it was the happening of the event and not the fact that the event was the result of a breach by one party of his contractual obligations that relieved the other party from further performance of his obligations.[137]

This is substantially the thesis that has been put forward in this chapter. And it is submitted that the reason it has been so difficult to see is because of the failure to distinguish between the promise, the breach of which gives rise to an action for damages, and the condition, the failure of which operates as a discharge.

It is for this reason that Diplock LJ was correct when he went on to say there are 'many contractual undertakings of a more complex character which

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[135] *Hongkong Fir* (n 1) 69.

[136] ibid 66.

[137] ibid 68.

cannot be categorised as being "conditions" or "warranties""[138] breach of which will always or never give rise to a discharge, and that:

> [o]f such undertakings all that can be predicated is that some breaches will and others will not give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract…[139]

This is because where exact performance of a contractual term is not a condition, not every breach of that term (ie not every breach of duty) will cause the substantial-benefit condition to fail. A breach will only do so where its effect is to deprive the other party of substantially the whole benefit of the contract and thus cause the substantial-benefit condition to fail.

In sum, a number of points can be taken away from the decision in *Hongkong Fir*. First, far from being 'revolutionary'[140] it appears to have been little more than an orthodox application of a long line of authorities stemming back to *Boone v Eyre*.[141] Secondly, while Diplock LJ has been credited with the so-called 'invention' or 'rediscovery' of this form of discharge, it seems that the credit should really be given to *Universal Cargo Carriers*, which formed the primary basis of much of the argument in *Hongkong Fir*. Indeed, it was not even in dispute that this second form of discharge existed in *Hongkong Fir*; the issue on appeal was only as to the standard or yardstick to be applied. Finally, the decision is readily explicable on the basis that while performance of the seaworthiness stipulation

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[138] ibid 70.

[139] ibid.

[140] A Weir, 'Contract—The Buyer's Right to Reject Defective Goods' [1976] Cambridge Law Journal 33, 35.

[141] An argument made in Nolan (n 4).

exactly was not a 'condition' (ie not a promissory condition), the obligations of the charterers were nevertheless subject to the substantial-benefit condition.[142] And despite there being a clear breach of the seaworthiness stipulation, the substantial-benefit condition simply had not failed on the facts.

### 3.4.3 The 'intermediate' or 'innominate' term

It follows from the above that the decision in *Hongkong Fir* is perfectly explicable on a failure of condition model. Unfortunately, it seems that despite Diplock LJ's insistence that the question of discharge could not be answered solely by reference to a priori classification of contractual terms, the decision in *Hongkong Fir* is said to have 'given birth'[143] to a brand new type of term: the 'intermediate' term or 'innominate' term. This third category of contractual term now sits alongside 'conditions' and 'warranties'.[144]

But as Professor Donal Nolan has observed, to suggest that Diplock LJ introduced a third category of term 'seems rather a simplistic way of encapsulating the very sophisticated analysis which [Diplock LJ's judgment] represents'.[145] The whole point of Diplock LJ's judgment was to move away from the so-called classification of terms. The classification of terms for this purpose

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[142] Reynolds (n 87) 542.

[143] Carter, Tolhurst, and Peden (n 84) 268.

[144] See, eg, Edwin Peel, *The Law of Contract* (15th edn, Sweet & Maxwell 2020) 989–991 [18-052]–[18-054]; Jack Beatson, Andrew Burrows, and John Cartwright, *Anson's Law of Contract* (31st edn, Oxford University Press 2020) 151–153; Ewan McKendrick, 'Termination for Breach' in Hugh Beale (ed), *Chitty on Contracts* (34th edn, Sweet & Maxwell 2021) vol 1 1981, 2006–2007 [27-045]; Andrew Burrows, *A Restatement of the English Law of Contract* (2nd edn, Oxford University Press 2020) 118–119.

[145] Nolan (n 4) 286.

is also, as this chapter has shown, completely ahistorical. No prior case had considered the need to classify the term when considering the application of the substantial-benefit condition. Indeed, in *Universal Cargo Carriers*, when discussing this form of discharge, the Court said that '[t]o bring a contract to an end by *breach of warranty* there had to be a failure of consideration'.[146] And even after *Hongkong Fir*, there were doubts expressed as to whether any so-called third term had been created.[147]

The tendency to focus on the classification of terms is all the more surprising when it is recognised that Diplock LJ himself at no point mentioned 'innominate' or 'intermediate' terms and never adopted the terminology post-*Hongkong Fir*.[148] The first reported reference in a case appears to be the judgment of Stephenson LJ in the Court of Appeal *Wickman Machine Tool Sales Ltd v L Schuler AG*,[149] where he referred to 'Anson's innominate term'.[150]

One difficulty this has caused is that, as all students of contract law will know, it now means that there is a debate as to whether there is a continued need for three categories of terms: (i) 'conditions', any breach of which will give rise to a power to terminate; (ii) 'intermediate terms', some breaches of which will give rise to a power to terminate; and (iii) 'warranties', no breaches of which will

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[146] *Universal Cargo Carriers* (n 7) 431 (emphasis added).

[147] *Cehave NV v Bremer Handelsgesellschaft mbH (The Hansa Nord)* [1976] QB 44 (CA) 84.

[148] Carter, Tolhurst, and Peden (n 84) 271.

[149] [1972] 1 WLR 840 (CA) 860.

[150] Noted in *Grand China Logistics Holding (Group) Co Ltd v Spar Shipping AS* [2016] EWCA Civ 982, [2017] 4 All ER 124, 131 [19]. The expression is said to have originated in the academic literature in M P Furmston, 'The Classification of Contractual Terms' (1962) 25 Modern Law Review 584. See Carter, Tolhurst, and Peden (n 84) 271 fn 19.

give rise to a power to terminate.[151] The doubt relates to the continued need for a third category of 'warranty' on the basis that it is difficult to imagine any obligation in a contract that could not somehow be breached in a way so as to deprive one party of substantially the whole benefit of the contract.

This debate only arises because of the assumption that a 'power to terminate' arises in response to certain kinds of breaches of certain kinds of terms. This thinking in turn has only arisen because, as we saw in Chapter 2, English lawyers began to refer to stipulations, the performance of which was a condition, as 'conditions' themselves.[152] A 'warranty' was then used simply to refer to everything else, but crucially it did not need to carry the implication that no breach of a warranty could ever give rise to a discharging event.[153] On the approach put forward in this thesis, the tripartite classification of terms misses the whole point that it is not the breach of a particular term or duty that discharges one party from his or her obligation to perform, but the failure of the condition. The key focus is always upon ascertaining the conditions of each party's obligation to perform. There is no significance in how a term or duty is classified.

In other words, the problem with the continued insistence that it is necessary to classify the terms of a contract as either conditions, warranties, or innominate terms in order to answer questions about discharge, is that it again blinds us to the distinction between the promise and the condition. Two

[151] See, eg, Peel (n 144) 990 [18-053].

[152] Reynolds (n 87) 542.

[153] See ibid 548–549.

examples illustrate the point and the difficulties that arise on the now-orthodox approach.

First, suppose that in a charterparty to collect a cargo of perishable goods, multiple promises are breached: the ship does not proceed to the loading port with all convenient speed;[154] the owner then delays in leaving on time;[155] the owner deviates slightly on the way to the end-destination;[156] and finally, due to the unseaworthiness of the ship it requires repairs on the way and is even further delayed.[157] Suppose further that the combined effect of all these delays is that the goods perish, depriving the charterer of substantially the whole benefit of the contract, but no breach on its own would have been sufficient to cause this outcome. If each of these obligations is to be classified as an 'innominate term', then it seems that no individual breach of any innominate term has deprived the innocent party of substantially the whole benefit of the contract. But once we separate the promise and the condition, we can see that the short answer is that there can be multiple breaches of duty, the combined effect of which is to cause the substantial-benefit condition to fail.[158]

Secondly, what happens if a delay that deprives one party of substantially the whole benefit of the contract is partly due to a breach and partly due to an excepted peril (ie an event that is not a breach of any duty)? Again, if a 'power to

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154 *Tarrabochia v Hickie* (n 25); *MacAndrew v Chapple* (n 20).

155 *Freeman v Taylor* (1831) 8 Bing 124; 131 ER 348.

156 ibid.

157 *Hongkong Fir* (n 1).

158 Reynolds (n 87) 548.

terminate' arises in response to certain kinds of breaches of 'innominate terms', this too looks difficult to resolve. The breach of the duty has not, on its own, deprived the other party of substantially the whole benefit of the contract—only the combined effect of the breach and the excepted peril has done so. But on the model put forward here, whether the failure of condition is caused by a breach of duty or not is irrelevant to the question of discharge: the condition has failed, and the party need not perform. Indeed, this was the view taken in *Nitrate Corporation of Chile Ltd v Pansuiza Compania de Navegacion (The Hermosa)*,[159] where Mustill LJ correctly stated that 'it is the consequences of the events, not their origins, which matter.'[160]

An approach which focuses on the classifications of terms, rather than the identification of conditions, struggles with these issues. This is because the distinction between promises and conditions, which this thesis focuses on, is fundamental. The key point, which cannot be emphasised enough, is that the innocent party is discharged not for the breach of an 'innominate term', but for the failure of the substantial-benefit condition.

## 3.5 THE SUBSTANTIAL-BENEFIT CONDITION AND 'FRUSTRATION'

This failure to distinguish promises from conditions has also obscured the relationship between the substantial-benefit condition and the so-called doctrine of frustration. Nolan has described the failure to notice this as 'remarkable', pointing out that 'Diplock LJ could not have asserted more clearly the

[159] [1980] 1 Lloyd's Rep 683 (Com Ct).

[160] ibid 649.

consistency of the rules governing discharge by frustration and discharge for breach'.[161] Indeed, what is more remarkable is that the authors who have noticed the link reject it. Professor Andrew Burrows (as his Lordship then was), for example, noted that in *Hongkong Fir* 'the judges used the language, or the analogy, of frustration' but he suggested that '[i]t is misleading to draw too close a link between the two'.[162]

It should be clear by now that the claim in this chapter is precisely to the opposite effect: it would be misleading not to draw the link. Cases such as *Jackson v Union Marine Insurance Co* and *Poussard v Spiers* make clear that the substantial-benefit condition can fail even in cases where there is no breach of duty. Moreover, *Hongkong Fir* is direct authority against Burrows' contention—the judgments expressly rejected the proposition, which was the primary ground of appeal, that a different test ought to be applied in cases of discharge following breach and in cases of 'frustration'. The argument that the two are not the same, to borrow Diplock LJ's words, makes the same 'fallacy' as the 'contention that a different test is applicable when the event occurs as a result of the default of one party from that applicable in cases of frustration', namely, 'a failure to view the cases in their historical context'.[163]

There is, however, a very limited sense in which we must be careful in assimilating the substantial-benefit condition with the so-called doctrine of frustration. It will be seen in Chapter 5 that cases said to fall within the ambit of

[161] Nolan (n 4) 286. See also 295–296.

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

[163] *Hongkong Fir* (n 1) 66.

'frustration' in fact involve the failure of several different conditions commonly found in contracts, only one of which is the substantial-benefit condition. The simple point for present purposes is that the failure to distinguish between the promise and the condition obscures the relationship between these different instances of discharge.

## 3.6 CONCLUSION

The purpose of this chapter has been to demonstrate that discharge following breach of a so-called 'innominate' or 'intermediate' term is explicable in terms of failure of the substantial-benefit condition. In the older cases, the substantial-benefit condition ran under the label of 'failure of consideration' and 'frustration' but, as we have seen, it has also travelled under other names such as the so-called doctrine of substantial performance. For over 150 years before *Hongkong Fir*, the substantial-benefit condition was applied alongside promissory conditions. On closer inspection, it becomes apparent that the judgments in *Hongkong Fir* added very little to what had gone before. But what has occurred since *Hongkong Fir*, under the guise of the 'innominate' or 'intermediate' term concept, is a renewed focus upon the a priori classification of terms. The problem is that this focus runs the risk of obscuring the very point to be gleaned from that case, namely, that it is the failure of the condition (the 'event' in Diplock LJ's language) that discharges the innocent party, and not the breach of duty. Once we see this, not only does this instance of discharge itself become clearer, but so too do other instances of discharge, such as cases said to fall within the so-called doctrine of frustration.

# CHAPTER 4: WAIVER OF CONDITIONS



## 4.1 INTRODUCTION

The core claim in this thesis is that the failure of a condition operates to discharge a party from his or her obligation to perform unless he or she waives (or has waived) the condition. This chapter therefore considers the circumstances in which conditions can be waived. In addition to exploring each instance of waiver, this chapter also makes a number of distinct claims. The first is that there is an intelligible body of law concerned with waiver of conditions that is broader than so-called 'waiver by election' and 'waiver by estoppel'. In particular, while some cases of waiver of conditions can be seen as waiver by election, and some cases can be seen as waiver by estoppel, some cases fit into neither category. The second is that while there has been a modern tendency to subsume cases of waiver of conditions into the doctrine of promissory estoppel, the integration has not been altogether satisfactory. The third is 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 recognise. Waiver only precludes a person from relying upon a condition—it does not deem that condition to have been fulfilled. The fourth and final claim is that not all

conditions can be waived 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.

## 4.2 WAIVER DEFINED

Professor Samuel Stoljar once observed that 'waiver has had far too little recognition in our contract books' and that this 'neglect has also led to much misunderstanding'.[1] Part of the reason for the neglect is no doubt that '[i]n contract law, waiver is used in different senses which can cause confusion'.[2] If the concept is to be of any use in this thesis, it is necessary to specify the sense in which it is being used.

At its core, waiver is concerned with the forgoing or the giving-up of a right or privilege.[3] This is the meaning adopted in this chapter. But even this simple definition is apt to mislead. This is because while it is often said that one waives duties or conditions, in contract law (and elsewhere in private law) the underlying duty or condition, strictly speaking, is not what is waived. What is waived is the privilege or ability to insist on the performance of the duty or condition. Thus, in this chapter, the phrase 'waiver of conditions' is a loose expression. To say that a condition is 'waived' is not to say that the condition is struck out of the contract, but rather to say that one party has foregone or given

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[1] Samuel Stoljar, 'The Modification of Contracts' (1957) 35 Canadian Bar Review 485, 489 fn 12.

[2] Robert Stevens, 'Not Waiving but Drowning' in Andrew Dyson, James Goudkamp, and Frederick Wilmot-Smith (eds), *Defences in Contract* (Hart Publishing 2017) 126, 127. See the various meanings identified in Samuel Williston, *The Law of Contracts* (Baker, Voorhis & Co 1920) vol 2, 1311–1314 §679.

[3] Stoljar (n 1) 489–490.

up his or her 'right to insist upon the unperformed condition precedent as an answer to the action'.[4]

It is this feature of waiver that, in theory, distinguishes waiver from a variation of the contract.[5] In contrast with waiver, a variation of the contract does alter the primary rights and duties of the parties. And for a variation to be effective, there must be an agreement and, on current orthodoxy, consideration.[6] The difficulty is that, in practice, the distinction between variation and waiver may be fine, for in the context of waiver of conditions the practical effect of waiver will be to enlarge the scope of the one party's primary obligation to perform.[7]

The more difficult question is the extent to which waiver is distinct from the doctrine of 'promissory estoppel'. Indeed, the explanation given above—that the underlying right or condition is not waived, but rather the ability to rely upon that right or condition—is practically indistinguishable from the effect of promissory estoppel. It is perhaps for this reason that it is sometimes said that waiver and promissory estoppel are 'really two ways of saying exactly the same thing'.[8]

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[4] *Roberts v Brett* (1865) 11 HL Cas 337, 358; 11 ER 1363, 1371 (HL).

[5] Stevens (n 2) 126.

[6] *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553, [2017] QB 604; [2018] UKSC 24, [2019] AC 119, 131 [18].

[7] Arthur Corbin, *Corbin on Contracts: A Comprehensive Treatise on the Rules of Contract Law* (West Publishing Co 1960) vol 3A, 480 §752.

[8] *Prosper Homes v Hambro's Bank Executor & Trustee Co* (1979) 39 P & CR 395 (Ch) 401, quoted in Edwin Peel, *The Law of Contract* (15th edn, Sweet & Maxwell 2020) 130 [3-091]. See also *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741 (HL) 762.

No attempt is made in this chapter to deny that the effects of waiving a condition are the same as those of promissory estoppel. But, as will be seen, to ask whether waiver is simply an instance of promissory estoppel in many ways puts the cart before the horse. Indeed, the doctrine of waiver of conditions significantly predates promissory estoppel, and only in the 1950s, in a series of cases decided by Lord Denning,[9] was an attempt made to subsume some (but not all) instances of waiver of conditions into promissory estoppel. For the reasons given in this chapter, the integration has not been wholly successful and, in any event, leaves a number of instances of waiver of conditions outside the scope of promissory estoppel. So long as promissory estoppel continues to be seen as a unified doctrine with uniform rules,[10] it seems that any further integration of waiver of conditions into promissory estoppel will be neither possible nor desirable. Indeed, it might be better to put the question the other way around: is promissory estoppel in this context simply an instance of waiver?[11]

Another important clarification is that even in this context, the language of 'waiver' can be used in two senses. The first is to refer to a statement or conduct that represents (expressly or implicitly) that a person is not relying upon a condition, such as where one party allows the other to continue to perform in the face of known non-compliance with a condition. The second is to refer to the conclusion that, on a set of given facts, the ability to rely on the condition has

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[9] See s 4.4.1.

[10] Cf Ben McFarlane, 'Understanding Equitable Estoppel: From Metaphors to Better Laws' (2013) 66 Current Legal Problems 267; Ben McFarlane, 'Promissory Estoppel and Debts' in Andrew Burrows and Edwin Peel (eds), *Contract Formation & Parties* (Oxford University Press 2010) 115.

[11] See s 4.4.2.

been lost. The two will not always coincide. For example, sometimes it will be possible for someone who has represented that they will not rely upon a condition to retract the representation and rely upon the condition in an action for non-performance.[12] It is sometimes said in such cases that the person has 'retracted the waiver'. Equally, in some cases, a person will be held to have waived a condition even though no representation was made that they would not rely upon it.[13] To avoid confusion, the term 'waiver' will be used principally in the second sense identified at the beginning of this paragraph. Although it might be argued that 'waiver' here is doing no more than expressing a conclusion (that the ability to rely on the condition is lost), using waiver in this sense has the benefit of allowing us to employ the language used in the cases themselves.

## 4.3 WAIVER OF CONDITIONS BY 'AFFIRMATION'

### 4.3.1 'Affirmation' as waiver of a condition

As earlier chapters explained, where one party fails to comply with a condition, the counterparty's immediate duty of performance either will not fall due, or if it has fallen due, will be extinguished. In this sense, the counterparty is 'discharged' from his or her obligation to perform.[14] But 'the necessity of performing the condition precedent may be *waived* by the party in whose favour it is stipulated,

[12] See, eg, *Charles Rickards Ltd v Oppenheim* [1950] 1 KB 616 (CA), discussed in s 4.4.1 below.

[13] See s 4.6 and s 4.7.

[14] See s 1.3.2.

either expressly or tacitly, by inference from his acts or conduct'.[15] And in this connection, there is a well-established principle that a party who is entitled to rely on a condition, but who continues to perform or allows the other side to go on and perform, will be held to have waived the condition.[16] This principle—insofar as it applies in the context of discharge following breach—has today, on the orthodox approach, come to be known as the 'affirmation' of the contract or (as the next sub-section explains) 'waiver by election'.

Traditionally, the leading case was *Bentsen v Taylor*,[17] the facts of which were discussed in Chapter 2.[18] It will be recalled that notwithstanding the fact that the shipowners had failed to fulfil the condition that the ship was 'now sailed or about to sail', the charterers' conduct in advising the owners of their intention to load meant that they had waived the condition and were therefore liable on the contract. Bowen LJ said that the question was whether 'the condition precedent had been waived by the defendants';[19] in other words, '[d]id the defendants lead the plaintiff to believe that they intended to treat the misdescription as a breach of contract only, and not as a failure to perform a condition precedent?'[20] Importantly, while the waiver of the condition meant that they could not treat themselves as discharged, it did not deprive the charterers of their right to

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[15] Walter Charles Alan Ker and Arthur Reginald Butterworth, *A Treatise on the Law of Sale of Personal Property with references to the American Decisions and to the French Code and Civil Law*, (5th edn, Sweet & Maxwell 1906) 563 (emphasis in original).

[16] ibid; Corbin (n 7) 497 §755.

[17] [1893] 2 QB 274 (CA).

[18] See s 2.2.4.3.

[19] *Bentsen v Taylor* (n 17) 283.

[20] ibid 283–284.

damages:[21] '[w]aiver of the condition does not release the other party from his promise'.[22]

Earlier cases took a similar approach. In *Alexander v Gardner*,[23] the plaintiff sold to the defendants a quantity of butter, which was to be shipped to London in October 1833 and paid for within two months of landing. The butter was not in fact shipped until November 1833. This fact had been communicated to the defendants who had at first refused to abide by the contract, but then shortly thereafter abandoned their objection and accepted the invoice and bill of lading. In December 1833, the butter was lost by shipwreck. A small quantity arrived in a damaged state and the defendants refused to pay. It was held that the plaintiffs could recover the price of the butter.[24] Tindal CJ said:

> If the Defendants had in the first instance repudiated the bargain on that ground, it is true that no action would have lain against them. But it is found by the jury that they waived the objection… if the party waives the condition he is in the same situation as if it had never existed.[25]

In *Ollive v Booker*,[26] the issue, similar to *Bentsen v Taylor* albeit different in the ultimate result, was whether a statement in a charterparty that described the vessel as 'now at sea, having sailed three weeks ago' was a mere representation or a warranty (in the sense of a guarantee), and if so, whether its performance was a

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[21] ibid 279.

[22] J L Montrose, 'Conditions, Warranties, and other Contractual Terms' (1937) 15 Canadian Bar Review 309, 326.

[23] (1835) 1 Bing NC 671, 131 ER 1276.

[24] The Court held that the arrival of the goods was not a condition precedent to the defendant's obligation to pay: *Alexander v Gardner* (1835) 1 Bing NC 671, 677; 131 ER 1276, 1278.

[25] ibid.

[26] (1847) 1 Exch 416, 154 ER 177.

condition precedent to the defendant's obligation to load. The defendant, upon learning that the vessel had not sailed until some later time, had refused to load any cargo. Parke B held that the statement was a warranty and that its performance was a condition precedent. He then went on to say:

> This being a condition precedent, and not performed, the defendant was not bound to load the vessel. If he had loaded her, the breach of the condition would have been waived, and he would have been liable for the full freight.[27]

Even before *Bentsen v Taylor* was decided, this principle had been approved of in the House of Lords. In *Roberts v Brett*,[28] Lord Chelmsford said:

> I have no difficulty in saying that … [a] party who may avail himself of the non-performance of the condition precedent but who allows the other side to go on and perform the subsequent stipulations has waived his right to insist upon the unperformed condition precedent as an answer to the action.

The cases post-*Bentsen v Taylor* also continued to apply the principle of waiver of conditions in similar contexts. In *Panoutsos v Raymond Hadley Corp*,[29] the defendant sellers entered into a contract to sell 4,000 tons of flour to the plaintiff buyers. The contract provided that 'each shipment shall be deemed a separate contract' and payment was to be by 'confirmed banker's credit'. Credit was opened in favour of the buyers in respect of the full shipment of 4,000 tons, but because the credit was not irrevocable it was not a confirmed bankers' credit. Despite this, the sellers made five shipments of flour in partial fulfilment of the contract and were duly paid. However, the sellers subsequently purported to

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[27] *Ollive v Booker* (1847) 1 Exch 416, 423; 154 ER 177, 180.

[28] (1865) 11 HL Cas 337, 358; 11 ER 1363, 1371 (HL).

[29] [1917] 2 KB 473 (CA).

'cancel' the balance of the contract on the ground that the buyer had failed to perform the condition as to payment by confirmed banker's credit.

At first instance, Bailhache J held that 'the sellers must be taken to have waived the performance of the condition, that the buyer was entitled to reasonable notice [of the sellers' intention to insist upon its performance], and that such notice had not in fact been given'.[30] Viscount Reading CJ (with whom Lord Cozens-Hardy MR and Scrutton LJ agreed) was of the same view and thought that Bowen LJ's judgment in *Bentsen v Taylor* 'applie[d] exactly to the present case'.[31]

This same principle was applied in *Hartley v Hymans*,[32] a case in which a buyer of goods sought to rely upon the seller's late deliveries to justify his refusal to accept the balance of the goods due under the contract. While deliveries had not commenced on time and the buyer had protested this delay, he had nonetheless continued to press for delivery, and the buyer had in fact obtained seven further deliveries after the initial late delivery. McCardie J was of the view that the buyer 'had undoubtedly waived the condition… inasmuch as … he demanded and received deliveries under the contract'.[33] While confusingly basing his decision on three grounds, McCardie J held that the buyer was, on one of

[30] ibid 477.

[31] ibid 478.

[32] [1920] 3 KB 475 (KB).

[33] ibid 487.

those grounds, 'debarred by the doctrine of waiver from asserting that an original condition precedent [was] still operative and binding'.[34]

The same approach has also been applied in the context of insurance contracts. In *Ayrey v British Legal and United Provident Assurance*,[35] the proposal form for a life insurance policy contained a clause providing that if any false information were provided 'the policy to be granted in pursuant of the above proposal shall be absolutely void'.[36] The assured stated his occupation to be that of a fisherman (which was true) but he was also a member of the Royal Naval Reserve Service and he was expecting to be called up for the purpose of being employed in mine-sweeping. On the day he signed the proposal form, he received orders to report for service, which he duly did. The plaintiff executrix had asked the defendant whether in light of this fact any insurance money would be paid. The defendant in turn informed the plaintiff that the insurance money would be paid. The plaintiff thereupon continued to pay the premiums for two years. The deceased drowned at sea.

It was held that by continuing to receive the premiums with knowledge of the material facts, 'the company must be taken to have waived any objection to the validity of the policy founded upon that omission'.[37] While treating the issue

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[34] ibid 495.

[35] [1918] 1 KB 136 (KB).

[36] ibid 137. Note that '[s]uch a provision as this seldom means what it appears to say. Generally, what is meant is that the duty of one of the parties shall be conditional': Corbin (n 7) 517 §761.

[37] *Ayrey v British Legal* (n 35) 140.

as one of estoppel, Atkin J said that '[t]he true principle to be invoked is best stated in the judgment of Bowen LJ in *Bentsen v Taylor*'.[38]

### 4.3.2 Affirmation as loss of 'power to terminate'

As we saw in Chapter 2, during the course of the twentieth century, the orthodox understanding of discharge following breach changed such that a condition became to be seen simply as an important term breach of which gives to a 'power to terminate'. Unless and until that power was exercised, the innocent party remained bound to perform. What had previously been seen as discharge for failure of a condition became a 'power to terminate', and what had previously been seen as waiver of the condition became the 'affirmation of the contract'.

The leading case on affirmation in this context is *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India (The Kanchenjunga)*.[39] The charterers of a vessel had ordered it to load a cargo of oil at Kharg Island, Iran. The vessel arrived and provided a notice of readiness to load, but a few days later an air raid occurred as part of the Gulf War. The master had sailed away to safety and the owners thereupon called on the charterers to nominate an alternative safe port. The charterers insisted that the vessel proceed to Kharg Island. The owners accordingly instructed the master of the vessel to load at Kharg Island, but he refused due to safety concerns. It was found that Kharg Island, at its time of nomination, was not a prospectively safe port and that the owners were entitled

[38] ibid 142.

[39] [1990] 1 Lloyd's Rep 391 (HL).

to reject it as a valid nomination.[40] Lord Goff, delivering the leading speech in the House of Lords, however, held that the owners had 'elected not to reject the charterers' nomination', and so must be taken 'to have waived their right to do so or to call for another nomination'.[41] The owners therefore would have been liable for damages for breach had they not been protected by a 'war clause' in the charterparty.

*The Kanchenjunga*, strictly speaking, was concerned with the 'right to reject' rather than the 'power to terminate' (which, on the orthodox approach, are not the same thing).[42] Nonetheless, Lord Goff said that the 'same principles apply'.[43] He said:

> [W]e are concerned with an election which may arise in the context of a binding contract, when a state of affairs comes into existence in which one party becomes entitled, either under the terms of the contract or by the general law, to exercise a right, and he has to decide whether or not to do so. … [I]f he does not [make a decision], the time may come when the law takes the decision out of his hands, either by holding him to have elected not to exercise the right which has become available to him, or sometimes by holding him to have elected to exercise it.[44]

When this is applied to the modern-orthodox understanding of discharge following breach we get the following propositions:

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[40] ibid 397.

[41] ibid 400.

[42] On the difference, see Michael Bridge (ed), *Benjamin's Sale of Goods* (11th edn, Sweet & Maxwell 2020) 631–632 [12-029].

[43] *The Kanchenjunga* (n 39) 399.

[44] ibid 398.

(1) 'breach of a condition'[45] gives the innocent party a 'power to terminate';

(2) the innocent party must elect to exercise that power;

(3) if the innocent party instead elects to 'affirm' the contract, he or she is 'thereby waiving or abandon his [or her] right to terminate it'.[46]

It is sometimes suggested that the election is between inconsistent rights,[47] namely, the 'power to terminate' and the 'right to affirm'. But this would appear to be incorrect even on the orthodox approach. This is because on the orthodox view there is only one 'right' (in the broadest sense of that term), namely, the 'power to terminate'. The choice appears instead to be between inconsistent courses of action. The so-called 'right to affirm' is simply a label to describe the choice made *not* to exercise the 'power to terminate'—it has no normative content other than that it results in the innocent party losing the 'power to terminate'. To put it another way, the only effect of choosing not to terminate (or to 'affirm') is that the innocent party is then 'said to have waived his

[45] For reasons already explained, a loose and inaccurate phrase: s 2.2.4.5.

[46] *The Kanchenjunga* (n 39) 398.

[47] See *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850 (HL) 883; William Day, 'Variation and Waiver' in William Day and Sarah Worthington (eds), *Challenging Private Law: Lord Sumption on the Supreme Court* (Hart Publishing 2020) 25, 41; Ewan McKendrick, 'Termination for Breach' in Hugh Beale (ed), *Chitty on Contracts* (34th edn, Sweet & Maxwell 2021) vol 1 1981, 2020 [27-060]; Jack Beatson, Andrew Burrows, and John Cartwright, *Anson's Law of Contract* (31st edn, Oxford University Press 2020) 461 fn 54.

right to terminate'.[48] That is why the principle is sometimes referred to as 'waiver by election'.[49]

As we have already seen,[50] the main difference between modern orthodoxy and the failure of condition model put forward in this thesis is the starting point: on the failure of condition model, the innocent party is discharged immediately following the failure of a condition, unless he or she chooses to waive the condition. In contrast, on the 'power to terminate' model, the innocent party is discharged if, and only if, he or she exercises the power to terminate. But this very large and important difference aside, the two approaches unsurprisingly have similar features.

First, '[a]n important characteristic of affirmation is that it bars only the injured party's right to terminate: it does not deprive him of his right to damages for breach'.[51] That is self-evidently true for waiver of a condition, which does not operate to waive the duty.[52] Secondly, even the failure of condition model can be expressed in terms of an 'election' in the same way as the orthodox model if it must be. So it could be said that following the failure of a condition the party who is entitled to rely upon that condition has a choice: he or she can choose to rely upon the condition and treat himself or herself as discharged, or he or she can choose not to rely upon the condition, and waive it (eg by continuing to

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[48] Peel (n 8) 1014 [18-089].

[49] McKendrick (n 47) 2020 [27-060].

[50] Section 1.4.

[51] Peel (n 8) 1015 [18-091].

[52] See s 4.3.1.

render or receive performance). The key point is that by 'affirming' the contract, the innocent party loses the ability to rely upon the condition. The only difference is the position in the interim before the innocent party has definitively made any such choice. On the approach being put forward here, the innocent party is discharged unless and until he or she decides to waive the condition. While that is the reverse of the orthodox approach—which states that both parties are bound unless and until the 'power to terminate' is exercised—that does not change the essential point that both approaches provide the party with a choice: on the orthodox approach, to exercise the power to terminate or not and, on the failure of conditional model, to waive the condition or not.

## 4.4 WAIVER OF CONDITIONS BY 'ESTOPPEL'

There has been a tendency in the cases from the 1950s onwards to treat some instances of waiver of conditions as instances of estoppel (promissory estoppel in particular). The first half of this section records that trend and the influence of Lord Denning in this area. The second half of this section then asks whether the law should continue to treat some instances of waiver of conditions as part of the law promissory estoppel.

### 4.4.1 Lord Denning's influence

The earlier cases typically had not characterised waiver of conditions as being concerned with estoppel, and certainly not as part of promissory estoppel, which was yet to be 'rescued from oblivion'[53] by *Central London Property Trust Ltd v High*

[53] *WJ Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189 (CA) 212.

*Trees House Ltd*.[54] For example, there is no mention of estoppel in *Bentsen v Taylor* or in *Panoutsos v Raymond Hadley Corp*, which purported to follow *Bentsen v Taylor*. Some cases did, however, notice the similarities. In *Hartley v Hymans*,[55] McCardie J gave three grounds for his decision, one of which was waiver, and another of which was that 'in so far as estoppel differs from waiver', 'the defendant [was] estopped from saying that the period for delivery expired' at the end of November.

Following the decision in *High Trees*, however, Lord Denning set out to rationalise the law on waiver of conditions as being a principle within the law of promissory estoppel (waiver by estoppel). The earliest case is *Charles Rickards Ltd v Oppenheim*.[56] The defendant contracted with the plaintiff motor-car traders for a body to be built on a Rolls Royce Silver Wraith chassis that he had ordered. The work was to take six or seven months, making the time for delivery, at the latest, 20 March 1948. The work was not completed on time, but the defendant continued to press for delivery. On 29 June, the defendant wrote to the coachbuilders telling them that he would not be able to accept delivery after 25 July, when he had planned to take the car abroad on a holiday. The car was completed on 18 October, but the defendant refused to accept delivery.

At first instance, Finnemore J held that time was of the essence of the contract and therefore it was a condition that the car should be delivered within

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[54] [1947] KB 130 (KB).

[55] *Hartley v Hymans* (n 32) 495.

[56] *Charles Rickards* (n 12).

seven months. And while the defendant initially had 'waived' that condition,[57] the defendant, by his letter of 29 June, had reinstated his right to rely upon that condition, on terms specifying a reasonable time for completion.[58] The defendant was therefore entitled to refuse to accept delivery; he had not waived the condition.

An appeal from this decision was dismissed by the Court of Appeal (Denning, Singleton, and Bucknill LJJ). But Denning LJ considered what the situation would have been if the defendant had simply waived the condition and not written the 29 June letter specifying a reasonable time for completion. He said:

> It is a kind of estoppel. By his conduct he evinced an intention to affect their legal relations. He made, in effect, a promise not to insist on his strict legal rights. That promise was intended to be acted on, and was in fact acted on. He cannot afterwards go back on it. … It is a particular application of the principle which I endeavoured to state in *Central London Property Trust Ld v High Trees House Ld.*[59]

Lord Denning thus sought to bring waiver of conditions within the newfound doctrine of promissory estoppel.

Lord Denning set out his views again in *Plasticmoda Societa per Azioni v Davidsons (Manchester) Ltd.*[60] The defendant sellers entered into a contract to sell to the plaintiff buyers 100 tons of cable strippings to be paid for by a

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[57] 'Waived' here being used in the sense of having represented by conduct that he would not rely upon the condition: see s 4.2 above.

[58] *Charles Rickards* (n 12) 619.

[59] ibid 623.

[60] [1952] 1 Lloyd's Rep 527 (CA).

confirmed letter of credit. The sellers sought to deny liability for failing to deliver the goods on the basis that the letter of credit for 100 tons had never been opened. The Court of Appeal accepted that the stipulation for credit was 'a condition precedent to the obligation of the seller[s] to ship the goods, and that condition precedent was not fulfilled'.[61] But the Court held that the condition had been waived because the 'the seller[s], by [their] conduct, led the buyer[s] to believe that [they] would not insist on the credit being established until the seller[s] had told the buyer[s] that the goods were ready.'[62] The sellers were therefore liable. Singleton LJ said that the sellers' conduct 'was of the nature of a waiver of the condition precedent'.[63] But Denning LJ, although agreeing with Singleton LJ, said that it fell within the 'broad principle of "fair dealing and justice"',[64] which is now known as promissory estoppel.[65]

Not all cases followed Lord Denning wholeheartedly in this explanation. In *Enrico Furst & Co v WE Fischer*,[66] Diplock J was similarly faced with an action for non-delivery in which the defendant sellers sought to rely upon the fact that the buyers had not opened a conforming letter of credit. He accepted that 'the defendants waived their right to insist upon the credit complying strictly with the contract'[67] and said that it was a 'classic case of waiver, indistinguishable, indeed

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[61] ibid 538.

[62] ibid.

[63] ibid 536.

[64] ibid 538.

[65] ibid 539. See also *Barrett Bros (Taxis) Ltd v Davies* [1966] 1 WLR 1334 (CA), where Lord Denning applied the same approach.

[66] [1960] 2 Lloyd's Rep 340 (Com Ct).

[67] ibid 348.

(without going into any more esoteric argument), from the decision in *Panoutsos v Raymond Hadley Corporation*'.[68] While noting what Lord Denning had said in *Charles Rickards Ltd v Oppenheim* about waiver being an instance of promissory estoppel, Diplock J said that he 'prefer[red] to say that, in relation to sale of goods, it was a particular application of [s] 11(1)(a) of the [Sale of Goods Act 1893]'.[69] Section 11(1)(a) provided that:

> Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating contract as repudiated'.[70]

Lord Denning was evidently unperturbed by the fact that Diplock J in *Enrico Furst* had refrained from considering whether waiver was an instance of promissory estoppel because in *WJ Alan & Co Ltd v El Nasr Export and Import Co*,[71] Lord Denning said:

> In *Enrico Furst*, Diplock J said it was a 'classic case of waiver.' I agree with him. It is an instance of the general principle which was first enunciated by Lord Cairns LC in *Hughes v Metropolitan Railway Co*, and rescued from oblivion by *Central London Property Trust Ltd v High Trees House Ltd.* The principle is much wider than waiver itself: but waiver is a good instance of its application.

The influence of Lord Denning can also be seen in leading contract texts today, which write that '[t]his type of waiver does not exist as a separate principle but is in fact an application of the principle of equitable estoppel deriving from the classic statement of Lord Cairns in *Hughes v Metropolian Ry Co*'.[72] 'Deriving

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[68] ibid.

[69] ibid 350.

[70] See now Sale of Goods Act 1979, s 11(2).

[71] *WJ Alan v El Nasr* (n 53) 212 (footnotes omitted).

[72] McKendrick (n 47) 2020–2021 [27-060].

from' is an interesting choice of wording here given that, as we have seen, the cases considered in this section were, in fact, derived from *Panoutsos v Raymond Hadley Corp*, which in turn was derived from *Bentsen v Taylor*, a case that today would be seen as 'affirmation' or 'waiver by election'. Nonetheless, it shows that Lord Denning appears, by fiat, to have subsumed part of the law of waiver of conditions within the doctrine of promissory estoppel. The question to be asked in the next sub-section is whether he was right to do so.

### 4.4.2 Should waiver of conditions be part of promissory estoppel?

The question as to whether waiver of conditions should be understood as part of promissory estoppel is not an easy one to answer and the considerations either way are finely balanced. The considerations in favour of understanding waiver of conditions as part of the law of promissory estoppel are as follows.

First, analytically, waiver of conditions operates in the same way as promissory estoppel—as was explained above, to say that a condition is 'waived' is not to say that the condition is struck out of the contract, but rather to say that one party has waived his or her 'right to insist upon the unperformed condition precedent as an answer to the action'.[73]

Secondly, it would allow us to treat together the cases in which conditions have been waived and the cases in which it has been held that a duty can be waived. In this regard, a number of cases have relied indifferently on (i) the

[73] *Roberts v Brett* (1865) 11 HL Cas 337, 358; 11 ER 1363, 1371.

common law doctrine of forbearance,[74] (ii) the decision in *Panoutsos v Raymond Hadley Corp*, or (iii) a doctrine of 'total waiver',[75] to hold that the parties can, in some circumstances at least, waive duties (not just conditions).[76] These appear to be cases in which courts have been willing to hold that the acceptance by one party of a substitute performance, which does not strictly comply with the terms of the contract, is sufficient to discharge the duty.[77] Again, due to the influence of Lord Denning,[78] these cases today would be understood as part of the law of promissory estoppel.[79] Indeed, it has been observed by Professor Ben McFarlane, that this principle—acceptance of a substitute performance—is the same principle that was 'recognized by Denning J in what has become the foundation of the modern law of promissory estoppel: his "brilliant obiter dictum" in *Central London Property Trust Ltd v High Trees House Ltd*'.[80]

Finally, treating waiver of conditions as part of the law of promissory estoppel might assist in explaining not just waiver, but also promissory estoppel

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[74] See generally, A J Phipps, 'Resurrecting the doctrine of common law forbearance' (2007) 123 Law Quarterly Review 286; Beatson, Burrows, and Cartwright (n 47) 461; Day (n 47) 38–40; Peel (n 8) 115 [3-069].

[75] See Peel (n 8) 1015 [18-093].

[76] See, eg, *Tankexpress A/S v Compagnie Financiere Belge des Petroles SA* [1949] AC 76 (HL) 98, 103–104; *WJ Alan v El Nasr* (n 53) 212–213; *Toepfer v Warinco AG* [1978] 2 Lloyd's Rep 569 (Com Ct) 576–577 (although the claim ultimately failed: see 577–578); *Bottiglieri Di Navigazione SpA v Cosco Qingdao Ocean Shipping Co (The 'Bunga Saga Lima')* [2005] EWHC 244 (Comm), [2005] 2 Lloyd's Rep 1, 11 [30]–[31].

[77] See generally, McFarlane, 'Promissory Estoppel and Debts' (n 10) 116–122; McFarlane, 'Understanding Equitable Estoppel' (n 10) 281–282.

[78] *WJ Alan v El Nasr* (n 53) 212–213.

[79] On forbearance, see Andrew Burrows, *A Restatement of the English Law of Contract* (2nd edn, Oxford University Press 2020) 79–80. On *Panoutsos v Raymond Hadley Corp* (n 29), see ibid. On 'total waiver', see Peel (n 8) 1015 [18-093].

[80] McFarlane, 'Understanding Equitable Estoppel' (n 10) 281 (footnotes omitted). See also McFarlane, 'Promissory Estoppel and Debts' (n 10) 118.

itself. Professor Robert Stevens has argued that the law of 'promissory estoppel' is simply an 'equitable extension of the doctrine of waiver'.[81] And when understood in this way certain of its features become readily explicable: (i) that promissory estoppel is a 'shield not a sword'; (ii) that there must be pre-existing relationship (ie pre-existing rights to waive); and (iii) that in some circumstances the doctrine only 'suspends' rights rather than precluding all reliance on them.[82]

However, against these benefits are the following considerations. First, understanding waiver of conditions as part of the law of promissory estoppel requires us to draw a clear line between 'waiver by election', and 'waiver by estoppel', particularly because statements or conduct amounting to waiver by election are said to be irrevocable whereas statements or conduct in the context of waiver by estoppel are sometimes capable of being retracted.[83] But the distinction is ahistorical. As we saw above, *Panoutsos v Raymond Hadley Corp*, which has since been rationalised as a case of waiver by estoppel, was a case that applied *Bentsen v Taylor*, which is today seen as a case about waiver by election.

Moreover, the distinction is 'often elusive'.[84] A good illustration is *Kosmar Villa Holidays Plc v Trustees of Syndicate 1243*.[85] In this case, the question was as follows: where the insured fails to comply with a condition precedent to the

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[81] Stevens (n 2) 131.

[82] ibid 131–132.

[83] See generally Peel (n 8) 1016 [18-094].

[84] *Youell v Bland Welch & Co Ltd (The 'Superhulls Cover' Case) (No 2)* [1990] 2 Lloyd's Rep 431 (Com Ct) 449.

[85] [2008] EWCA Civ 147, [2008] 2 All ER (Comm) 14.

insurer's obligation to pay out on a claim,[86] but the insurer nonetheless begins to deal with the claim, is the appropriate principle to apply 'waiver by election' or 'waiver by estoppel'? Rix LJ (with whom Jacob LJ and Forbes J agreed), disagreeing with the primary judge, held that the doctrine of 'waiver by election' was 'ill-fitting in these circumstances, and unneeded' for waiver by estoppel would give the insured 'all the protection that he needs'.[87] While that may or may not have been the correct result, it is not entirely clear what the distinction is between this case and a case like *Bentsen v Taylor* or *Ayrey v British Legal*, which were dealt with in s 4.3.1.

Secondly, a further reason for caution is that the various instances of waiver of conditions are not uniform and do not all fall within promissory estoppel. It is probably more accurate to say that some cases of waiver of conditions can be seen as part of promissory estoppel, and some cases can be seen as waiver by election, but that some cases fit into neither category. Thus, three further instances of waiver that remain to be considered in this chapter are: (i) waiver of conditions by accepting the benefit of performance; (ii) waiver of conditions by prevention of fulfilment of the condition; and (iii) waiver of conditions on a repudiation. As we shall see, none of these is easily explicable in terms of estoppel (whether promissory or otherwise). In relation to the first, the attempt made by Lord Denning in *Panchaud Freres SA v Etablissements General*

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[86] That the insured 'immediately' notify the insurer of the occurrence of any injury.

[87] *Kosmar Villa Holidays* (n 85) 36 [70]. It was held in any event that the communications were equivocal: 39–40 [79].

*Grain Co*[88] to analyse it as a case of estoppel by conduct has generally been met with scepticism.[89] The second is at present treated wholly separately from estoppel. As for the third, it will be seen that in an attempt to explain the absolving effects of an unaccepted repudiation, courts have confusingly rejected 'waiver of conditions' only to introduce a 'quite new kind of estoppel'[90] to reach the same result.[91]

Where does all of this lead? Not without some hesitation, because it entails drawing difficult distinctions between waiver of conditions by 'election' and waiver of conditions by 'estoppel'—distinctions which courts to date have not drawn satisfactorily—it is submitted that some instances of waiver of conditions can be understood as part of promissory estoppel, so long as it is borne in mind that waiver by election and waiver by estoppel are not the only instances in which conditions can be waived.

As for the difficult question as to how the line might be drawn between waiver of conditions by election and waiver of conditions by estoppel, one tentative suggestion would be to say that waiver by election applies where the condition has already failed, and the party entitled to rely upon the condition represents by words or conduct that he or she will not so rely. The fact that such a waiver is final could be justified by the need for 'finality in commercial

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[88] [1970] 1 Lloyd's Rep 53 (CA) 57.

[89] See, eg, McKendrick (n 47) 2019 [27-059].

[90] Sir Michael Mustill, 'Anticipatory Breach of Contract: The Common Law at Work' in *Butterworth Lectures 1989–90* (Butterworths 1990) 68.

[91] *Fercometal SARL v Mediterranean Shipping Co SA (The Simona)* [1989] AC 788 (HL) 805. See s 4.7.2.4 below.

transactions'[92] which negatives 'any liberty to blow hot and cold in commercial conduct.'[93] Waiver by estoppel would then apply where the condition is still capable of being fulfilled. In such cases, the party waiving the condition should be entitled to retract the waiver on the giving of reasonable notice, unless (i) it is no longer possible for the other party to comply with the condition, in which case it becomes, in essence, a case of waiver by election, or (ii) where complying with the condition will now cause prejudice to the other party.

Unfortunately, courts have not quite grappled with how to draw the line between these cases because it appears to have been assumed that 'waiver by election' refers only to the loss of a 'power to terminate' by the 'affirmation' of the contract. But once it is appreciated that a number of cases said to be concerned with 'affirmation' and so-called waiver by election, such as *Bentsen v Taylor*, were actually concerned with waiver of conditions, the distinction between these cases and cases said to involve waiver of conditions 'by estoppel' becomes much more difficult to draw.

## 4.5 WAIVER OF CONDITIONS BY ACCEPTANCE

A further instance of waiver of conditions occurs in sale of goods cases in which it is said that by accepting the goods the buyer waives any unperformed conditions of their obligation. That rule is now found in s 11(4) of the Sale of Goods Act 1979[94] and, as was explained in earlier chapters,[95] it is derived from a

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[92] *BP Exploration Co v Hunt (No 2)* [1979] 1 WLR 783 (QB) 811.

[93] *Panchaud Freres* (n 88) 59.

[94] See originally s 11(1)(c) of the Sale of Goods Act 1893.

line of cases at common law interpreting *Boone v Eyre*.[96] Thus in *Graves v Legg*,[97] Parke B said:

> The defendants, therefore, have a right to object to fulfil the contract on their part, as the plaintiff did not fulfil his, though they could no longer object to the plaintiff's non-performance, had they afterwards taken any benefit under the contract.

The key difference between this instance of waiver and the instances of waiver considered in the previous two sections is that it can apply even though the party accepting the benefit of performance is unaware that the condition has not been fulfilled and even though the other party may not have relied upon any representation by the person waiving the condition.[98]

This principle was subsequently extended in *Panchaud Freres SA v Etablissements General Grain Co*.[99] In that case, buyers under a cif contract had received shipping documents, including a bill of lading and a certificate of quality, the latter of which stated that the goods had been shipped late. They nonetheless took up the documents and paid for them. They subsequently rejected the goods on the ground of their quality and description, but when these grounds were held in an arbitration to be inadequate, they sought, on an arbitration appeal, to rely on the late shipment. It was held that they were

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[95] See s 2.3.1 and s 3.2.1.

[96] *Ellen v Topp* (1851) 6 Ex 424, 441–442; 155 ER 609, 61; *Graves v Legg* (1854) 9 Ex 709, 717; 156 ER 304, 307; *Behn v Burness* (1863) 3 B & S 751, 755; 122 ER 281, 283; *Wallis, Son & Wells v Pratt & Haynes* [1910] 2 KB 1003 (CA) 1013; [1911] AC 394 (HL) 400. See Charles Morison, *Rescission of Contracts, A Treatise on the Principles Governing the Rescission, Discharge, Avoidance and Dissolution of Contracts* (Stevens & Haynes 1916) 100–105; Anthony Beck, 'The Doctrine of Substantial Performance: Conditions and Conditions Precedent' (1975) 38 Modern Law Review 413, 418–419.

[97] (1854) 9 Ex 709, 718; 156 ER 304, 307. See also Beck (n 96) 418.

[98] Peel (n 8) 1022 [18-106].

[99] *Panchaud Freres* (n 88).

precluded from complaining of the late shipment or of any defect in the bill of lading.

Lord Denning MR sought to characterise this case as one of estoppel by conduct, stating that:

> If a man, who is entitled to reject goods on a certain ground, so conducts himself as to lead the other to believe that he is not relying on that ground, then he cannot afterwards set it up as a ground of rejection, when it would be unfair or unjust to allow him do so.[100]

He thought that this was the case even if the buyer had no knowledge of the non-compliance with the condition, 'for the simple reason that he had the full opportunity of finding out from the contract documents what the real date of shipment was'.[101]

One 'difficulty with the estoppel analysis is that there does not appear to have been any reliance by the sellers on any representation which was made by the buyers when they took up the documents'.[102] By contrast, Winn LJ thought that it was not possible to say that there was 'anything which, within the scope of the doctrine as hitherto enunciated, could be described as an estoppel or a quasi estoppel'.[103] He said:

> [W]hat one has here is something perhaps in our law not yet wholly developed as a separate doctrine—which is more in the nature of a requirement of fair conduct—a criterion of what is fair conduct between the parties. There may be an inchoate doctrine stemming from the manifest convenience of consistency

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[100] ibid 57.

[101] ibid.

[102] McKendrick (n 47) 2019 [27-059]. See also *BP Exploration Co v Hunt* (n 92) 811.

[103] *Panchaud Freres* (n 88) 59.

> in pragmatic affairs, negativing any liberty to blow hot and cold in commercial conduct.[104]

In *BP Exploration Co v Hunt (No 2)*,[105] Robert Goff J similarly rejected any estoppel analysis. Instead, he said that '[t]he decision stems from the need for finality in commercial transactions, as does the doctrine of acceptance in contracts for the sale of goods'.[106] In brief, this is another instance of waiver that falls outside of 'waiver by election' and 'waiver by estoppel'.

## 4.6 WAIVER OF CONDITIONS BY PREVENTION

A general principle, subject to limitations to be discussed, is that a person who prevents the performance or fulfilment of a condition will be held to have waived that condition.[107] This principle is longstanding. As the editors of the fifth edition of *Benjamin on Sale* recorded:

> As long ago as 1787, Ashurst J, in delivering the opinion of the King's Bench in *Hotham v East India Company*, said that it was evident from common sense, and therefore needed no authority to prove it, that if the performance of a condition precedent had been rendered impossible by the neglect or default of the defendant, 'it is equal to performance.'[108]

Despite being longstanding, the modern authorities on this principle are not clear[109] and some textbooks even doubt its existence.[110] Indeed, it has been

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[104] ibid.

[105] *BP Exploration Co v Hunt* (n 92).

[106] ibid 811.

[107] *Hotham v East India Co* (1787) 1 Term Rep 638, 99 ER 1295; *Mackay v Dick* (1881) 6 App Cas 251 (HL). See also C C Langdell, *A Selection of Cases on the Law of Contracts with a Summary of the Topics Covered by the Cases* (2nd edn, Little Brown, and Company 1879) Part II, 1083.

[108] Ker and Butterworth (n 15) 563. See also Arthur Corbin, 'Conditions in the Law of Contact' (1919) 8 Yale LJ 739, 757; Corbin (n 7) 540 §767.

[109] See s 4.6.2 below.

said recently that '[t]he precise status of the … rule is one which may well merit exploration by a higher court on a future occasion'.[111]

This doubt is due to two matters. The first can be seen in the words 'it is equal to performance' in the quote above. This might suggest that the rule is concerned with the 'fictional fulfilment' of conditions, a doctrine found in some civilian legal systems,[112] rather than the common law doctrine of waiver of conditions. As this section argues, the English authorities have been correct to reject any principle of the 'fictional fulfilment' of conditions, but that does not mean that there is not a principle of waiver of conditions by prevention of fulfilment. The distinction between the two is explained below[113] and, as will be seen, it is not merely a matter of semantics. The second matter is a failure to appreciate the limits on which conditions can be waived. As will be shown, not all conditions can be waived, at least not for all purposes; if they could, it would lead to some undesirable outcomes. In particular, it is not possible to waive a condition for the purpose of an action for the price if the performance of the condition is the consideration for the promise it qualifies Once both of these matters are appreciated, the objections to this principle fall away.

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[110] Peel (n 8) 74 [2-112].

[111] *Nautica Marine Ltd v Trafigura Trading LLC* [2020] EWHC 1986 (Comm), [2021] 1 All ER (Comm) 1157, 1187 [105].

[112] German Burgerliches Gesetzbuch, s 162(1); French Code Civil, Art 1304-3.

[113] Sections 4.6.1–4.6.2.

### 4.6.1 *Mackay v Dick*: waiver or fictional fulfilment?

While earlier cases established this general principle in English law,[114] the leading case—*Mackay v Dick*[115]—was in fact a Scottish appeal to the House of Lords. Indeed, as we shall see, the confusion over the applicability of this case in English law might stem from the different ways in which the Scottish lawyer (Lord Watson) and the English lawyer (Lord Blackburn) expressed themselves. The important question for present purposes is whether either approach forms part of English law.

The appellant, Mr Mackay, was a railway contractor. He agreed to buy a steam excavator from the respondents and it was a condition of the obligation to accept and pay for the machine that the machine would, upon fairly being tested, dig and fill 350 cubic yards of clay, or other soft substances, within a day. The machine was tested at one of the appellant's sites but by the time it was tested the conditions had entirely changed so that the machine could not be fairly tested. The machine failed to dig and fill the guaranteed quantity. The appellant refused to provide another opportunity to conduct the test and asked the respondents to remove the machine. The House of Lords held that even though the machine had not passed a test, because the appellant had prevented a fair test from taking place, the appellant was liable to pay the price. Two speeches were delivered by Lord Blackburn and Lord Watson. Lord Selbourne LC agreed with both.

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[114] Eg *Hotham v East India Co* (n 107); *Giles v Giles* (1846) 9 QB 164, 115 ER 1237.

[115] *Mackay v Dick* (n 107).

Lord Blackburn first explained that there was an implied duty on the part of the appellant not to prevent the fulfilment of the condition.[116] Subsequent cases have relied upon this for the proposition if one party prevents the other from fulfilling a condition he or she may be liable in damages for breach of an implied duty that he or she not prevent fulfilment of the condition.[117] But more importantly for present purposes, in explaining why the appellant was liable for the price, Lord Blackburn said:

> [T]he [appellant] having had the machine delivered to him, was by his contract to keep it, unless on a fair test according to the contract it failed to do the stipulated quantity of work, in which case he would be entitled to call on the [respondents] to remove it. And by his own default he can now never be in a position to call upon the [respondents] to take back the machine, on the ground that the test had not been satisfied, he must, as far as regards that, keep, and consequently pay for it.[118]

By contrast, Lord Watson spoke in terms of the 'fiction of fulfilment'. He said:

> The Respondents were only entitled to receive payment of the price of the machine on the condition that it should be tried at a proper working face provided by the Appellant, and that on trial it should excavate a certain amount of clay or other soft substance within a given time. They have been thwarted in the attempt to fulfil that condition by the neglect or refusal of the Appellant to furnish the means of applying the stipulated test; and their failure being due to his fault, I am of opinion that … they must be taken to have fulfilled the condition.[119]

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[116] *Mackay v Dick* (n 107) 263.

[117] See, eg, *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108 (HL); *Mona Oil Equipment & Supply Co Ltd v Rhodesia Railways Ltd* [1949] 2 All ER 1014 (KB); *Thompson v ASDA-MFI* [1988] Ch 241 (Ch); *Compagnie Noga d'Importation et d'Exportation SA v Abacha (No 3)* [2002] CLC 207 (Com Ct).

[118] *Mackay v Dick* (n 107) 264.

[119] ibid 270.

Lord Watson's approach is clear in adopting the fiction of fulfilment. But Lord Blackburn's approach is capable of two interpretations. On the first interpretation, Lord Blackburn construed the contract as involving not a condition precedent to the duty to accept and pay for the machine, but a condition subsequent the occurrence of which would extinguish the immediate duty to pay that had already fallen due.[120] That condition subsequent was of the form: if upon a fair test, the machine fails to dig the stipulated quantity, the price shall cease to be payable. And because a test would never take place, the condition subsequent would never occur and the price would remain payable. The immediate duty of performance had arisen and the appellant had 'prevented himself from escaping the liability to pay'.[121] On this interpretation, no question of waiver arose.

The second interpretation that has been proffered in the case law is that 'Lord Blackburn … favoured a principle of waiver'.[122] This is supported by a reference in his speech to a case decided in 1469 concerning the great bell of Mildenhall.[123] The defendant, a brazier, was sued on an indenture to recast the great bell of Mildenhall and make a new bell in harmony with the tone of the other bells in Mildenhall. It was a condition of the indenture that the bell be brought to the defendant's house, weighed, and put into the fire in the presence of the men of Mildenhall. The defendant pleaded that the bell was not weighed

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[120] See *Mona Oil* (n 117) 1017–1018; *Colley v Overseas Exporters* [1921] 3 KB 302 (KB) 308. See also Bridge (n 42) 1112 [16-023].

[121] *Mona Oil* (n 117) 1017–1018.

[122] *Abacha (No 3)* (n 117) 232 [100]. See also *Nautica Marine* (n 111) 1184–1185 [96].

[123] (1469) YB Pas 9 Edw IV, fo 3b–4a, pl 13. See John James Raven, *The Church Bells of Suffolk* (Jarrold and Sons 1890) 47–50.

nor put into the furnace according to the indenture. It was argued for the plaintiff, and the Court of Common Pleas agreed, that this was a bad plea because it was the defendant who ought to have weighed the bell and put it into the furnace. Moreover, and importantly for our purposes, Lord Blackburn in discussing this case said:

> [A] further point was mooted… that if the Defendant had put the bell in the fire, without seeing it weighed, he would have waived that which was but an incident, and been as much bound to fulfil that which was the substance of the contract, viz, to make a proper tenor, as if he had had it weighed. I mention this old case, decided in 1469, because it is on it that the different digests laying down the principle are all founded, and because I think it is obvious good sense and justice.[124]

In other words, if the defendant had prevented the condition from being fulfilled, he would be held to have waived the condition.

If Lord Blackburn is understood as having relied upon waiver it might be thought that there is no substantive difference between his approach and Lord Watson's approach: '[o]n either principle, the seller was entitled to his price'.[125] But there is an important difference between the fiction of fulfilment and the principle of waiver and it manifests in how each of their Lordships dealt with the appellant's alternative argument. That argument was that despite the absence of a fair test as per the contract, the repeated failures of the machine, coupled with the other evidence, showed that the machine did not conform with the description in the contract and could not in substance have satisfied it.[126]

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[124] *Mackay v Dick* (n 107) 264.

[125] *Abacha (No 3)* (n 117) 232 [100].

[126] *Mackay v Dick* (n 107) 265.

Lord Watson took the view that this argument was 'irrelevant' because, applying the fiction of fulfilment, 'the machine must be held to have satisfied the contract test'.[127] By contrast, Lord Blackburn thought that it was unnecessary to consider this argument, only because it had not been raised in any of the courts below.[128] He said that 'if such a defence had been raised on the record in this case, the Court of Session ought… to have found how much, if any, of the allegations were proved in fact'.[129]

This difference in approach is important. Lord Blackburn's way of dealing with this alternative argument amounts to saying that although the appellant had waived the condition of testing, this would not have prevented him from showing that the machine did not, in fact, conform to the contract and therefore that another condition to his liability to pay the price had not been fulfilled. In contrast to the fiction of fulfilment, waiver does not deem the condition to have been satisfied—it only precludes the defendant from relying on that condition. While this will in many cases produce the same result, *Mackay v Dick* is an example of a case where it would have produced a different result (had the argument been raised in time).

### 4.6.2 Does either principle form part of English law?

*Mackay v Dick* is therefore capable of supporting either an approach based on the fictional fulfilment of conditions or an approach based upon the waiver of

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[127] ibid 271.

[128] ibid 265–266.

[129] ibid.

conditions. But as mentioned above, *Mackay v Dick* was a Scottish appeal. The question then arises whether either principle can be found in English law.

Starting with the fiction of fulfilment, this principle has largely been rejected in English law. In *Thompson v ASDA-MFI Group plc*,[130] Scott J said that while the 'fictional fulfilment of conditions … may be part of the civil law… they are not principles of English law'. And in *Little v Courage Ltd*,[131] Millett LJ similarly said '[t]he doctrine of fictional fulfilment of a condition precedent which is found in the civil law forms no part of English law'. These authorities also have academic support. In *Treitel on Contract*, it is said that the '[m]ore recent authorities rightly hold that such a doctrine of "fictional fulfilment" of a condition does not form part of English law'.[132]

As for waiver by prevention of fulfilment, this principle is established in English law. In *Colley v Overseas Exporters*,[133] for example, McCardie J referred to 'the principle indicated by Lord Blackburn' which 'operates to make a price payable which, apart from that principle, would not be payable',[134] and said:

> Although, as I have said, *Mackay v Dick* turned on Scotch law yet I think that that principle is equally well settled in English law. It has frequently been asserted in well-known text books based on English law … This rule is recognized by the text books as embodied in English law, and has been widely applied by high tribunals as of obvious justice and convenience…[135]

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130 *Thompson v ASDA-MFI* (n 117) 266.

131 (1995) 70 P & CR 469 (CA) 474.

132 Peel (n 8) 74 [2-112].

133 *Colley v Overseas Exporters* (n 120).

134 ibid 308.

135 ibid 308–309.

Although applications of the principle today are less common, the principle continues to be applied.[136]

### 4.6.3 Doubts expressed about the principle

Despite the longstanding authority supporting this principle, doubts have been expressed about it, with some writers even questioning the principle's existence. These doubts stem from two matters. The first is the failure to distinguish between waiver of conditions and the fiction of fulfilment. Thus, Professor Edwin Peel writes:

> [I]n *Mackay v Dick* the buyer was held liable *for the price*… In principle it seems wrong to hold him so liable, for such a result ignores the possibility that the machine might have failed to come up to the standard required by the contract, even if proper facilities for trial had been provided.[137]

But this was the very argument addressed by both Law Lords. Lord Blackburn, applying a principle of waiver, held that it was too late to raise the argument, but it appears that he would have agreed with it had it been raised and proved earlier. This is because, unlike the fiction of fulfilment, waiver does not deem the condition to have been fulfilled. It was only Lord Watson, applying the fiction of fulfilment, who would have rejected this argument. As such, this criticism only applies to the fiction of fulfilment; it does not apply to the principle of waiver. And while in fairness, the passage from *Treitel* is only directed to the fiction of fulfilment and its applicability in English law, there is no discussion of the separate principle of waiver and how it may differ.

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[136] *Tiberghien Draperie SaRL v Greenerg & Sons (Mantles) Ltd* [1953] 2 Lloyd's Rep 739 (QB); *Abacha (No 3)* (n 117) 230–233 [94]–[108].

[137] Peel (n 8) 74 [2-112].

The second matter is a failure to appreciate the limits on which conditions can be waived. In particular, part of the reluctance to embrace this principle of waiver stems from an intuition that in some cases the principle would lead to 'extraordinary results'.[138] It would mean, for example, that a landowner is liable to a builder for the price if he or she prevents the builder from completing the work, that a buyer of goods who refuses to accept them is liable to pay for the goods even if title to the goods never passes,[139] and that a freighter is bound to pay freight if he or she refuses to load the cargo even though the effect of refusing to load a cargo is that the goods are never carried.[140]

But that has not been the position in English law since the 1841 decision in *Laird v Pim*.[141] As will be argued in s 4.7.2.2 below when discussing that case, the best understanding of that decision and its consequences is that the principle of waiver is subject to an important limitation: 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.[142] Unless the consideration has become executed, a party to conditional contract involving dependent promises can only

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[138] *Colley v Overseas Exporters* (n 120) 311.

[139] ibid.

[140] In this respect there may be a difficulty with *Bentsen v Taylor* (n 17), where it appears that the action was for the price.

[141] (1841) 7 M & W 474, 151 ER 852.

[142] Langdell (n 107) 1087. See also Corbin (n 7) 486 §753; American Law Institute, *Restatement of the Law Second: Contracts 2d* (American Law Institute Publishers 1981) 217 §84(1)(a), 218 comment (c). However, note that the American texts put the threshold too low by referring to a 'material part'. This is not consistent with the position in English law: see s 4.7.2.2.

recover damages.[143] This appears to be a manifestation of the principle of 'mutuality' or 'reciprocity' that, as discussed in Chapter 1, is at the heart of contracting.[144]

This limitation significantly reduces the scope of 'waiver of conditions by prevention of fulfilment' and avoids the 'extraordinary results' that might otherwise occur. For example, it explains why the principle did not apply in a case like *Colley v Overseas Exporters*,[145] where title to goods had not passed. It also explains why it did apply in a case like *Abacha (No 3)*,[146] where an obligation to pay a sum of money under a settlement agreement was conditional on that party's accounts being released from a freezing order, and the party had refused to cooperate in the implementation of the agreement, with the result that the freezing orders were not discharged. In the former case, the consideration for the promise to pay—the transfer of title to the goods—had not been executed, and insofar as it formed a condition of the obligation to pay, it could not be waived for the purpose of an action for the price. In the latter case, the consideration for the promise to pay—the settlement—had been executed, and the condition that was waived (ie discharge of the freezing orders) was not the consideration for the promise to pay.

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143 Francis Dawson, 'Metaphors and Anticipatory Breach of Contract' [1981] Cambridge Law Journal 83, 95–96. See also *Newmont Pty Ltd v Laverton Nickel NLC* [1983] 1 NSWLR 181 (PC) 188.

144 See s 1.4.

145 *Colley v Overseas Exporters* (n 120).

146 *Abacha (No 3)* (n 117).

To sum up: the principle of waiver of conditions by prevention of fulfilment is not the same as a principle of the fictional fulfilment of conditions. Insofar as Lord Watson adopted the latter approach in *Mackay v Dick*, it is not the law in England. On the other hand, the principle of waiver is well established and, provided the above limitation is kept in mind, it is entirely unobjectionable. As Lord Blackburn himself said, the principle rests on 'obvious good sense and justice'.[147]

## 4.7 WAIVER OF CONDITIONS ON A REPUDIATION

The last instance of waiver of conditions that will be considered in this chapter traditionally arose following the disablement of, or renunciation by, a promisor (a 'repudiation'). 'Long before the doctrine of anticipatory breach of contract was developed',[148] the law took the position that:

> [A] positive absolute refusal by one party to carry out the contract, or his conduct in incapacitating himself from performing his promise… dispenses the other party from the useless formality of tendering performance of the condition …[149]

The basis of the rule was that 'the law will not enforce any one to do a thing which will be vain and fruitless'.[150]

However, as we will see, this principle was never absolute and was limited in two important ways. The first limitation—which applies across all instances of

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[147] *Mackay v Dick* (n 107) 264.

[148] *Peter Turnbull & Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd* (1954) 90 CLR 235 (HCA) 246–247.

[149] Ker and Butterworth (n 15) 564.

[150] *Sir Anthony Main's Case* (1596) 5 Co Rep 20 b, 21 a; 77 ER 80, 81. See also Langdell (n 107) 1083–1084; Ker and Butterworth (n 15) 564.

waiver, but was developed in this context—is the limitation just mentioned that a condition cannot be waived for the purpose of an action for the price where it is the consideration for the promise it qualifies. This is because of the rule in *Laird v Pim* that no action for the price can be brought unless the consideration has become executed. The second limitation is that the principle of waiver of conditions on a repudiation required the promisee actually to have been 'prevented' (in a loose sense of 'prevention' discussed below) from completing the contract by acting on the renunciation. If the plaintiff did not act upon the renunciation then, in principle, there was nothing to preclude the defendant from relying upon any conditions of his or her obligation if the plaintiff failed to perform.

Finally, in terms of the applicability of this principle in the modern law, while the doctrine of anticipatory breach has certainly reduced the scope of its application (or rather the need for it), as will be seen, in certain cases the principle of waiver of conditions on a repudiation still has an important role to play. Suppose that in a contract for the sale of land, the seller intimates to the buyer that he or she will not perform the contract on the date for completion. The buyer neither 'accepts' the repudiation nor 'affirms' the contract, but simply waits to see whether the seller will change their mind.[151] The repudiation is never retracted, the day for performance comes, and neither party tenders performance. Can the buyer sue the seller for not performing the contract when they themselves (on account of the fact that it would be useless to do so) did not

[151] See further s 4.7.2.4.

perform the concurrent condition of tendering the purchase price? Applying the principle to be discussed in this section, the answer is 'yes'.[152]

Unfortunately, it will be shown at the end of this section that, due to a series of cases that extended the rule beyond its proper limits, this principle has been rejected in the modern law, but curiously, only to be reintroduced under a 'quite new kind of estoppel'.[153]

### 4.7.1 Disablement

A number of early cases held that disablement by a promisor operated as a waiver of the conditions of the obligation that he or she was unable to perform.[154] These cases were forerunners to the modern doctrine of 'anticipatory breach'.[155] One of the earliest is *Sir Anthony Main's Case.*[156] Sir Anthony Main leased land to Scott for 21 years, and covenanted that at any time during the life of Scott, upon surrender of his lease, Sir Anthony would make a new lease for Scott's life, and bound himself to perform those covenants by a bond. In an action by Scott on that bond, Sir Anthony pleaded that Scott had not surrendered the lease. Scott replied that Sir Anthony had granted an 80-year lease of the land

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[152] *Peter Turnbull* (n 148) 251.

[153] Mustill (n 90) 68.

[154] *Sir Anthony Main's Case* (n 150); *Bowdell v Parsons* (1808) 10 East 359, 103 ER 811; *Amory v Brodrick* (1822) 5 B & Ald 712, 106 ER 1351; *Ford v Tiley* (1827) 6 B & C 325, 108 ER 472; *Short v Stone* (1846) 8 QB 358, 115 ER 911; *Lovelock v Franklyn* (1846) 8 QB 371; *Caines v Smith* (1847) 15 M & W 189, 153 ER 816; *Sands v Clarke* (1849) 8 C B 751, 137 ER 703. See Stephen Leake and Alfred Randall, *Principles of the Law of Contracts* (4th edn, Stevens and Sons 1902) 469–470.

[155] See generally, Mustill (n 90) 14–26; Paul Mitchell, '*Hochster v De La Tour* (1853)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in the Law of Contract* (Hart Publishing 2008) 135, 136–139.

[156] *Sir Anthony Main's Case* (n 150).

to a third party. On a demurrer to this plea, it was held that Sir Anthony had breached the covenant and that a surrender of the lease was unnecessary because it would be 'vain to compel [Scott] to make a surrender to [Sir Anthony]'[157] when he had disabled himself from performing.

This principle was applied in a number of cases where a request by the plaintiff was a condition precedent to the defendant's obligation. In such cases, typically the defendant had disabled himself or herself from performing an obligation but sought to rely upon the fact that no request had been made by the plaintiff as a defence to an action for damages. The courts, however, held that disablement by a defendant dispensed with the need to make a request.[158] In *Caines v Smith*,[159] Pollock CB said: 'If a man were under a contract to deliver certain goods to another, and he had put it out of his power to do so by destroying them, it could not be necessary to request him to deliver them.' These cases showed that the claimant was dispensed from performing a condition where to do so would be in vain—in other words, the defendant's self-disablement operated as a waiver of the condition.

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[157] *Sir Anthony Main's Case* (1596) 5 Co Rep 20 b, 21 a; 77 ER 80, 81.

[158] *Bowdell v Parsons* (n 154); *Armory v Brodrick* (n 154); *Short v Stone* (n 154); *Caines v Smith* (n 154).

[159] *Caines v Smith* (1847) 15 M & W 189, 190; 153 ER 816, 817.

### 4.7.2 Renunciation

#### *4.7.2.1 An extension of the prevention principle?*

In a similar vein, it has long been held that a 'renunciation … by one party dispenses with a condition to be performed in the meantime'.[160] Historically, these cases were seen as an extension of the prevention principle,[161] which was discussed in s 4.6. But as we shall see, the loose approach taken in these cases to 'prevention' suggests that the principle underlying these cases is not really about prevention at all, but rather, as in the previous sub-section, not requiring parties to act in vain.

The leading case is *Jones v Barkley*.[162] The plaintiffs were the assignees in bankruptcy of Gardiner. Gardiner was entitled to the equity of redemption of £1,490 of bank stock that he had mortgaged to Lane. The defendant, Barkley, agreed that in consideration of the plaintiffs assigning the equity of redemption to Lane, as well as executing a general release of all claims that they had against Lane, the defendant would pay the sum of £611. In an action for damages for non-performance of the agreement, the plaintiffs alleged that while they had offered to assign the equity of redemption and to execute a general release (they had even shown the defendant a draft release), the defendant had 'discharged the plaintiffs'[163] from doing so by refusing to execute it and, despite being requested to do so, had refused to pay the sum of £611. The defendant sought to defend

[160] *Hochster v De La Tour* (1853) 2 E & B 678, 693–694; 118 ER 922, 927–928.

[161] See, eg, *Peter Turnbull* (n 148) 246–247.

[162] (1781) 2 Doug 684, 99 ER 434.

[163] *Jones v Barkley* (1781) 2 Doug 684, 685; 99 ER 434, 434.

the claim on the basis that the plaintiffs had never in fact executed the assignment or a general release. The plaintiff demurred to these pleas.

The plaintiffs advanced two distinct arguments. The first argument was advanced on the assumption that the execution of the assignment and release was a condition precedent, and not simply a concurrent condition where an offer to execute the assignment would have been sufficient on its own.[164] The plaintiffs argued that even if the tender of the draft release had not satisfied the condition precedent, the defendant had 'made it good by waver [sic], having discharged the plaintiffs from doing anything further'.[165] Counsel for the plaintiffs argued that 'it is a general principle, that he who prevents a thing from being done, shall not avail himself of the non-performance which he has occasioned.'[166] As explained in more detail below, 'prevent' here was being used in a loose sense. It was enough to prevent the plaintiffs from performing that the defendant had intimated that he or she did not intend to perform his part.[167]

The second argument advanced by the plaintiffs was an argument that would be more familiar to modern lawyers. That argument was 'that there [was] no condition precedent',[168] but rather a concurrent condition, and therefore

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[164] *Jones v Barkley* (1781) 2 Doug 684, 688; 99 ER 434, 436.

[165] ibid. The language of 'discharge' here was being used in a special sense simply to mean that the act of the defendant was the reason that the contract was not further performed by the plaintiff: *Cort v Ambergate Railway Co* (1851) 17 QB 127, 145–146; 117 ER 1229, 1236.

[166] *Jones v Barkley* (1781) 2 Doug 684, 686; 99 ER 434, 435.

[167] See, eg, *Jones v Barkley* (1781) 2 Doug 684, 694; 99 ER 434, 440.

[168] *Jones v Barkley* (1781) 2 Doug 684, 688; 99 ER 434, 436.

'absolute performance by the plaintiff was not necessary' and it was only necessary to plead that 'he was ready to assign the stock, and grant the release.'[169]

The Court of King's Bench (Lord Mansfield, Willes, Ashurst, and Buller JJ) ultimately found for the plaintiffs. But the judgments given were not explicit as to which argument they were accepting.[170] The result has been that the judgment has been interpreted as illustrative of both how concurrent conditions work[171] and how waiver works. Lord Mansfield said:

> Take it on the reason of the thing. The party must shew he was ready; but, if the other stops him on the ground of an intention not to perform his part, it is not necessary for the first to go farther, and do a nugatory act.[172]

Our focus here is on the principle of waiver.

This principle of waiver was applied in two further cases concerned with actions for damages, both of which held that a renunciation, so long as it was not withdrawn, had the effect of waiving the conditions of the promisor's obligation to perform.[173] In *Ripley v M'Clure*,[174] the defendant agreed to buy one third of a cargo of tea from the plaintiff on the arrival of the vessel with the cargo in Belfast. Before the arrival of the vessel the defendant wholly refused to perform the agreement. This renunciation had remained unretracted, albeit that it was not 'accepted' by the plaintiff. The Court of Exchequer (affirmed on appeal) held

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[169] *Jones v Barkley* (1781) 2 Doug 684, 691; 99 ER 434, 438.

[170] Dawson (n 143) 91.

[171] See, eg, J W Carter and C Hodgekiss, 'Conditions and Warranties: Forebears and Descendants' (1976) 8 Sydney Law Review 31, 34 and s 2.2.3.

[172] *Jones v Barkley* (1781) 2 Doug 684, 694; 99 ER 434, 440.

[173] Leake and Randall (n 154) 619.

[174] (1849) 4 Exch 345, 154 ER 1245; affirmed on appeal (1850) 5 Exch 139; 155 ER 60.

that the refusal to perform, unretracted at the time of performance, operated as a waiver of the conditions to the defendant's liability.[175]

The decision in *Cort v Ambergate Railway Co*[176] also demonstrates this principle[177] as well as the loose sense in which 'prevention' was used. The plaintiffs agreed to supply railway chairs to be used in the construction of a railway by the defendants. The agreement provided for the construction of the chairs according to certain specifications and for their delivery from time to time, the price being payable on delivery. After a number of chairs had been delivered under the agreement, the defendants' engineer told the plaintiffs not to make any more as the defendants had all that they needed and would not take any more—this renunciation was never retracted.[178] The plaintiffs brought an action against the defendants (after the date on which the chairs ought to have been received) for wrongfully refusing to accept the residue of the chairs agreed to be supplied. The defendants, among other things, argued that the plaintiffs could not show that they were ready, willing, and able to carry out the contract because they 'had not offered to deliver, nor had ever made, the residue of the chairs'.[179] The defendants—with an eye to this principle of waiver—also argued that they had not prevented the plaintiffs from supplying the residue since there had been no physical obstruction.

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[175] *Ripley v M'Clure* (1849) 4 Exch 345, 359–360; 154 ER 1245, 1251.

[176] (1851) 17 QB 127; 117 ER 1229.

[177] Langdell (n 107) 1084.

[178] *Cort v Ambergate Railway Co* (1851) 17 QB 127, 148; 117 ER 1229, 1237.

[179] *Cort v Ambergate Railway Co* (1851) 17 QB 127, 134; 117 ER 1229, 1232.

The Court of King's Bench rejected both these arguments and held that by refusing to accept the residue of the goods the defendant had 'prevented and discharged the plaintiff from manufacturing and delivering them.'[180] As for the defendants' argument that they had not physically prevented performance, Lord Campbell CJ said:

> But may I not reasonably say that I was prevented from completing a contract by being desired not to complete it? Are there no means of preventing an act from being done, except physical force or brute violence?[181]

*Cort v Ambergate* thus adopted the 'looser approach to prevention'[182] that had prevailed in *Jones v Barkley*. It will be recalled there that Lord Mansfield spoke of the defendant stopping the plaintiff 'on the ground of an intention not to perform his part'.[183] In light of this, it might be queried to what extent these cases were really about 'prevention' at all. As Professor Paul Mitchell observed in relation to *Jones v Barkley*, '[t]his was not really prevention; rather, it was a good reason for the claimant to be excused from further performance'.[184] And when understood in this way, the underlying idea is the same as that underlying waiver of conditions following self-disablement: if a promisor indicates that he or she does not intend to perform, the law does not require the promisee to act in vain and perform the condition to the promisor's obligation. As Professor Christopher Columbus Langdell once said, 'the former cannot complain that the

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[180] *Cort v Ambergate Railway Co* (1851) 17 QB 127, 148; 117 ER 1229, 1237.

[181] *Cort v Ambergate Railway Co* (1851) 17 QB 127, 145; 117 ER 1229, 1236.

[182] Mitchell (n 155) 142. See also 143.

[183] *Jones v Barkley* (1781) 2 Doug 684, 694; 99 ER 434, 440.

[184] Mitchell (n 155) 142. Although cf Dawson (n 143) 96–97.

latter takes him at his word'.[185] The repudiating party would thus be held to have waived the condition.

#### *4.7.2.2 The rule in Laird v Pim and the limits of waiver*

The principle that a renunciation by a promisor, while unretracted, operated as a waiver of the conditions to the promisor's obligation was, however, qualified in its operation. An important limitation is that 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.[186] As this section argues, this is a result of the decision in *Laird v Pim*,[187] the effect of which is that no action for the price can be brought unless the consideration has become executed.

The prospect of this limitation first arose due to the uncertainty surrounding the scope of *Jones v Barkley*.[188] Although *Jones v Barkley* was an action for damages, at trial the plaintiffs were awarded £611—the same amount as the price the defendant was to pay.[189] While all the cases discussed above were concerned with actions for damages, the question would soon arise as to whether this principle of waiver permitted a claimant to recover the price from the

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[185] Langdell (n 107) 1083–1084.

[186] See text in n 142.

[187] *Laird v Pim* (n 141).

[188] Mitchell (n 155) 144.

[189] For completeness, it is worth noting that the judgment given at trial was later nonsuited for the agreement fell afoul of the Bankrupts Act 1731 (5 Geo 2 c 30), s 11: *Jones v Barkley* (1781) 2 Doug 684, 698; 99 ER 434, 444–445.

[189] Dawson (n 143) 91.

defendant, even if the consideration for the promise to pay had never been executed.[190]

The question was considered in *Smith v Wilson*[191] in an action for the freight alleged to be due on a charterparty. The plaintiff had agreed to take the defendant's goods and deliver them to Monte Video and afterwards proceed back to Great Britain. The ship was, however, seized by persons unknown off the coast of Africa. After a long time the ship was released back to the plaintiff, who repaired the ship and sought instructions. The defendant, however, refused to give any instructions in respect of the voyage and renounced their obligations under the charter-party. The plaintiff alleged that this 'discharged'[192] him from the further prosecution of the voyage and that he was therefore entitled to the freight. The Court of King's Bench rejected this argument and gave judgment for the defendant.

Lord Ellenborough CJ noted that the 'arrival and discharge at her destined port in Great Britain' was 'a condition precedent to the plaintiff's right to demand the [freight]'.[193] But the plaintiff relied on *Jones v Barkley* to argue 'that the plaintiff had acquired the right to the sums demanded as freight [etc], as completely as if the voyage had been performed'.[194] The Lord Chief Justice, however, distinguished *Jones v Barkley*. He said that in that case 'no contingency

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[190] Mitchell (n 155) 144.

[191] (1807) 8 East 437, 103 ER 410.

[192] In the sense referred to in n 165.

[193] *Smith v Wilson* (1807) 8 East 437, 442–443; 103 ER 410, 413.

[194] *Smith v Wilson* (1807) 8 East 437, 443; 103 ER 410, 413.

but the immediate death of the party tendering the act could have disappointed its performance' and that the party doing the act 'would have instantly acquired, without any further act… a full right by the terms of his contract to the duty demanded; which in that case was the payment… of a sum of money'.[195] In contrast, in the present case:

> [I]f he had done all that he offered to do, and which the defendant discharged him from performing, still it would have amounted at most only to an endeavour on his part to prosecute and complete the voyage…[196]

Lord Ellenborough CJ's reasons for distinguishing *Jones v Barkley* were not 'completely convincing'.[197] After all the difference between the two cases appears to be a difference in degree, not a difference in kind. But regardless of whether it was a convincing basis upon which to distinguish *Jones v Barkley*, the decision in *Smith v Wilson* was an attempt to constrain the scope of the principle in *Jones v Barkley* so as to avoid permitting a party to recover the contract price in circumstances where the consideration for the promise to pay had remained unexecuted.

As stated above, however, the decision that is responsible for this limitation is *Laird v Pim*.[198] There is a certain irony in this because the case itself was concerned with an action for damages. The plaintiff had agreed to sell to the defendants title to a parcel of land. The plaintiff alleged that he had offered to execute a conveyance and would have tendered a conveyance but the defendants

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[195] *Smith v Wilson* (1807) 8 East 437, 444; 103 ER 410, 413.

[196] *Smith v Wilson* (1807) 8 East 437, 443–444; 103 ER 410, 413.

[197] Mitchell (n 155) 144.

[198] *Laird v Pim* (n 141). In addition to the discussion below, see generally, Dawson (n 143) 93–96.

had refused to proceed and, despite entering into possession, they 'did not nor would pay the plaintiff the said purchase-money'.[199] The plaintiff claimed as damages the full amount of the purchase money (£4,125) and interest thereon. The defendants pleaded that no conveyance had ever been made or executed, which they alleged was a condition precedent.[200] They argued therefore that they were under no immediate duty to pay the purchase price and that it could not be recovered as damages while the plaintiff still held title to the land. They also demurred generally to the plaintiff's claim.

At trial, Rolfe B held that the plaintiff could not recover the whole purchase price as damages and could only recover such damages as resulted from the breach, namely, £680 for interest on the purchase money and £70 for the value of brick clay that the defendants had taken from the plaintiff's land. The plaintiff then argued before the Court of Exchequer (Parke, Alderson, Gurney, and Rolfe BB) that the damages award should be increased by the amount of the purchase money on the basis that the plaintiff was entitled to the price. The Court rejected this argument. Parke B said:

> The question is, how much worse is the plaintiff by … the loss of the purchase-money, in consequence of the non-performance of the contract? It is clear he cannot have the land and its value too. A party cannot recover the full value of a chattel, unless under circumstances which import that the property has passed to the defendant, as in the case of goods sold and delivered, where they have been absolutely parted with, and cannot be sold again.[201]

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[199] *Laird v Pim* (1841) 7 M & W 474, 475; 151 ER 852, 853.

[200] No argument appears to have been made that tendering of the conveyance was a concurrent condition.

[201] *Laird v Pim* (1841) 7 M & W 474, 478; 151 ER 852, 854.

The second issue—whether the pleadings disclosed a cause of action at all—then arose upon the general demurrer. Here, the main question was the precise breach alleged by the plaintiff on the pleadings, and whether this entitled the plaintiff to succeed. The breach alleged was simply that the defendants 'did not nor would pay the plaintiff the said purchase-money'.[202] The defendants argued that if the breach assigned was non-payment of the purchase money—as opposed to, for example, a refusal to execute the conveyance—then they were not liable, for '[a] tender of the conveyance is not sufficient; it must be executed before payment can be enforced'.[203] The plaintiff argued that '[t]he execution of a conveyance [was] not a condition to the plaintiff's recovering in this action, and if it were, it ha[d] been waived by the defendants'.[204]

The Court found in favour of the plaintiff on this issue. Lord Abinger CB said that the breach was 'informally alleged' but 'the objection, as it arises on general demurrer, cannot prevail'.[205] On the issue of waiver, the Chief Baron added that 'the case of *Jones v Barkley* appears to be an express authority, and must govern the present case.'[206] Parke B expressed some doubt, but ultimately arrived at the same conclusion. He said:

> This declaration is certainly informally drawn, but I think it is sufficient on general demurrer, upon the principle laid down in *Jones v Barkley*. Upon the facts alleged in this declaration, the

[202] *Laird v Pim* (1841) 7 M & W 474, 475; 151 ER 852, 853.

[203] *Laird v Pim* (1841) 7 M & W 474, 481; 151 ER 852, 855.

[204] *Laird v Pim* (1841) 7 M & W 474, 478–479; 151 ER 852, 854.

[205] *Laird v Pim* (1841) 7 M & W 474, 484; 151 ER 852, 856. A general demurrer takes the pleadings as generally sufficient but objects on a 'matter of substance'. A special demurrer objects to a 'matter of form only': Henry John Stephen, *A Treatise on the Principles of Pleading in Civil Actions* (Butterworth and Son 1824) 159.

[206] *Laird v Pim* (1841) 7 M & W 474, 484; 151 ER 852, 856.

> plaintiff is substantially in the same situation, for the purpose of recovering the money, as if all had been done on his part which he engaged to do. It does not follow that he shall recover the whole purchase-money, but he is in the same situation for the purpose of recovering damages for the non-payment of the price, as if all had been done by him.[207]

Although *Laird v Pim* was only an action for damages, it was axiomatic that Parke B's statements of principle must also apply to an action for the price itself (ie an action for the agreed sum). For if they did not apply to an action for the price, then there would be nothing to prevent a vendor from bringing an action for the price against the buyer, on the basis that the conditions to the obligation to pay had been waived, while also selling the title to the land to a third party. In other words, if these statements of principle did not apply to an action for the price, a vendor could obtain both the agreed sum from the buyer and substitute performance from a third party. The vendor would thus find himself or herself in a far better position than contractual performance ever could have produced—the vendor could have his or her cake and eat it too. Consequently, since *Laird Pim*, the position has been 'that the price is only payable in return for an executed consideration'.[208] This is the 'rule… in *Laird v Pim*',[209] and it is now found in all kinds of contracts, not just contracts for the sale of title to land.[210]

The result of the rule in *Laird v Pim* is that there is an important limitation on waiver of conditions, namely, that a condition cannot be waived for

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[207] *Laird v Pim* (1841) 7 M & W 474, 485; 151 ER 852, 857.

[208] Francis Dawson, 'Waiver of Conditions Precedent on a Repudiation' (1980) 96 Law Quarterly Review 239, 243 fn 25. See also Dawson (n 143) 95; *Colley v Overseas Exporters* (n 120) 311.

[209] *East London Union v The Metropolitan Railway Co* (1869) LR 4 Exch 309 (Exch) 310.

[210] *Colley v Overseas Exporters* (n 120) 311. See the Sale of Goods Act 1979, s 49(1).

the purpose of an action for the price if the performance of that condition is the consideration for the promise it qualifies. This is because, in such cases, to permit the promisee to recover on the principle of waiver of conditions on a repudiation, despite not fulfilling the condition, 'would be to permit him to keep the *quid pro quo* and yet recover payment for it'.[211] And this is the very thing the rule in *Laird v Pim* prohibits.

Importantly, this does not prevent the condition being waived for the purpose of an action for damages,[212] albeit that consistently with Parke B's approach the damages would be calculated taking into account the fact that the plaintiff has not had to provide the consideration. That is why in *Laird v Pim*, Parke B said that the vendor 'is in the same situation for the purpose of recovering damages for the non-payment of the price, as if all had been done by him'.[213]

#### *4.7.2.3 The limited scope of the principle*

While the limitation discussed in the previous sub-section related to the conditions that can be waived, the limitation discussed in this sub-section relates to the 'scope of the principle' of waiver of conditions on a repudiation.[214] In particular, in this section we explore the problem caused by 'the notorious trio of

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[211] Langdell (n 107) 1087.

[212] *Peter Turnbull* (n 148) 252–253.

[213] *Laird v Pim* (1841) 7 M & W 474, 485; 151 ER 852, 857. Cf the criticism of this view in Dawson (n 143) 94–95. Space does not permit a detailed discussion of the issue here.

[214] Dawson (n 208) 244.

cases':[215] *Braithwaite v Foreign Hardwood Co*,[216] *Taylor v Oakes, Roncoroni & Co*,[217] and *British and Benington*s *Ltd v North Western Cachar Tea Co*.[218]

The difficulties have arisen due to the failure to appreciate that the old cases which said that a renunciation operates as a waiver of the conditions of the renunciating party's obligation gave this principle a limited scope.[219] As was demonstrated above, on one view, the earlier cases saw a renunciation by one party as 'preventing' the other party from performing his or her side of the bargain. The principle of waiver therefore required the promisee actually to have been prevented (albeit in a loose sense) from completing the contract by acting on the renunciation.[220] Similarly, on the approach that this principle is simply recognition that the law does not require the promisee to act in vain and tender a useless performance:

> A waiver of a condition precedent arising from the defendant's repudiation did not entirely relieve the plaintiff from showing that he was ready and willing; the plaintiff was dispensed from the need to do that which the defendant had indicated would be pointless.[221]

The limited scope of the principle had two consequences. First, as Lord Campbell CJ said in *Cort v Ambergate*,[222] it meant that a plaintiff seeking to justify their non-performance of a condition on account of the defendant's

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[215] Mustill (n 90) 65.

[216] [1905] 2 KB 543 (CA).

[217] (1922) 127 LT 267 (CA).

[218] [1923] AC 48 (HL).

[219] Dawson (n 208) 244.

[220] *Peter Turnbull* (n 148) 247.

[221] *Foran v Wight* (1989) 168 CLR 385 (HCA) 398 (Mason CJ), citing Dawson (n 208) 244–245.

[222] (1851) 17 QB 127, 144; 117 ER 1229, 1236. See also Dawson (n 208) 247.

renunciation had to show 'that the noncompletion of the contract was not the fault of the plaintiffs, and that they were disposed and able to complete it if it had not been renounced by the defendants.' The language of 'fault' here should not be taken to connote moral blameworthiness, but rather that the cause of the plaintiff not performing the condition was the defendant's renunciation and not some other factor.

Secondly, it meant that if a plaintiff did not rely upon the repudiation, and chose to tender performance in any event, he or she would not be absolved from complying with the conditions to the defendant's obligation for the purpose of an actual tender of performance—the waiver only operated to the extent that the plaintiff acted upon the renunciation by not completing. If the plaintiff chose to perform in any event, but failed to comply with some condition to the other defendant's obligation, there was nothing preventing the defendant from relying on the condition for the purpose of refusing a performance actually tendered. In such a case, the cause of the non-compliance with the condition was simply the plaintiff's defective performance.

However, in the trio of cases discussed below, these limitations were either not applied or confused, the result of which was to push the principle of waiver of conditions on a repudiation far beyond its proper limit. It was this expansion of the principle which ultimately led to its abandonment in the House

of Lords decision in *Fercometal SARL v Mediterranean Shipping Co SA (The Simona)*.[223]

The first decision in this trio is *Braithwaite's Case*.[224] The plaintiff seller made a contract with the defendant buyers for the sale of 100 tons of Honduras rosewood by instalments, cash being payable on presentation of a bill of lading. The buyers subsequently wrote to the seller's agent renouncing their liability under the contract and refusing to accept any wood under it. The ground on which they did so, as it turned out at trial, was insufficient. At the time the letter was received, the first shipment was already on its way. The seller's agents informed the buyers that they were ready to hand over the bill of lading,[225] but the buyers persisted in their refusal. The seller then sold the goods elsewhere. A second shipment was similarly refused by the buyers and sold elsewhere by the seller.

The seller claimed damages for non-acceptance of the goods. The buyers sought to resist the claim in respect of the first shipment on the basis that the seller had not fulfilled the conditions on his part because—as they had discovered sometime later—a portion of the rosewood onboard the first shipment did not answer the description of quality in the contract, and therefore

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[223] *The Simona* (n 91).

[224] *Braithwaite's Case* (n 216).

[225] There is an ambiguity as to whether the plaintiff's agents actually tendered the bill of lading or merely offered to tender it. The headnote appears to say the former, while Collins MR says the latter: see ibid 549. Compare *Taylor v Oakes* (n 217) 269 (Greer J) and 270–271 (Bankes LJ) with 271 (Scrutton LJ) and 272 (Atkin LJ).

the buyers were entitled to reject the goods.[226] The Court of Appeal (Collins MR, Matthew, and Cozens-Hard LJJ) found for the seller and held that the buyers' repudiation had operated to waive the condition that the plaintiff tender a conforming shipment. They were therefore liable for breach.[227]

As for the measure of damages, the primary judge had allowed a reduction in damages in respect of the inferior quality. While not setting aside this order, Collins MR said:

> Logically, the damages should, I think, have been assessed upon the footing that the wood which the plaintiff was excused from delivering was up to the standard stipulated for in the contract, though it turns out that it in fact fell slightly short of the monetary value of wood quite up to that standard…[228]

The second decision in the trio is *Taylor v Oakes*.[229] Under two separate contracts the sellers agreed to sell to the buyers certain quantities of Scotch fur, deliveries to be made in monthly instalments. After certain deliveries had been made and accepted, the buyers stopped taking delivery of the goods and refused to accept further instalments. The buyers did not have any good reason for this at the time and did not offer any ground as justification. The sellers brought an action for damages and after the action had commenced, the buyers became aware that the goods that had been delivered did not comply with the contract description. They thereafter sought to rely upon this in their defence to the action.

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[226] *Braithwaite's Case* (n 216) 546–547.

[227] ibid 551.

[228] ibid 552.

[229] *Taylor v Oakes* (n 217).

The primary judge found that the goods delivered had in fact failed to comply with the contract description in a way that would have entitled the buyers to reject. However, by accepting and paying for the goods, they were precluded from returning them (ie they had waived the condition) and were limited to an action for damages. Moreover, they were not entitled to support their repudiation in respect of the balance on the ground that 'the plaintiffs would in all probability, indeed as a practical certainty, have tendered goods which the defendants would, if they so chose, have been justified in refusing to accept'.[230] And for this latter conclusion, the judge applied *Braithwaite's Case*. This conclusion was upheld in the Court of Appeal (Bankes, Scrutton, and Atkin LJJ).

The third and final decision is *British and Benington Ltd v North Western Cachar Tea Co.*[231] Pursuant to three separate contracts, the appellant buyers agreed to buy crops of tea from the respondents (three firms of tea growers in India). Delivery was to be made to a warehouse in London. In early 1920, ships carrying consignments of tea under the contracts had arrived in London but due to congestion at that port they were diverted to other ports throughout England and Scotland resulting in delay. In July 1920, the buyers renounced their obligation to accept the tea on the ground of delay but this reason was found at arbitration to be insufficient. The buyers were ordered to pay damages. On appeal before the House of Lords, the buyers argued that the contract required delivery in London and that due to the congestion the sellers were never ready and willing to deliver in London. The House of Lords found in favour of the

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[230] *Taylor v Oakes* (n 217) 269.

[231] *British and Benington* (n 218).

sellers. Lord Atkinson held, applying *Braithwaite's Case*,[232] that the buyer's wrongful repudiation had dispensed with the need for the sellers to be ready, willing, and able, to deliver the tea in London.

Lord Sumner, who agreed in the result, rejected the suggestion that *Braithwaite's Case* had decided that 'when there has been a repudiation by one party on a given ground, and an acceptance of that repudiation by the other party, the former can no longer rely on any other ground for refusing to perform his obligations'.[233] He said 'the case as reported either does not lay down this proposition or, if it does so, is wrong.'.[234] In particular, Lord Sumner said:

> I do not see how the fact, that the buyers have wrongly said 'we treat this contract as being at an end, owing to your unreasonable delay in performance of it' obliges them, when that reason fails, to pay in full, if, at the very time of this repudiation, the sellers had become wholly and finally disabled from performing essential terms of the contract altogether. *Braithwaite's Case* says nothing, which affects the regular consequences, when it appears that at the time of breach the plaintiff is already disabled from doing his part at all.[235]

Ultimately, Lord Sumner did not think that this was a case of that kind (ie one of disablement). In particular, it had not been found that the sellers 'could not have forwarded the tea to London, or that the tea, when so forwarded, would not have

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[232] ibid 64–66.

[233] ibid 70.

[234] ibid.

[235] ibid 72.

been still such as the contract provided for'.[236] Lord Sumner's speech cast some doubt on *Braithwaite's Case*, but it did not appear to have overruled it.[237]

Prior to being 'overshadowed'[238] by *The Simona*,[239] these three cases appeared to establish the following propositions:

(1) a repudiation by a defendant 'completely absolve[d]'[240] the plaintiff of the need to comply with the conditions to the defendant's obligation or to 'show any readiness and willingness to perform at all';[241]

(2) consequently, a defendant who repudiated for a bad reason was precluded from 'subsequently justifying the repudiation by showing that had the contract run its course a discharging breach would inevitably have occurred';[242] and

(3) as per the obiter statement of Collins MR in *Braithwaite's Case*, damages were to be assessed as if all the conditions to the defendant's obligation to perform in fact had been fulfilled.[243]

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[236] ibid.

[237] *Continental Contractors Ltd v Medway Oil & Storage Co* (1925) 23 Ll LR 124 (CA) 132.

[238] Mustill (n 90) 65.

[239] *The Simona* (n 91).

[240] Dawson (n 208) 243.

[241] ibid.

[242] Dawson (n 208) 243.

[243] See also *Continental Contractors v Medway Oil* (n 237) 132–133 (Scrutton LJ).

Each of these propositions was inaccurate. To take the first proposition, for the reasons discussed above, the scope of the principle of waiver of conditions on a repudiation was limited. It did not mean that the repudiating party waived the right to rely upon the condition for all purposes. The waiver was only operative insofar as the non-completion of the contract was the 'fault' of the repudiating party—ie because it had been acted on by the innocent party in circumstances where they otherwise would have been able to perform.

The second proposition—subject to one qualification below—was always doubtful, as the speech of Lord Sumner in *British and Beningtons* showed. In particular, if at the date of a purported repudiation, the other party had become wholly and finally disabled from performing the contract, then the repudiation was not wrongful because the 'repudiating' party was already discharged on account of the other's disability. This is the doctrine of anticipatory breach and the law in this respect was set out clearly in *Universal Cargo Carriers Corp v Citati*.[244] The waiver of conditions on a repudiation principle did not apply in such a case because, in the language of the old cases, the non-completion of the contract was not the 'fault' of the repudiating party—it was the 'fault' of (in the sense of 'caused by') the party who had disabled himself or herself from performance.

However, it is necessary to distinguish between two situations: (i) where the plaintiff was, at the time of the defendant's repudiation, wholly and finally disabled from performing; and (ii) where the plaintiff was not wholly and finally disabled from performing, but it can be shown that but for the repudiation, they

[244] [1957] 2 QB 401 (QB) 445–446.

would in fact have tendered a defective performance.[245] The difficulty arises because the line between the two can become blurred, as in the case where the non-conforming goods have already been shipped.[246] The doctrine of anticipatory breach applies only to the former. But in cases of the latter, it appears that the waiver of conditions on a repudiation principle would still operate so as to dispense the plaintiff from the need to comply with any conditions. This would appear to be an explanation for the decision in *Gill & Duffus SA v Berger & Co Inc*,[247] in which it was held that the buyers' refusal to pay the contract price upon presentation of shipping documents was a repudiation which could not be justified by the fact that the balance of the goods still to be delivered under the contract would not have conformed with the contract description, thus justifying rejection.[248]

Finally, the third proposition—that damages were to be assessed as if all the conditions to the defendant's obligation to perform had been fulfilled—appears to have flowed from a misunderstanding about the nature of waiver. If true, it would lead to the consequence, as Professor Francis Dawson noted, that:

> [I]f one party agrees to sell a quantity of cheese and it can be proved that he would only have tendered chalk, he recovers damages as if the chalk were cheese, if prior to the time for

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[245] In *Taylor v Oakes* (n 217) 268–269, for example, Greer J at first instance said on the one hand that the 'the plaintiffs would in all probability, indeed as a practical certainty, have tendered goods which the defendants would… have been justified in refusing to accept', but on the other hand, that it was not clear 'that if the defendants had asked for a better compliance with the contracts, the plaintiffs might not have been able to improve' so as to comply.

[246] See, eg, *Braithwaite's Case* (n 216); *Gill & Duffus SA v Berger & Co Inc* [1984] AC 382 (HL).

[247] *Gill & Duffus* (n 246).

[248] Admittedly, the House of Lords justified the result by 'power to terminate' reasoning: *Gill & Duffus* (n 246) 390. See Bridge (n 42) 505–506 [9-014].

> performance the other party is unfortunate enough to have repudiated and the seller alert enough to accept the repudiation.[249]

This is to attempt to introduce the 'fiction of fulfilment' by the back door (and in circumstances where it is doubtful that even those systems that recognise the doctrine would seek to apply it). It has already been explained that English law does not recognise the doctrine of fictional fulfilment of conditions.[250] The principle of waiver of conditions does not require a court to treat the condition as if it had been fulfilled; it only precludes the defendant from relying upon the condition as an answer to the action. If the defendant can show that the plaintiff, despite not being wholly and finally disabled from performing at the time of repudiation, would not in fact have performed at the due date, there is nothing in this principle of waiver that precludes this from being taken into account in the assessment of damages. The obiter comments in *Flame SA v Glory Wealth Shipping Pte Ltd*,[251] which make this point, are to be welcomed.[252]

#### *4.7.2.4 The demise of waiver and the rise of promissory estoppel*

The final decision that needs to be considered in this section is *The Simona*.[253] This decision is important for its interpretation of *Braithwaite's Case*, but also for what it held about the nature of the principle of waiver of conditions on a repudiation. Continuing with what is now a familiar theme, the House of Lords

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[249] Dawson (n 208) 243.

[250] See s 4.6.2.

[251] [2013] EWHC 3153 (Comm), [2014] QB 1080.

[252] Cf Edwin Peel, 'Desideratum or principle: the "compensatory principle" revisited' (2015) 131 Law Quarterly Review 29.

[253] *The Simona* (n 91).

appears to have subsumed the principle within promissory estoppel. But, for the reasons given below, the integration is not altogether satisfactory.

*The Simona* concerned a charterparty for the carriage of a cargo of steel. Clause 10 provided that if the vessel should not be ready to load on or before 9 July 1982, the charterers were to have the option of cancelling the charterparty. On 2 July, the owners requested an extension of the cancellation date. The charterers refused to grant this extension and purported to cancel the charterparty. It was common ground that this was premature and amounted to a repudiation. This repudiation, however, was not 'accepted' by the owners who had, on 5 July, tendered a notice of readiness to load. That notice was, however, false as the vessel was not ready to load and indeed was still not ready by 9 July due to the owners' decision to load other cargo first. On 12 July, the charterers sent a further cancellation notice on the ground that the vessel was not ready to load.

The owners claimed dead freight from the charterers. Relying on *Braithwaite's Case*, the owners argued that the non-readiness of the vessel was a condition precedent to the exercise by the charterers of the option to cancel and that the charterers, by their repudiation, had excused the owners from serving any notices or having the vessel ready to load.[254] In essence, the argument was that the charterers had lost their right to rely upon the condition as enlivening the power to cancel as a result of their prior unaccepted repudiation.

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[254] ibid 791.

The House of Lords held that the charterers had not lost the power to cancel the contract as a result of the prior unaccepted repudiation.[255] Lord Ackner said:

> [T]he decision in *Braithwaite* … is not an authority for the proposition advanced by the appellants, alternatively if it is, then it is wrong. When A wrongfully repudiates his contractual obligations in anticipation of the time for their performance, he presents the innocent party B with two choices. He may either affirm the contract by treating it as still in force or he may treat it as finally and conclusively discharged. There is no third choice, as a sort of via media, to affirm the contract and yet to be absolved from tendering further performance unless and until A gives reasonable notice that he is once again able and willing to perform.[256]

At the outset, it should be said that the result in the case is clearly correct. The principle of waiver of conditions on a repudiation, for the reasons given earlier, only operates to the extent that the non-repudiating party acts upon the repudiation by not performing. It does not preclude the repudiating party from relying upon any conditions to his or her obligations—or in this case, from relying upon any conditions to the exercise of a power—if the non-repudiating party chooses to ignore the renunciation and persist with performance. In *The Simona* it could not be said that the non-completion of the contract was the 'fault' of the charterers in the sense that it was caused by their repudiation. As Lord Ackner said: '[t]he non-readiness of the vessel by the cancelling date was in no way induced by the charterers' conduct. It was the result of the owners[']decision to load other cargo first.'[257]

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[255] ibid 801.

[256] ibid 805.

[257] ibid 806.

But in reaching this decision, Lord Ackner appears to have lost sight of the original principle and, in an attempt to explain the absolving effects of an unaccepted repudiation, he rejected waiver of conditions only to reintroduce promissory estoppel to reach the same result. In particular, the question arose as to what would happened if despite not having accepted the repudiation, the owners' had, due to the continuing renunciation of the charters', abstained from presenting the vessel in time? While correctly stating that this was not what had occurred in this case, Lord Ackner said:

> Of course, it is always open to A … to contend that in relation to a particular right or obligation under the contract, B is estopped … If B represents to A that he no longer intends to exercise that right or requires that obligation to be fulfilled by A and A acts upon that representation, then clearly B cannot be heard thereafter to say that he is entitled to exercise that right or that A is in breach of contract by not fulfilling that obligation.[258]

The result of this passage appears to be that where one party 'refuses to accept'[259] the other's repudiation then even if the repudiating party persists in his repudiation, he or she does not waive the conditions to his or her obligation.[260] However, according to Lord Ackner, it may be possible to establish a promissory estoppel.

What is not clear is the precise scope of this estoppel. Lord Ackner appears to have required a representation by the repudiating party that he or she would not seek to rely upon his or her rights if the non-repudiating party chose

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[258] ibid 805.

[259] An 'ambiguous expression': see J W Carter, 'Discharge as the Basis for Termination for Breach of Contract' (2012) 128 Law Quarterly Review 283, 301.

[260] Bridge (n 42) 509 [9-018].

not to perform—this gives the estoppel a narrow scope. In the decision of the High Court of Australia in *Foran v Wight*,[261] Brennan J expressed the scope of the estoppel differently, requiring only 'an intimation by one party that tender of performance by the other will be nugatory'.[262] The difference in opinion appears to be in relation to the 'ease with which the requirements of representation and reliance may be satisfied in order to give rise to an estoppel'.[263]

Neither approach is wholly satisfactory. Lord Ackner's approach appears to be too narrow in requiring a representation that the non-repudiating party need not perform and not merely that it would be useless for him or her to do so. Take the case of a contract for the sale of title to land where in the face of a repudiation prior to completion, the non-repudiating party chooses not to tender a useless performance on the date for completion (without necessarily 'accepting' the repudiation). These are, shorn of complications, the facts of *Foran v Wight*.[264] On Lord Ackner's approach it would be necessary to find that '[a] statement in the form "I refuse [to] perform" is implicitly a statement "You are not required to perform".'[265] But as Professor John Carter has observed, '[t]hat is simply fiction upon fiction. It uses a fiction (the estoppel) which is based on a fictional

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[261] *Foran v Wight* (n 221).

[262] ibid 421.

[263] Bridge (n 42) 510 [9-019].

[264] *Foran v Wight* (n 221).

[265] Carter (n 259) 301.

characterisation of the promisor's conduct.'[266] So either the approach is too narrow, or it is completely fictional.

The approach of Brennan J appears to fare better by requiring simply 'an intimation by A that he does not intend to perform which conveys to B that performance by him would be nugatory'.[267] But while it reaches a result that is consonant with the understanding of this principle of waiver as it developed, it would appear to be inconsistent with the requirements of the modern doctrine of promissory estoppel. In particular, there appears to be no necessity for A to represent or promise to B that A will not insist upon his or her strict legal rights. Indeed, there is not even a need for a representation that B need not perform. Instead, it is enough that A intimates that *A* does not intend to perform irrespective of what B may do. Lord Mustill, writing extra-judicially, has described it as 'a quite new kind of estoppel'.[268]

There is simply no need to invoke promissory estoppel. The principle of waiver of conditions on a repudiation, properly understood, could deal with this situation perfectly well. It was only the misunderstanding of that principle that led to undesirable results and ultimately to a confusion of thought. The approach of Lord Ackner is ahistorical and appears to have lost sight of the fact that the principle of waiver never depended upon a representation of the kind ordinarily necessary to found an estoppel. If the principle of waiver of conditions on a repudiation is to be treated as a case of promissory estoppel, it needs to be

[266] ibid.

[267] *Foran v Wight* (n 221) 422.

[268] Mustill (n 90) 68.

accepted that an estoppel can sometimes be made out without any representation that one party will not insist upon his or her strict legal rights—it is enough to state 'I will not perform'. But this is then a very different kind of estoppel.

## 4.8 CONCLUSION

This chapter has explained the various instances in which conditions can be waived. It was seen that, despite being supported by centuries of authority, much of the law in this area has been either doubted or subsumed within the doctrine of promissory estoppel. This latter approach has not been altogether satisfactory. In particular, it would be misleading to suggest that all instances of waiver can be understood either as 'waiver by election' or 'waiver by estoppel'. Two clear exceptions are the doctrine of waiver by acceptance applied in the sale of goods context and waiver of conditions by prevention of fulfilment. Moreover, if waiver of conditions on a repudiation is, in some form, to be treated as an instance of promissory estoppel, it may be that the time has come for us to revisit the suggestion that promissory estoppel is in fact a unified doctrine.[269] We have also seen that the principle of waiver of conditions must be distinguished from the fictional fulfilment of conditions. Waiver does not deem the condition to have been satisfied—it only precludes the defendant from relying on that condition. English law has not recognised any fiction of fulfilment. Finally, a key point that emerges from the cases considered in this chapter is that not all conditions can be waived for all purposes. Crucially, a condition cannot be waived

[269] See McFarlane, 'Understanding Equitable Estoppel' (n 10); McFarlane, 'Promissory Estoppel and Debts' (n 10) 115.

for the purpose of an action for the price if the performance of the condition is the consideration for the promise it qualifies.

# CHAPTER 5: FRUSTRATION



## 5.1 INTRODUCTION

This chapter defends the view that the so-called doctrine of frustration is an instance of discharge for failure of condition. The central argument is that in cases of 'frustration' the reason the parties are discharged from further performance of their contractual obligations is that the parties have agreed that their obligations are conditional upon the existence of particular facts or the occurrence of particular events, which no longer exist or have not occurred. This is why it is often said that frustration 'brings the contract to an end forthwith, without more and automatically'.[1] The only qualification to this statement is that 'the contract' is not at an end. The parties are discharged from their contractual obligations, but the contract remains in existence.

In advancing this claim, this chapter proceeds as follows. First, it considers and explains the development of the various conditions in play in cases of so-called frustration. Understanding the various conditions in play, and their historical development, is essential to understanding the claim that this instance of discharge is also an instance of failure of condition. In particular, it will be

[1] *Hirji Mulji v Cheong Yue Steamship Co* [1926] AC 497 (PC) 505.

seen that in cases of 'frustration'—contrary to modern orthodoxy—although both parties are discharged, they are often discharged for failure of different conditions. Secondly, the chapter criticises the development of a unified doctrine of frustration and explains the problems that have arisen from thinking about this instance of discharge in this way. The third part of this chapter seeks to defend the claim that in cases of frustration the parties' obligations, as a matter of construction, are implicitly conditional. The fourth and final part of this chapter addresses a question often posed by asking whether frustration is invariably 'automatic'.[2] In this chapter, the question takes a slightly different form, which is whether it is possible to waive the relevant condition(s) in cases of frustration.

## 5.2 THE CONDITIONS IN CASES OF 'FRUSTRATION'

'[T]he term "frustration" has an embarrassing width of meaning'.[3] As this section shows, cases said to fall within the ambit of the so-called doctrine of frustration in fact involve the failure of several different conditions commonly found in contracts. The first, which can be called the 'possibility condition', is the condition of a party's obligation, generally but not always found, that it is possible to perform it.[4] Failure of this condition discharges the party who was to render the performance. The second condition is what this thesis has called the

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[2] See, eg, G D Goldberg, 'Is Frustration Invariably Automatic?' (1972) 88 Law Quarterly Review 464.

[3] Roy Granville McElroy, and Glanville L Williams, *Impossibility of Performance: A Treatise on the Law of Supervening Impossibility of Performance of Contract, Failure of Consideration, and Frustration* (Cambridge University Press 1941) xxxiii.

[4] Eg, *Taylor v Caldwell* (1863) 3 B & S 826, 122 ER 309.

'substantial-benefit condition'[5] and, as we saw in Chapter 3, this discharges the party who was to receive the performance (which may be unforthcoming due to impossibility or simply because one party fails or refuses to perform). Finally, there are a very limited number of cases where a condition is implied that discharges both parties from their respective obligations to perform because 'the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. … It was not this that I promised to do'.[6] The precise content of this particular condition adapts to the case and contract at hand.

### 5.2.1 The possibility condition

There is no principle in English law that prevents parties from contracting to do that which is impossible.[7] Where an unconditional (or 'absolute') promise is or becomes impossible to perform, this does not discharge a party from his or her obligation to perform.[8]

But to say that 'impossibility' does not discharge a party from his or her unconditional obligation to perform, while true, assumes that the obligation was

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[5] Eg *Jackson v Union Marine Insurance Co* (1874) LR 10 CP 125 (Exch Chamb). It will be argued that this is also the best explanation of *Krell v Henry* [1903] 2 KB 740 (CA).

[6] *Davis Contractors Ltd v Farham Urban District Council* [1956] AC 696 (HL) 729.

[7] *Thornborow v Whitacre* (1706) 2 Ld Raym 1164, 1165; 92 ER 270, 271; *Clifford v Watts* (1870) LR 5 CP 577 (Comm Pleas) 588. See also Edwin Peel, *Frustration and Force Majeure* (4th edn, Sweet & Maxwell 2021) 1–3 [1-002].

[8] Frederick Pollock, *Principles of Contract at Law and in Equity* (1st edn, Stevens and Sons 1876) 330. See also *Baily v De Crespigny* (1869) LR 4 QB 180 (QB) 185; *Grant, Smith & Co & McDonnell Ltd v Seattle Construction and Dry Dock Co* [1920] AC 162 (HL) 169.

in fact unconditional.[9] Yet, 'it must, of course, always be a matter of construction what the contractual obligation was'.[10] In most contracts, the parties' obligations are not absolute and unconditional; neither party has promised to perform 'come what may', guaranteeing performance in all circumstances. More often than not,[11] one party's promise to perform—at least where it is not concerned with the payment of a sum of money[12]—is implicitly conditional upon it being possible to perform.[13]

It is true that this was not always the position. As we have seen in Chapter 2,[14] at one time, courts were reluctant to find conditions unless they were expressly stated in the contract. This was because it was supposed that if a party had wished to protect himself or herself, that party could have limited his or her own promise 'by the use of appropriate words of condition'.[15] And where the parties' promises were not expressly conditional, 'the justice of that day required

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[9] McElroy and Williams (n 3) 6; Michael Bridge, 'Frustration and Excused Non-Performance' (2021) 137 Law Quarterly Review 580, 583.

[10] McElroy and Williams (n 3) 6.

[11] But see Robert Stevens, 'Objectivity, Mistake and the Parol Evidence Rule' in Andrew Burrows and Edwin Peel (eds), *Contract Terms* (Oxford University Press 2007) 102, 106.

[12] Rarely does a party promise to pay only if they have the money to do so. Perhaps this is why it is often said that the law does not regard obligations to pay money as capable of being impossible to perform: Michele De Gregorio, 'Impossible Performance of Excused Performance? Common Mistake and Frustration after *Great Peace Shipping*' (2005) 16 King's Law Journal 69, 72; William Herbert Page, 'The Development of the Doctrine of Impossibility of Performance' (1920) 18 Michigan Law Review 589, 595; Cliona Kelly, '*Paradine v Jane*: A Doctrine of Absolute Contractual Liability' (2004) 12 Irish Student Law Review 64, 66.

[13] *Taylor v Caldwell* (n 4); *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd* [1942] AC 154 (HL) 204–205.

[14] Section 2.2.1.

[15] Arthur Corbin, *Corbin on Contracts: A Comprehensive Treatise on the Rules of Contract Law* (West Publishing Co 1960) vol 3A, 136 §654.

each one to be enforced as it was made';[16] impossibility was no defence.[17] On this approach, each party had promised to perform 'no matter what'.

#### *5.2.1.1 Paradine v Jane*

The case often referred to in this context, as authority for the 'doctrine of absolute contracts',[18] is *Paradine v Jane*.[19] In that case, the plaintiff landlord brought an action in debt against the defendant tenant for three years of rent due under a lease of land. The defendant pleaded in response to the action that 'a certain German prince, by name Prince Rupert, an alien born, enemy to the King and Kingdom, had invaded the realm with an hostile army of men'[20] and forced the defendant out of possession. This had the result that the defendant could not take the profits of the land. On the plaintiff's demurrer, it was held that this plea was not a sufficient answer to the claim.

Three grounds were given for the decision, the broadest of which was simply that this provided no defence: 'he ought to pay his rent'.[21] The Court distinguished the situation 'where the law creates a duty or charge'[22] and said that 'when the party by his own contract creates a duty or charge upon himself, he is

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[16] ibid 170 §661.

[17] Arthur Corbin, *Corbin on Contracts: A Comprehensive Treatise on the Rules of Contract Law* (West Publishing Co 1962) vol 6, 323 §1320.

[18] Peel (n 7) 17 [2-001]. The phrase 'absolute contracts' is just another way of saying that the parties' obligations are 'unconditional'. See Pollock (n 8) 330, who uses the terms interchangeably in this way.

[19] (1647) Aleyn 26, 82 ER 897. Also reported as *Paradine v Jane* (1647) Sty 47, 82 ER 519.

[20] *Paradine v Jane* (1647) Aleyn 26, 26; 82 ER 897, 897.

[21] *Paradine v Jane* (1647) Aleyn 26, 27; 82 ER 897, 897.

[22] ibid.

bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract'.[23]

The following points should be made about *Paradine v Jane*. The first is that, perhaps ironically, *Paradine v Jane* was not an impossibility case.[24] No question arose as to the landlord fulfilling his obligation to convey the interest in the land, and there is no mention of an express or implied covenant of quiet enjoyment.[25] The only question was as to the tenant's obligation to pay rent, and the basis on which the tenant resisted this claim was not that his performance had become impossible (for he could not argue that it had become impossible to pay rent),[26] but that he had been deprived of the use and enjoyment of the land.[27] As one commentator observed, 'the plea would not be regarded as raising any question of impossibility at modern law'.[28] Strictly speaking, then, the statement in *Paradine v Jane* was obiter.[29]

The second point to note is that the dictum contains an ambiguity because it is qualified by the language of 'if he may'.[30] This qualification is open to two interpretations. The first is that it was attempting to preserve impossibility

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[23] ibid.

[24] Page (n 12) 596; Kelly (n 12) 66.

[25] Corbin (n 17) 330 §1322; Page (n 12) 595.

[26] See the text in n 12.

[27] Corbin (n 17) 330 §1322.

[28] Page (n 12) 595. See also Pollock (n 8) 332.

[29] Kelly (n 12) 65. This same point has been recognised judicially by Lord Porter in *Joseph Constantine Steamship* (n 13) 203. See also Page (n 12) 595.

[30] De Gregorio (n 12) 72; John Henry Schlegel, 'Of Nuts, and Ships, and Sealing Wax, Suez, and Frustrating Things—The Doctrine of Impossibility of Performance' (1969) 23 Rutgers Law Review 419, 420; Kelly (n 12) 74–77; Peel (n 7) 26 [2-013].

as a ground for non-performance of an unconditional promise. In this sense, 'if he may' would mean 'if he can', 'in the sense of being *able* to do something'.[31] The second is that 'if he may' meant 'if he is allowed', 'in the sense of being legally permitted to do something'.[32]

The problem with the first view is that it would make the statement 'largely self-contradictory'.[33] As Lord Wright observed in *Joseph Constantine Steamship*,[34] 'the reference to inevitable accident seems inconsistent with reading "if he may" as reserving impossibility'. Moreover, the statement was intended to contrast the situation where a 'party by his own contract creates a duty or charge upon himself' with that 'where the law creates a duty or charge', in which case it was said that if 'the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him.'[35] In other words, for this latter category of case, impossibility was an excuse. The interpretation of 'if he may' as a reference to impossibility fails to give weight to that contrast.[36]

By contrast, the second interpretation—that 'if he may' meant 'if he is allowed'—merely recognises a limited exception to the proposition,[37] namely supervening illegality, which had been recognised before *Paradine v Jane*.[38] It was

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[31] Peel (n 7) 26 [2-013]. See also H W R Wade, 'The Principle of Impossibility in Contract' (1940) 56 Law Quarterly Review 519, 525.

[32] Peel (n 7) 26 [2-013]. See also *Joseph Constantine Steamship* (n 13) 184; Schlegel (n 30) 420.

[33] Peel (n 7) 26 [2-013].

[34] *Joseph Constantine Steamship* (n 13) 184.

[35] *Paradine v Jane* (1647) Aleyn 26, 27; 82 ER 897, 897.

[36] McElroy and Williams (n 3) 4 fn 6.

[37] Peel (n 7) 26 [2-013].

[38] *Abbott of Westminster v Clerke* (1536) 1 Dyer 26b, 28b; 73 ER 59, 63.

stated in the following way in *Brewster v Kitchell*: 'if [a person] covenants to do a thing which is lawful and an Act of Parliament comes in and hinders him from doing it, the covenant is repealed'.[39]

The third point is that even when *Paradine v Jane* was decided, there were a few instances in which it had been held that performance of a promise that was not expressly unconditional would be excused where its performance had become impossible.[40] These included: (i) the death of a party who had promised to perform personal services[41] (although this would later be explained by Bramwell B[42] and Pollock CB[43]—admittedly both dissenting—as resting upon an implied condition); (ii) the destruction of a chattel that was the subject-matter of a contract of bailment;[44] and (iii) as already mentioned, illegality due to a subsequent Act of Parliament. But despite these limited exceptions, '[f]or over two centuries this rule was more or less rigorously applied'.[45]

The final point to make is that the dictum in *Paradine v Jane* needs to viewed in its historical context. As mentioned above, when the case was decided, courts were reluctant to find conditions unless they were expressly stated in the contract. But only a short time later the approach to finding conditions had

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[39] *Brewster v Kitchell* (1697) 1 Salk 198, 198; 91 ER 177, 178.

[40] Schlegel (n 30) 420 fn 9; McElroy and Williams (n 3) 5; *Joseph Constantine Steamship* (n 13) 203; De Gregorio (n 12) 72–73; Catharine MacMillan, '*Taylor v Caldwell* (1863)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in the Law of Contract* (Hart Publishing 2008) 167, 185–189.

[41] *Hyde v The Dean and Canons of Windsor* (1597) Cro Eliz 552, 553; 78 ER 798, 798.

[42] *Hall v Wright* (1859) El Bl & El 765, 778; 120 ER 695, 700.

[43] *Hall v Wright* (1859) El Bl & El 765, 793; 120 ER 695, 706.

[44] *Williams v Lloyd* (1628) W Jones 179, 82 ER 95. See also *Coggs v Bernard* (1703) 2 Ld Raym 909, 92 ER 107.

[45] McElroy and Williams (n 3) 5.

changed. As we saw in Chapter 2 in the context of promissory conditions, in the second half of the seventeenth century the old approach had been abandoned in favour of an approach focusing on the construction that would best serve the objective intentions of the parties.[46] The problem was that outside the context of promissory conditions—ie in cases of impossibility—*Paradine v Jane* had wrongly come to be seen as authority for the proposition that such conditions as would discharge a party in cases of impossibility ought not to be implied.[47] The tension between these differing approaches was bound to come to a head. Indeed, it led Pollock CB, in his dissenting judgment in *Hall v Wright*,[48] to say that 'it must be conceded on all hands that there are contracts to which the law implies exceptions and conditions which are not expressed.'[49] And only a few years later, the tension arose again in *Taylor v Caldwell*.[50]

#### *5.2.1.2 Taylor v Caldwell*

In *Taylor v Caldwell*,[51] the defendants, Caldwell and Bishop, agreed to let the plaintiffs, Taylor and Lewis, have use and possession of the Surrey Gardens and Music Hall over four days to give a series of grand concerts and fêtes at the Music Hall and Gardens. The plaintiffs agreed to pay £100 for each day. After the contract had been made, but before the first concert, the Music Hall was

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[46] See s 2.2.2.

[47] See, eg, *Atkinson v Ritchie* (1809) 10 East 530, 533; 103 ER 877, 878; *Hall v Wright* (1859) El Bl & El 765, 789; 120 ER 695, 704.

[48] *Hall v Wright* (n 42).

[49] *Hall v Wright* (1859) El Bl & El 765, 793; 120 ER 695, 706.

[50] *Taylor v Caldwell* (n 4).

[51] For a detailed discussion of the factual history of the case, see MacMillan (n 40) 167.

destroyed by an accidental fire.[52] The plaintiffs subsequently sued the defendants for breach of duty, alleging that 'they did not nor would allow the plaintiffs to have the use of The Surrey Music Hall and Gardens according to the agreement'.[53] They claimed as damages the expenses incurred in advertising and preparing for the concerts. Blackburn J, delivering the judgment of the Court, held that the defendants were not liable as their obligation to perform was implicitly conditional upon the existence of the music hall. The principle governing the case was expressed as being that:

> in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.[54]

In reaching this conclusion, Blackburn J did not purport to depart from *Paradine v Jane*. He stated the general rule that where an obligation to do something is absolute (unconditional) then—provided its performance is not unlawful—'the contractor must perform it or pay damages for not doing it', even if 'the performance of his contract has become unexpectedly burdensome or even impossible'.[55] But Blackburn J then said:

> [T]his rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied: and there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have

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[52] Without seemingly any fault on Caldwell and Bishop's part: ibid 179–180.

[53] *Taylor v Caldwell* (1863) 3 B & S 826, 827; 122 ER 309, 310.

[54] *Taylor v Caldwell* (1863) 3 B & S 826, 839; 122 ER 309, 314.

[55] *Taylor v Caldwell* (1863) 3 B & S 826, 833; 122 ER 309, 312.

> contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.[56]

Blackburn J's approach was not new and 'such an implication had been argued in previous cases'.[57] In his judgment, he referred to the 'much discussed case of *Hall v Wright*',[58] in which the court narrowly held that a condition should not be implied discharging the defendant from his promise to marry on account of him becoming inflicted with a serious disease. The disease had caused severe bleeding in his lungs, rendering him 'incapable of marriage'.[59] The dissenting judges (Pollock CB, Bramwell, and Watson BB) had all been willing to imply a condition but the majority thought that *Paradine v Jane* precluded such an implication.

The incremental change brought about by Blackburn J's judgment in *Taylor v Caldwell* was to 'revisit the decision in *Hall v Wright*'[60] and express a greater willingness to find implied conditions where they had not been expressly stated. In other words, courts became more willing to find that contractual obligations were not absolute and unconditional (the premise upon which the so-called rule

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[56] *Taylor v Caldwell* (1863) 3 B & S 826, 833–834; 122 ER 309, 312.

[57] MacMillan (n 40) 192. See also Schlegel (n 30) 423 fn 22.

[58] *Taylor v Caldwell* (1863) 3 B & S 826, 833; 122 ER 309, 312.

[59] *Hall v Wright* (1859) El Bl & El 765, 773; 120 ER 695, 698. There was discussion about the meaning of this plea and whether it meant 'an unfitness for sexual intercourse' and or 'an incapacity to bear the fatigue and excitement of the marriage ceremony': *Hall v Wright* (1859) El Bl & El 765, 777; 120 ER 695, 700.

[60] MacMillan (n 40) 199.

in *Paradine v Jane* was based). This was the true principle in *Taylor v Caldwell*, and it was confirmed as such in subsequent cases. Thus, in *Robinson v Davison*,[61] Bramwell B said:

> It is contended, however, that to [imply a condition] is to engraft a new term on an express contract. But this is really a fallacy… The fallacy consists, first, in supposing there is in the first instance an absolute contract; and, secondly, that the new term is a condition added to its express terms; whereas the whole question is what the original contract was, and whether it was a contract with or without a condition.

Unfortunately, at the end of his judgment in *Taylor v Caldwell*, Blackburn J went beyond what was necessary to dispose of the issue in the case (whether the defendants were liable for not giving the plaintiffs the use of the Music Hall) and said that 'both parties [were] excused'.[62] The problem is that 'Blackburn J does not explain why an event which makes it impossible for only one party to perform his [or her] promise nevertheless discharges both parties'.[63] Put another way, why were the plaintiffs discharged from their obligation to pay the money? It cannot be because their obligation to make payment had become impossible to perform; the fire 'clearly did not make it impossible for the plaintiffs to perform their principal obligation to make the agreed payments'.[64] The principled answer is that they were discharged because the impossibility of providing the Music Hall meant that they were deprived of substantially the whole benefit of the

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[61] (1871) LR 6 Ex 269 (Exch) 277.

[62] *Taylor v Caldwell* (1863) 3 B & S 826, 840; 122 ER 309, 315.

[63] Peel (n 7) 54 [2-050].

[64] Peel (n 7) 53–54 [2-050]; Ewan McKendrick, 'Frustration: Automatic Discharge of Both Parties?' in Andrew Dyson, James Goudkamp, and Frederick Wilmot-Smith, *Defences in Contract* (Hart Publishing 2017) 141, 144; McElroy and Williams (n 3) 99–100.

contract. This is sometimes called 'failure of consideration'[65] but, as mentioned above, in this thesis the condition has been labelled the 'substantial-benefit condition'.[66] It is discussed in s 5.2.2 below.

Subsequent cases applied 'the principle in *Taylor v Caldwell*' to find that the obligations of the parties were not absolute. In *Appleby v Myers*,[67] the principle was applied to 'excuse'[68] the plaintiffs from an obligation to erect, and keep in repair, machinery on the defendant's premises when the premises were destroyed by an accidental fire. In *Robinson v Davison*,[69] it was held to excuse the defendant's wife, a pianist, from performing at a concert when, on the day, she was unable to perform due to illness.[70] And in *Howell v Coupland*,[71] which concerned a contract to sell 200 tons of potatoes that were to be grown specifically on land belonging to the defendant,[72] the defendant was held not liable for failing to deliver the full 200 tons when only 80 tons were delivered due to disease attacking the crop.[73]

One minor issue with the judgments in these cases is that, like Blackburn J's in *Taylor v Caldwell*, they did not generally express the condition as being that it should be possible to perform. Rather, they expressed the condition

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[65] Peel (n 7) 56 [2-054]; McKendrick (n 64) 145.

[66] See Chapter 3.

[67] (1867) LR 2 CP 651 (Exch Chamb).

[68] This is a loose sense of the word, but one which was common in judgments at the time.

[69] *Robinson v Davison* (n 61); compare *Hall v Wright* (n 42).

[70] Although curiously damages were awarded on the basis that she should have given notice.

[71] (1876) 1 QBD 258 (CA).

[72] Importantly, 'there was not an absolute contract to deliver 200 tons of potatoes in September and October, but 200 tons of potatoes grown on particular land': ibid 263.

[73] As McElroy and Williams note, '[t]here might have been an interesting question as to the 80 tons': McElroy and Williams (n 3) 25. See the discussion of this issue below at s 5.5.

as the 'continued existence' of a given person or thing[74] which, if it should perish, would then make performance impossible. Focusing on the perishing of a given person or thing meant that some massaging of the language was necessary to make it applicable to certain cases,[75] for example: (i) *Robinson v Davidson*,[76] where the person necessary for performance had not 'perished' but was merely ill and for that reason unable to perform; (ii) *Howell v Coupland*,[77] where the thing necessary for performance did not exist at the time of the contract and never came to exist (and so could not have 'perished'); and (iii) *Nickoll & Knight v Ashton Edridge & Co*,[78] where a specific vessel that was to deliver cargo had become stranded (but had not perished) making it impossible to deliver a cargo aboard the ship within a fixed time. It would have been better in all these cases simply to state that often parties contract on the implicit basis that it is possible to perform, while recognising that it would be a matter of construction as to what circumstances of factual impossibility might not cause that condition to fail (such as impossibility arising due to factors within a contracting party's control).

#### *5.2.1.3 Illegality: impossibility by operation of law?*

It is well established that 'supervening illegality'—whether arising from a subsequent change in the law (eg an Act of Parliament) or from a change in circumstances that engages a previously existing law (eg the rule against trading

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[74] *Taylor v Caldwell* (1863) 3 B & S 826, 839; 122 ER 309, 314.

[75] See De Gregorio (n 12) 74–75.

[76] *Robinson v Davison* (n 61).

[77] *Howell v Coupland* (n 71).

[78] [1901] 2 KB 126 (CA).

with the enemy during wartime)[79]—can sometimes discharge parties from their respective obligations to perform.[80] As we saw above, even at the time of *Paradine v Jane*, illegality was recognised as an excuse for non-performance.

Some texts treat this as a circumstance in which the performance of an obligation becomes 'legally impossible'[81] and then treat it alongside cases in which performance is 'factually impossible'. There is some evident sense in treating the two together given that the effect of the supervening event in each case is the same: one or both parties need not perform. But there are three potential issues with doing so.

First, to refer to supervening illegality as 'legal impossibility' is to use 'impossibility' in a sense that does not accord with the ordinary usage of that word. Supervening illegality need not make it impossible to perform;[82] it appears to be based 'on the idea that performance ought not to be (though physically it could be) rendered'.[83] But if that is the case, it seems better just to say this and refer to 'supervening illegality' rather than 'legal impossibility'.

Secondly, there are cases of actual legal impossibility that need to be distinguished from cases of supervening illegality, such as a contract for the sale of title to land, where prior to the conveyance the title is compulsorily acquired

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[79] The distinction is neatly set out in Peel (n 7) 323 [8-001].

[80] ibid; Edwin Peel, *The Law of Contract* (15th edn, Sweet & Maxwell 2020) 1060 [19-045].

[81] Jack Beatson, Andrew Burrows, and John Cartwright, *Anson's Law of Contract* (31st edn, Oxford University Press 2020) 477.

[82] Peel (n 7) 325 [8-004].

[83] ibid 324 [8-003]. See *Clifford v Watts* (n 7) 586.

by the State. This is a true case of legal impossibility and is on all fours with factual impossibility: it is not possible to perform the agreement because the vendor no longer has title to the land. It has nothing to do with supervening illegality.

Thirdly, referring to supervening illegality as 'legal impossibility' gives the impression that whatever justifies discharge in cases of 'factual impossibility' might also justify discharge in cases of supervening illegality. But although the effects are the same, illegality is different—it is an 'excuse' for non-performance that is recognised 'on grounds of public policy'[84] apart from the parties' agreement.

To illustrate this last point, it might be thought that where the parties to a contract are discharged from their respective obligations to perform on account of 'supervening illegality' this can also be explained by the conditionality of the parties' obligations to perform. But even where the parties did intend that performance should occur despite the illegality, this does not prevent supervening illegality from excusing performance. An illustration is *Ertel Bieber & Co v Rio Tinto Co*,[85] in which it was held that contracts of sale between an English company and various Germany companies had ceased to be binding following the outbreak of World War I on account of the prohibition against trading with the enemy.[86] This was so even though each of the contracts contained a clause that merely suspended the parties' respective obligations in the event of a war;

[84] Peel (n 7) 324 [8-003].

[85] [1918] AC 260 (HL).

[86] See, eg, *Esposito v Bowden* (1857) 7 El & Bl 763, 119 ER 1430.

indeed, this clause was held to be of no effect, with the result that the contract as a whole was 'avoided'.[87]

In sum, supervening illegality is not an instance of failure of condition. Rather, supervening illegality is a distinct reason for discharge and due to the matters of public policy involved, it 'is governed by a number of special rules'.[88] These rules are not addressed further in this chapter.

### 5.2.2 The substantial-benefit condition (failure of consideration)

There is 'another class of case which is quite distinct'[89] in which the defendant does not seek to justify his or her non-performance by reference to the impossibility of doing so, but on the ground that the defendant simply did not get what he or she bargained for. This is often called the 'principle of failure of consideration'[90] and we encountered it in Chapter 3. In this thesis, it has been called the 'substantial-benefit condition'.[91] It is expressed in shorthand by asking whether one party has got what they bargained for. This is assisted by determining '[w]hat did the parties intend to "buy" and "sell"?'[92] And, as we saw in Chapter 3, the substantial-benefit condition can apply both in cases involving

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[87] *Ertel Bieber v Rio Tinto* (n 85).

[88] Peel (n 7) 324 [8-003].

[89] McElroy and Williams (n 3) 75.

[90] ibid; De Gregorio (n 12) 76.

[91] *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 (CA) 66.

[92] McElroy and Williams (n 3) 88; R G McElroy and Glanville Williams, 'The Coronation Cases—I' (1941) 4 Modern Law Review 241, 247, referring to *Knowles v Bovill* (1870) 22 LT 70 (Exch) 71.

breach and in cases not involving breach.[93] Here, we are concerned with those that do not involve breach.

In some cases, the reason there is no breach is that one party has by words in the contract expressly limited the scope of his or her contractual duty. This is illustrated by *Jackson v Union Marine Insurance Co.*[94] In that case, the charterers were discharged from their obligation to provide a cargo when the vessel ran aground and failed to arrive in time to carry a cargo of iron rails to San Francisco, which were needed for the construction of a railway. This was because the charterers had bought 'a charter for a definite voyage or adventure'[95] and the delay had deprived them of substantially the whole benefit of the bargain. But the shipowner was not in breach for failing to arrive on time because he had expressly excluded 'dangers and accidents of navigation' from his duty. The charterers thus had no cause of action.

In other cases, the reason that there is no breach is that one party's obligation to perform is implicitly conditional upon it being possible to perform. So in *Poussard v Spiers & Ponds Ltd*,[96] the defendant, who had engaged the plaintiff's wife to sing and play the principal female part in a new opera, was discharged from his obligation to accept her services when due to illness she missed the final week of rehearsals and was unable to perform on the opening night and the first three days of the following week. The defendant had been

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[93] See ss 3.3.1–3.3.2.

[94] *Jackson v Union Marine Insurance* (n 5). See s 3.3.2.

[95] ibid 142.

[96] (1876) 1 QBD 410 (QB). See s 3.3.2.

deprived of substantially the whole benefit of the bargain.[97] But the wife's illness fell within the scope of the possibility condition, which meant that the plaintiff[98] was not in breach.[99]

In cases involving discharge for failure of the possibility condition on one side, it is often the substantial-benefit condition that explains discharge on the other. But insofar as the party who is to receive the performance is concerned, the reason for non-performance, strictly speaking, is not relevant to the question of the discharge of that party. As Professor Samuel Williston once explained:

> As the basis for the defendant's excuse where the plaintiff has failed to perform, or is obviously going to fail to perform, is failure of consideration, the reason why the plaintiff fails to perform is immaterial. Even though his failure is caused by excusable impossibility, the result is the same. The defendant has not got what he bargained for and need not perform.[100]

This is why it was argued in Chapter 3 that Diplock LJ was correct to draw the link between discharge following breach and discharge in cases of frustration in *Hongkong Fir*.[101] The substantial-benefit condition can fail in cases involving breach (which orthodoxy now treats as discharge for breach of a so-called 'innominate term') or it can fail in cases not involving breach (which orthodoxy treats as 'frustration'). It is the failure to distinguish between the

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[97] ibid 415.

[98] The husband was the plaintiff due to the old doctrine of 'coverture' (abolished by the Married Women's Property Act 1882).

[99] *Poussard v Spiers* (n 96) 414.

[100] Samuel Williston and Walter H E Jaeger (ed), *A Treatise on the Law of Contracts* (3rd edn, Baker, Voorhis & Co Inc 1962) vol 6, 131–132 §838.

[101] See s 3.5.

promise and the condition that has made it difficult to see the relationship between these two seemingly disparate instances of discharge.

#### *5.2.2.1 The application of the 'doctrine' of frustration to leases*

A proper understanding of the substantial-benefit condition may also explain the reluctance of the law to apply the 'doctrine' of frustration to leases. The starting point here is once again *Paradine v Jane*. As we saw above, *Paradine v Jane* was not an impossibility case. The argument of the defendant was that he had been forced out of possession, with the result that he could not take the profits of the land, and that this entitled him to refuse to pay the rent. It was not an argument from impossibility, but (if anything) one of failure of the substantial-benefit condition.

Should the argument have succeeded? It is submitted that it should not have succeeded and that *Paradine v Jane* was correctly decided. This is because in *Paradine v Jane* if we ask '[w]hat did the parties intend to "buy" and "sell"',[102] the answer is that the plaintiff was to convey to the defendant the leasehold estate and with it the right to possession, and this he had done.[103] That the lessee was prevented from taking possession by Prince Rupert and his army did not mean that the lessee had not got what he bargained for.

This does not mean that the substantial-benefit condition can never, in principle, fail in the context of a lease. To the extent that it was ever suggested

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[102] McElroy and Williams (n 3) 88; McElroy and Williams, 'The Coronation Cases—I' (n 92) 247, referring to *Knowles v Bovill* (n 92) 71.

[103] McElroy and Williams, 'The Coronation Cases—I' (n 92) 257; Corbin (n 17) 330 §1322

that this might be the case, that is no longer the law.[104] But it does mean that such arguments are rarely, if ever, likely to succeed for, ordinarily, if the lessee is granted a leasehold estate in the land then he or she will have gotten all that he or she bargained for.

It has been suggested that such arguments might succeed in cases where a lease specifies that premises are to be used only for a particular purpose, the suitability of the premises for this use is reflected in the price, and for one reason or another it becomes the case that the premises can no longer be used for that particular purpose.[105] In such cases, there is at least an argument to be made—albeit a difficult one—that the lessee did not bargain merely for a conveyance of an interest in land, but for premises that could be used for that purpose. As Lord Wilberforce observed in *National Carriers Ltd v Panalpina (Northern) Ltd*,[106] '[i]n such a case the lease, or the conferring of an estate, is a subsidiary means to an end, not an aim or end of itself'. If the premises cannot be used for the particular purpose, the lessee does not get what he or she bargained for and the substantial-benefit condition fails. But these cases are likely to be rare and more recent authorities have suggested that the mere fact that a lessee has agreed only to use the premises for specific purposes does not mean that where the premises

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[104] See *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 (HL).

[105] See the example given in *National Carriers v Panalpina* (n 104) 695, referring to (an earlier edition of) Corbin (n 17) 472–473 §1356 about liquor saloons during the era of prohibition in the United States. For another example, see McElroy and Williams, 'The Coronation Cases—I' (n 92) 258.

[106] *National Carriers v Panalpina* (n 104) 695.

cannot be used for that purpose it follows that there has been a failure of the substantial-benefit condition.[107]

Moreover, even if this argument is open as a matter of construction of the lease on the facts, it should also be noted that whether the substantial-benefit condition fails will depend on the length of the contract and the comparative length of any event that prevents one party from receiving the benefit of performance. This is because the substantial-benefit condition only fails where a party has been deprived of 'substantially the whole' benefit. Anything less than this will not suffice. This is illustrated by *National Carriers v Panalpina*.[108] In that case, the plaintiffs, who sought to recover arrears of rent, had demised to the defendants a warehouse for a term of 10 years. The lease contained a covenant that it was not to be used otherwise than for the purpose of a warehouse without the written consent of the landlord. Five years into the lease, the only vehicular access to the warehouse, a street, was blocked off by the local authority due to the dangerous condition of a 'ruinous Victorian warehouse'.[109] It was proposed that the Victorian warehouse be demolished but because it was heritage listed, that process was likely to take around 18 to 20 months. The effect of the street being blocked off was that the plaintiffs' warehouse had been 'rendered totally useless for the one purpose, that of a commercial warehouse, for which alone it

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[107] See *Bank of New York Mellon (International) Ltd v Cine-UK Ltd; London Trocadero (2015) LLP v Picturehouse Cinemas Ltd* [2022] EWCA Civ 1021 [154]–[155], [157].

[108] *National Carriers v Panalpina* (n 104).

[109] ibid 685.

[was] fitted, and for which alone, by the terms of the contract between the parties it [could] be lawfully used'.[110]

While at first glance it might appear that this was a case in which the argument that the substantial-benefit condition had failed might have been possible (ie a case of 'possible frustration'),[111] the limited duration of the interruption precluded it from being one. As Lord Wilberforce explained, 'this does not approach the gravity of a frustrating event. Out of 10 years it will have lost under two years of use: there will be nearly three years left after the interruption has ceased.'[112]

#### *5.2.2.2 Krell v Henry and 'frustration of purpose'*

The substantial-benefit condition may also shed light on the famous decision in *Krell v Henry*,[113] a case often cited as having recognised a 'frustration of purpose' or frustration of the 'common purpose' doctrine.[114] As will be seen, the best understanding of that decision is that it was concerned with the substantial-benefit condition. This understanding of the decision also explains why attempts to invoke *Krell v Henry* in support of cases of so-called 'frustration of purpose' have nearly always failed.

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[110] ibid.

[111] ibid 697 (Lord Wilberforce).

[112] ibid. A similar conclusion was reached at first instance in *Bank of New York Mellon (International) Ltd v Cine-UK Ltd* [2021] EWHC 1013 (QB) [209(d)(iii)]. There was no appeal from this aspect of the decision (and the appeal was, in any event, dismissed): *Bank of NY Mellon v Cine-UK; London Trocadero v Picturehouse* (n 107).

[113] *Krell v Henry* (n 5).

[114] See, eg, Peel (n 7) Ch 7.

In *Krell v Henry*, the plaintiff, by an exchange of letters on 20 June 1902, agreed to let the defendant use his suite of chambers on the third floor of Pall Mall 'during the days (but not the nights)'[115] of 26 and 27 June for the sum of £75. The reason for doing so was to enable the defendant to view the procession in connection with the coronation of King Edward VII, although the letters themselves contained no express reference to the procession. On 24 June, the King fell ill and consequently the procession did not take place on the selected days. The defendant, who had already paid £25, declined to pay the balance of £50, upon which the plaintiff sued. The Court of Appeal (Vaughan Williams LJ, with whom Romer and Stirling LJJ agreed) held that the non-occurrence of the procession meant that the defendant was discharged from his obligation to pay the remaining £50. The defendant's cross-claim for recovery of the £25 was abandoned on appeal.[116]

The argument that *Krell v Henry* recognised a 'frustration of purpose' doctrine rests upon the fact that the express provisions of the contract were still literally capable of performance. The postponement of the coronation procession simply meant that the purpose in hiring out the room had been undermined.[117] When viewed in this way, *Krell v Henry* poses a grave threat to the sanctity of contract[118] and runs the risk of being invoked in many cases where supervening events have simply rendered the contract a bad bargain for one of

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[115] *Krell v Henry* (n 5) 741.

[116] ibid 754.

[117] Peel (n 7) 295 [7-014].

[118] ibid 289 [7-004].

the parties.[119] Apparently for this reason, it has 'scarcely ever been followed in England'.[120]

On closer examination, however, *Krell v Henry* is justifiable as an application of the substantial-benefit condition. This point was first made by Dr Roy McElroy and Professor Glanville Williams, who observed that '[t]he defendant was held to be excused because there was a total failure of consideration for his promise to pay'.[121] They noted that, although the contract made no express reference to the procession, extrinsic evidence was held to be admissible to identify the subject-matter of the contract.[122] In particular, there was an announcement in the windows of the plaintiff's flat, which had induced the defendant to enter into the contract, 'to the effect that windows to view the Royal coronation procession were to be let'.[123] This evidence was admitted by Vaughan Williams LJ who said that 'parol evidence is admissible to shew that the subject of the contract was rooms to view the coronation procession, and was so to the knowledge of both parties'.[124]

When viewed in this light it is clear that *Krell v Henry* was a case concerned with failure of the substantial-benefit condition. If we ask "'what did he buy?" the answer is that the defendant in *Krell v Henry* bought a "view of the

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[119] ibid 295 [7-014]; Peel (n 80) 1057 [19-043].

[120] Peel (n 80) 1058 [19-044].

[121] McElroy and Williams, 'The Coronation Cases—I' (n 92) 247.

[122] *Krell v Henry* (n 5) 753–754.

[123] ibid 750.

[124] ibid 754, quoted in McElroy and Williams, 'The Coronation Cases—I' (n 92) 249.

coronation procession.'"[125] And clearly he did not get what he bargained for. In other words, the defendant, due to no fault on the part of the plaintiff, was deprived of substantially the whole benefit that it was intended he should obtain in consideration of his promise to pay the hire. The failure of this condition meant that his obligation to pay the remainder never fell due.

Subsequent cases have recognised this feature of *Krell v Henry* and explained the case on the basis that '[w]hat the parties were buying and selling was, quite literally, … room[s] with a view'.[126] But the position is even stronger than that. What was being bought and sold in *Krell v Henry* was not *rooms* with a view of the coronation procession, but rather a *view* of the coronation procession.[127] That is, in part, shown by the fact that the defendant was to have access to the rooms during the days only. The licence to use the flat in *Krell v Henry* was 'a subsidiary means to an end, not an aim or end of itself'.[128]

This feature also explains why it is unlikely that the plaintiff would have been obligated to provide access to the room if the defendant had wished to pay. The plaintiff's obligation to provide access to the rooms was part of an indivisible obligation to provide a view of the procession or, if one prefers, also conditional upon being able to provide a view of the procession. On either view, the impossibility of providing a view of the procession discharged the plaintiff

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[125] McElroy and Williams, 'The Coronation Cases—I' (n 92) 249.

[126] *Canary Wharf v European Medicines Agency* [2019] EWHC 335 (Ch) [37(4)]; *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2002] EWCA Civ 1407, [2003] QB 679, 701 [66]; *Bell v Lever Brothers Ltd* [1932] AC 161 (HL) 226. See further, Peel (n 80) 1057–1058 [19-043].

[127] See, eg, *Clark v Lindsay* (1903) 88 LT 198 (KB) 202.

[128] To borrow the phrase from *National Carriers v Panalpina* (n 104) 695.

from the obligation to provide access. In the absence of a guarantee that the procession would take place, or a promise to perform even if the procession did not take place, the plaintiff's obligation was conditional upon it being possible to provide a view of the procession.

Of course, some might argue that on the facts of *Krell v Henry* this is an implausible construction of the agreement. It could be said that the defendant bargained for access to the rooms and that the view was no more than the reason the defendant wanted access to the rooms. This conclusion would be almost irresistible if, for example, the defendant was to have access to the rooms during the nights as well as the days.

But in many ways, this can only show one of two things, neither of which is fatal to the argument being put here. It could show that *Krell v Henry* was wrongly decided on its facts. That would only suggest that the court misapplied the principles, not that the principles are wrong, and that there are difficult questions of construction involved about which reasonable minds can disagree. Alternatively, it could show how exceedingly unusual the contract in *Krell v Henry* was. First, as mentioned above, the defendant was only to have access to the rooms during the days but not the nights. Secondly, the plaintiff did not warrant that the procession would take place. This is why the plaintiff was not in breach for failing to provide a view of the procession (though this fact would not change the analysis of whether the defendant had to pay).

These unique features of *Krell v Henry* can also explain an example given by Vaughan Williams LJ where the hirer would not be discharged from his or her obligation to pay the price—a cabdriver engaged to take a person to Epsom on

Derby Day at a 'suitable enhanced price for such a journey'.[129] Vaughan Williams LJ said that the hirer would not be discharged should the race not go ahead.[130] It is submitted that this would be because the contract could not, in this case, plausibly be construed as one 'to get him to the Derby' (which could not occur if there were no Derby); it would simply be a contract 'to get the passenger to Epsom'.[131] Of course, if the proper construction of the agreement was that the cabdriver had agreed to get the passenger to the 'Derby', then a similar result to *Krell v Henry* should follow.

Similar reasoning explains the decision in *Herne Bay Steam Boat Co v Hutton*,[132] which was delivered only a few days earlier by the same members of the Court of Appeal who sat in *Krell v Henry*. The plaintiff company agreed to make its steamboat available to the defendant on 28 and 29 June so that the defendant could take out paying passengers 'for the purpose of viewing the naval review and for a day's cruise around the fleet'.[133] The naval review, which was part of the same coronation celebrations as *Krell v Henry*, was cancelled. The defendant subsequently chose to have nothing further to do with the agreement, eventually informing the plaintiff on 29 June that he did not require the use of the ship and that he would not pay the balance of the hire. The Court of Appeal held that the defendant was liable to pay damages for his renunciation of his contractual obligations. One explanation of the case, given by McElroy and

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[129] *Krell v Henry* (n 5) 750.

[130] ibid. See also *Herne Bay Steam Boat Co v Hutton* [1903] 2 KB 683 (CA) 689.

[131] Peel (n 80) 1058 [19-043].

[132] *Herne Bay Steam Boat* (n 130).

[133] ibid 684. The quoted words are from the agreement itself.

Williams,[134] was that even if it could be said that the subject-matter of the contract was the use of a ship in order to provide a view of the naval review and the fleet, the effect of the naval review not taking place was not to deprive the defendant of substantially the whole benefit of the contract. The fleet was still there and it was not a trivial aspect. As Sir Frederick Pollock observed shortly thereafter, 'the fleet was still there… and, as the writer of these lines can bear witness, it was very well worth seeing without the review.'[135]

Another explanation is that the subject-matter of the contract was simply the use of the ship, which but for the defendant's renunciation would have been made available to him. That the defendant had wished to use it for the purpose of taking out passengers to view the naval review and the fleet was irrelevant. The defendant was buying the use of a ship with the hope of employing it profitably for paying customers. The only person who could have been selling a 'view' of the naval review and fleet, making it akin to *Krell v Henry*, was the defendant when he contracted with his customers, not the plaintiff company when it contracted with the defendant.

Finally, it is submitted that this understanding of *Krell v Henry*, which focuses on the subject-matter of the contract, is much more satisfactory than the current orthodoxy that English law has a doctrine of 'frustration of purpose', though one that will rarely, if ever, succeed. A case in point is the decision in

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[134] McElroy and Williams, 'The Coronation Cases—I' (n 92) 254–255.

[135] Pollock, 'Notes' (1904) 20 Law Quarterly Review 1, 4.

*Canary Wharf v European Medicines Agency*.[136] In that case, the European Medicines Agency (EMA) entered into a 25-year lease of property located at Canary Wharf, London, for the purpose of having its headquarters there. Following the news about the possibility of Brexit occurring, the EMA wrote to Canary Wharf and advised that if Brexit occurred, it would be 'treating that event as a frustration of the [l]ease'.[137] While Brexit was, at that stage, an uncertainty, proceedings were brought to clarify the position if Brexit should occur. One of the arguments the EMA sought to rely upon in support of its case for discharge was the 'frustration of a common purpose'[138] that 'the [p]remises would constitute the EMA's headquarters'.[139] In particular, there was evidence that the premises that were leased had been built in 'such a way as to suit the EMA (and conceivably only the EMA)'.[140]

If one believed in a frustration of purpose doctrine, it is hard to imagine a better case for it. The whole purpose of the lease was to provide a headquarters for the EMA—an agency of the European Union (EU)—in a member state of the EU. The purpose of the agreement would be frustrated when the United Kingdom ceased to be a part of the EU. Yet, Marcus Smith J held that the lease was not frustrated and said that the case did not even 'come close to a case

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136 *Canary Wharf* (n 126).

137 ibid [2].

138 ibid [34].

139 ibid [219].

140 ibid [217].

of frustration of common purpose'.[141] In a telling conclusion, he said that the EMA could not say that 'this is not what it bargained for'. [142]

On the assumption that there is a frustration of purpose doctrine, it is difficult to see how it could be said—as Marcus Smith J did—that '[t]his is not a case like *Krell v Henry* where the parties had a common purpose going beyond their agreement, which was thwarted'.[143] One answer given was that in this case the parties' purposes were 'divergent', with the EMA being focused on 'bespoke premises' and Canary Wharf focused on 'long-term cash flow, at the highest rate'.[144] But this only exposes a problem with the notion of a common purpose, namely, that there is no 'common purpose' of a contract; 'instead, there are [only] the purposes of the parties to the contract'.[145] And in commercial agreements, these objects will almost always diverge.[146]

The real reason that the EMA was not discharged from its obligation to pay rent was precisely that identified by Marcus Smith J: the EMA got exactly what it bargained for, namely, a valid legal lease. The subject-matter of the contract was simply a lease of commercial or office space. There was no term that the lease could be used only as a headquarters.[147] It would be better if English law recognised that there is no frustration of purpose doctrine, rather

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[141] ibid [247].

[142] ibid [248].

[143] ibid [244].

[144] ibid [245].

[145] Corbin (n 17) 326 §1322.

[146] Leon E Trakman, 'Frustrated Contracts and Legal Fictions' (1983) Modern Law Review 39, 47–48. See also McElroy and Williams (n 3) 142–143.

[147] A point made by Mr Justice Marcus Smith: *Canary Wharf* (n 126) [246].

than the current approach which merely pays lip-service to a doctrine that is never successfully invoked.

### 5.2.3 The 'not-radically-different' condition

The final category of case is concerned not with a single condition as such, but an amalgamation of conditions that have been implied into contracts. The precise conditions are various and distinct, but common to all is that they involve the implication of a condition to the effect that the circumstances in which performance is called for are 'not radically different' to those that were supposed to obtain at the time of contracting. They are thus referred to in this chapter, in the singular and at the more abstract level which unites them, as the 'not-radically-different condition'.

The not-radically-different condition arises because often it is not a reasonable construction of the parties' agreement to say that each promises to perform their respective obligations 'no matter what'.[148] Usually, the continued existence to some degree of the conditions prevailing, or supposed to be prevailing, at the time of contracting is a condition on which the contractual obligations of both parties are dependent.[149] As Earl Loreburn explained in *F A Tamplin Steamship Co Ltd v Anglo-Mexcian Petroleum Products Co Ltd*:

> [A] Court can and ought to examine the contract and the circumstances in which it was made… in order to see whether or

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[148] In the context of intentions, see Luca Ferrero, 'Conditional Intentions' (2009) 43 Noûs 700, 700; Gregory Klass, 'A Conditional Intent to Perform' (2009) 15 Legal Theory 107, 107.

[149] Hans Smit, 'Frustration of Contract: A Comparative Attempt at Consolidation' (1958) 58 Columbia Law Review 287, 304.

> not from the nature of it the parties must have made their bargain on the footing that a … state of things would continue to exist.[150]

The precise content of the not-radically-different condition will depend upon the contract under consideration, and the language with which the condition is expressed will necessarily be adapted to the case at hand.[151] At bottom, it reflects the fact that often 'from the nature of the contract it cannot be supposed that the parties, as reasonable men, intended it to be binding on them under such altered conditions.'[152] The language of 'not radically different' also reflects a basic fact, to be borne in mind when ascertaining the scope of contractual obligations, that '[s]ome delay or change is very common in all human affairs, and it cannot be supposed that any bargain has been made on the tacit condition that such a thing will not happen in any degree'.[153]

The not-radically-different condition can be engaged in circumstances where neither the possibility condition, the substantial-benefit condition, nor supervening illegality, would effect a discharge of either party from their contractual obligations. An example is *Metropolitan Water Board v Dick, Kerr & Co.*[154] In that case, the appellant Water Board had, in July 1914, contracted with the respondent firm of contractors for the construction of a reservoir to be completed within six years, although subject to a provision for extension. In February 1916, however, the Minister of Munitions, through the exercise of

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[150] [1916] 2 AC 397 (HL) 403.

[151] ibid 404.

[152] ibid. See also *Metropolitan Water Board v Dick, Kerr & Co* [1918] AC 119 (HL) 131.

[153] *Tamplin* (n 150) 403.

[154] *Metropolitan Water Board* (n 152).

powers conferred by the Defence of the Realm Acts and Regulations, directed the contractors to cease work on the contract, which they did. The Water Board subsequently commenced an action seeking a declaration that 'the contract [was] still in existence as a binding contract and had not been determined'.[155] The contractors alleged that the interruption caused by the notice meant that the contract had ceased to be binding. The House of Lords agreed and held that the contractors were discharged because of the failure of an implied condition.

The case was not—to borrow Lord Dunedin's words—a 'clean case of illegality' where the illegality was permanent.[156] While the notice had been in effect for almost two years at the time of judgment, the illegality was 'only temporary, and [would] some day be withdrawn'.[157] Thus, it could not be said that it would be illegal to perform the contract for its entire duration. Nonetheless, all members of the House agreed that the parties were discharged. Lord Dunedin said that 'the contract when resumed would be a contract under different conditions from those which existed when the contract was begun'.[158] Lord Finlay LC also said that the contract:

> does not cover the case in which the interruption is of such a character and duration that it vitally and fundamentally changes the conditions of the contract, and could not possibly have been in the contemplation of the parties to the contract when it was made.'[159]

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[155] ibid 123.

[156] ibid 128.

[157] ibid.

[158] ibid.

[159] ibid 126.

In sum, while a reasonable person in the position of parties may have contemplated some disruption to the performance of the contract, the degree of disruption was such that the 'from the nature of the contract it could not be supposed the parties, as reasonable men, intended it to be binding on them in such unreasonable conditions'.[160] This is because our obligations to perform are often conditional upon the state of affairs that existed at the time of contracting remaining the same, at least to some degree, at the time of performance.

Of course, the precise point at which the 'not-radically-different' condition will fail is necessarily imprecise and conclusions on this issue may well expose reasonable differences of opinion. An example is the decision in *F A Tamplin Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd*.[161] In that case, the appellant owners agreed to charter their steamship to the respondents for five years from December 1912 for the carriage of oil. The charterparty contained an exception for restraint of princes and rulers. In February 1915,[162] the steamer was requisitioned by the British Government for use as a troopship in the war. The owners claimed that the parties had been discharged from their obligations (or at least that their obligations had been suspended) by the requisitioning of the vessel. The charterers, who were willing to pay the agreed freight, claimed that the parties had not been discharged. The reason the parties took these (at first glance, surprising) positions was that the hire fee paid by the British Government

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[160] ibid 131.

[161] *Tamplin* (n 150).

[162] The ship had previously been requisitioned in December 1914 but there was no dispute in relation to that requisition, which was accepted by both parties 'as a merely temporary burden upon their rights under the charterparty': ibid 409.

(which both sides sought to claim) was higher than the sums due under the charter.

The House of Lords held, by a majority, that neither party had been discharged by the requisition. Earl Loreburn said that he could not infer that the interruption was, or would be, 'such as makes it unreasonable to require the parties to go on' and observed that '[t]here [might] be many months during which the ship [would] be available for commercial purposes before the five years [had] expired'.[163] By contrast, Lord Atkinson (in dissent) thought that the 'imposition of the restraint for a lengthened period create[d] a condition of things to which the charterparty [was] inapplicable'.[164]

The majority may have been influenced by the fact that owners were seeking to benefit from the higher rate of compensation payable by the government.[165] The only point that needs to be made here is that the question about when this condition is engaged is one on which reasonable minds can differ. Indeed, it has been observed that, although the majority and minority disagreed on the facts, the principles applied by each were 'identical'.[166]

Another case that illustrates this condition—and the difficult line-drawing exercise that its application can involve—is *Bank Line Ltd v Arthur Capel & Co*.[167]

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[163] ibid 405.

[164] ibid 421.

[165] Peel (n 7) 227–229 [5-060]. See also *Metropolitan Water Board* (n 152) 129.

[166] *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435 (HL) 443; *Metropolitan Water Board* (n 152) 127.

[167] *Bank Line* (n 166).

In February 1915, the appellant owners agreed to charter a steamship to the respondents for 12 months from the time at which the vessel was delivered and put at the disposal of the charterers. The ship was to be delivered by April 1915, but if it was not delivered by the end of the month the charterers were given an option to cancel the charter. The charterparty also provided that if the ship, through unforeseen circumstances, could not be delivered by the end of April, the charterers, if required by the owners, were to state whether they intended to cancel or take delivery of the vessel. Finally, the charterers were also given the option of cancelling if the vessel were 'commandeered' by the government during the charter.

The vessel was not delivered by the end of April 1915 (although the contract was not cancelled) and in early May 1915 it was requisitioned by the British government. Efforts were made by both parties to get the vessel released but these ceased in June 1915. The owners later received an offer to purchase the vessel and, after they arranged to provide the government with another vessel, they procured the vessel's release in September 1915. At this point, the charterers claimed that the owners were obliged to deliver the vessel and they sought damages for its non-delivery. In response, the owners argued that the requisition discharged the parties from their obligations to perform.

Importantly, the owners could not rely upon the possibility condition as permanently discharging them, rather than temporarily suspending their obligations, because the obligations of the parties were not permanently impossible to perform. Nonetheless, the House of Lords, by a majority, held that the owners were discharged and that the requisitioning of the vessel made the

'charter, as a matter of business a totally different thing'.[168] No member of the majority thought that the provision for such events in the contract precluded the implication.[169]

By contrast, Viscount Haldane, who dissented, would have held that the parties remained bound. In particular, he pointed to the facts that the vessel was to be used for twelve months 'not from a definite date, but from the date when the steamer was delivered to the charterers' and 'that they intended to use her for the carriage of coal across the Channel, a use which they could put her to at any period that was likely to call for it.'[170] He also noted that the contract expressly provided for the parties' rights if the ship were requisitioned, which demonstrated 'that such commandeering was contemplated by the parties as an event which would not necessarily put an end to the basis of their contract'.[171]

Viscount Haldane's view is the better one, but again this only shows a difference in the construction and application of this condition, rather than a difference in principle. Whether one agrees with the result in each of these cases, the question is not, as it was in the previous sections, whether an obligation has become impossible to perform or whether one party has been deprived of substantially the whole benefit of the bargain. The question is whether the circumstances in which performance is now called for are so far beyond the contemplated state of affairs at the time of contracting that the parties are

[168] ibid 460 (Lord Sumner). See also 444 (Lord Finlay LC).

[169] ibid 443 (Lord Finlay LC), 456 (Lord Sumner), 462 (Lord Wrenbury). Lord Shaw did not address the issue.

[170] ibid 445.

[171] ibid.

discharged from their unperformed contractual obligations. This is because our contractual obligations are often conditional upon the state of affairs that existed at the time of contracting remaining the same, at least to some degree, at the time performance is called for.

### 5.2.4 Unconditional agreements

Of course, in rare cases, where it has been expressed sufficiently clearly, the parties really do promise to perform 'no matter what'. Thus in *Salam Air SAOC v Latam Airlines Group SA*,[172] Foxton J, on an application for an injunction, was faced with the question of whether there was a sufficiently arguably case that the obligations of a lessee to pay rent under three six-year aircraft leases had been discharged when authorities, in response to the Covid-19 pandemic, placed significant restrictions on flights into and out of Oman (where the lessee and aircraft were based). The difficulty for the lessee was that this was a 'dry' lease—a lease in which the lessee undertakes all risks and responsibility for the aircraft and in which the lessor's obligation, aside from delivery, is limited to not interfering with the use, possession, and quiet enjoyment of the aircraft.[173] Moreover, the obligation to pay rent was expressed to 'be absolute and unconditional irrespective of any contingency whatever'[174]—a clause which is known as a 'hell or highwater' clause.[175] Unsurprisingly, Foxton J held that this clause—which had expressly made the obligation to pay rent unconditional—was 'fundamentally

[172] [2020] EWHC 2414 (Comm).

[173] ibid [48] ; *Wilmington Trust SP Services (Dublin) Ltd v Spicejet Ltd* [2021] EWHC 1117 (Comm) [4].

[174] *Salam Air* (n 172) [12], [51].

[175] *Bitumen Invest AS v Richmond Mercantile Ltd FZC* [2016] EWHC 2957 (Comm), [2017] 1 Lloyd's Rep 219, 221 [8]; ibid [51].

inconsistent' with any suggestion that the regulations had the effect of 'freeing [the lessor] of its obligation to pay rent'.[176]

## 5.3 A UNIFIED DOCTRINE OF FRUSTRATION?

A key feature of the so-called 'doctrine' of frustration that becomes apparent from analysing the relevant conditions at work is that the parties are often, although not always, discharged for failure of different conditions.[177] So, in *Taylor v Caldwell*,[178] the defendants were discharged from the obligation to give the plaintiffs the use of the musical hall due to impossibility (ie failure of the possibility condition). But had the owners been suing for the rent, it would seem absurd to say that the parties obliged to pay the money were discharged because of impossibility—it was perfectly possible for them to perform their obligation to pay the money.[179] They would be discharged because the impossibility of providing the Music Hall meant that they were deprived of substantially the whole benefit of the contract; the substantial-benefit condition had failed.

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[176] *Salam Air* (n 172) [51]. Cf *Spicejet* (n 173) [61], [65], in which Miss Julia Dias QC assumed without deciding that such a clause did not 'exclude the possibility of frustration'. However, the Deputy High Court Judge was very clear that she 'express[ed] no view one way or the other'.

[177] See generally, McElroy and Williams (n 3) xxvii, 140; Corbin (n 17) 326 §1322; J A Weir, 'Nec Tamen Consumebatur … —Frustration and Limitation Clauses' [1970] 28 Cambridge Law Journal 189, 191; John Stannard, 'Frustrating Delay' (1983) 46 Modern Law Review 738, 741–743. Compare Peel (n 7) 53–56 [2-050]–[2-054]; McKendrick (n 64) 144–146, 152–154.

[178] *Taylor v Caldwell* (n 4).

[179] McElroy and Williams (n 3) xxvii; Corbin (n 17) 326 §1322; Peel (n 7) 53–54 [2-050]; McKendrick (n 64) 144.

Yet the modern trend has been to regard these cases as revealing 'one single, fused doctrine of "frustration"'[180] with a single test for when frustration occurs. The start of this trend is usually identified as the 'war cases'—in particular, the decision in *Tamplin*,[181] discussed in the previous section.[182] In these cases, a number of the old decisions were 'rationalised' and 'transmuted … into the modern idea that a frustrating event displaced the contract itself'.[183] A consequence is that today there is said to be a 'general test for frustration',[184] namely, that given by Lord Radcliffe in *Davis Contractors Ltd v Fareham Urban District Council*:

> [F]rustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni*. It was not this that I promised to do.[185]

Of course, in a sense, the argument that there is a single reason which unites so-called cases of frustration is consistent with the argument being put forward in this chapter. Except for supervening illegality, which for the reasons given above is based upon different principles, each is an example of failure of

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[180] De Gregorio (n 12) 78. See Arnold D McNair, *Legal Effects of War* (Cambridge University Press 1920) 82; Arnold D McNair, 'Frustration of Contract by War' (1940) 56 Law Quarterly Review 173, 182 fn 40.

[181] *Tamplin* (n 150). Now see *Davis Contractors* (n 6) 729 (Lord Reid).

[182] See McNair, *Legal Effects of War* (n 180) 82; H C Gutteridge, 'Contract and Commercial Law' (1935) 51 Law Quarterly Review 91, 110; McNair, 'Frustration of Contract by War' (n 180) 182 fn 40; McElroy and Williams (n 3) 162; Stannard (n 177) 749; Andrew Tettenborn, 'From Chaos to Cosmos—Or Is it Confusion' [2002] 2 Web Journal of Current Legal Issues; De Gregorio (n 12) 77–78.

[183] Tettenborn (n 182).

[184] *Canary Wharf* (n 126) [22].

[185] *Davis Contractors* (n 6) 729 (emphasis added).

condition. The issue with the 'unified doctrine of frustration' is that it fails to appreciate that there are multiple conditions (and in this sense multiple reasons) in play that can operate together to discharge the parties from their respective obligations to perform. The modern approach instead looks for a single reason, in all cases, that discharges both parties from their obligations to perform. This is incorrect as a matter of principle and, as the next two sub-sections explain, this 'unification' has had some unfortunate side effects.[186]

### 5.3.1 First side effect: 'contracts' discharged instead of 'obligations'

First, the notion of a 'doctrine' of frustration has led courts and commentators to speak of 'contracts' rather than 'obligations' being 'frustrated' or discharged.[187] This tendency was described by Tony Weir as 'a characteristically sloppy English ellips[is]'.[188] In explaining that in *Taylor v Caldwell* it was the '*promise* [of each party] that was conditional, not the whole *contract*',[189] he said:

> So when the hall accidentally burnt down, this had an effect on the *promises* of both parties. But the *contract* need not somehow get consumed in the flames. It can survive, quite uncharred, in its own metaphysical world, and continue thence to regulate the rights and liabilities of the parties of which it is the source. … Instead of that, we have in English law the doctrine that *force majeure* makes the whole contract evanish like a Fifoot and Cheshire cat…[190]

It might be thought that this complaint is merely semantic, but it has contributed to courts making errors. Thus, in *Hirji Mulji v Cheong Yue*

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[186] McElroy and Williams (n 3) 162.

[187] See also the Law Reform (Frustrated Contracts) Act 1943, s 1.

[188] Weir (n 177) 191.

[189] ibid.

[190] ibid (emphasis in original).

*Steamship Co*, [191] it contributed to the Privy Council's conclusion that the 'frustration of the contract' meant that an arbitrator did not have jurisdiction to hear a dispute arising under it. Lord Sumner said that 'frustration brings the contract to an end forthwith, without more and automatically'[192] and that 'a contract that has been determined is in the same position as one that has never been concluded at all. It founds no jurisdiction.'[193] The House of Lords was rightly critical of this conclusion in *Heyman v Darwins Ltd*,[194] and *Hirji Mulji* was not followed in *Kruse v Questier & Co.*[195] Other common law courts have also noted that Lord Sumner was 'mistaken'[196] on this point. In fairness, and to not overstate the point, when orthodoxy refers to frustration automatically terminating 'the contract', what is meant is that the parties are prospectively discharged from the further performance of their obligations. The mistake here was in treating this situation as identical to one where no contract had been concluded at all. That is no doubt correct, but the notion of frustration bringing an end to 'the contract' is at least partly to blame for the confusion.

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[191] *Hirji Mulji* (n 1).

[192] ibid 505.

[193] ibid 502.

[194] [1942] AC 356 (HL) 366, 373, 383; 401.

[195] [1953] 1 QB 669 (QB) 679. See generally McKendrick (n 64) 149. It is now dealt with by the Arbitration Act 1996, s 7.

[196] *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 (HCA) 365 (Mason J).

### 5.3.2 Second side effect: separate treatment of 'frustration' and 'excuses'

A second side effect of the unified doctrine of frustration is that it has led to the separate treatment of 'frustration' and 'excuses' falling short of frustration,[197] with the latter being neglected, save in specialist texts.[198] It is said that in English law '[t]here is no such concept of as partial or temporary frustration on account of partial or temporary impossibility'[199] yet, at the same time, 'partial or temporary impossibility which occurs without the fault of one party may… give … an excuse for non-performance'.[200]

To illustrate partial impossibility, suppose a seller promises to sell to the buyer a particular tonnage of a crop to be grown specifically on the sellers land but, due to no fault of the seller, a portion of the crop fails. As we will see in s 5.5 below, the authorities appear to demonstrate that subject to the obligation being 'severable' (in that it can be broken down into individual obligations), the seller will not be liable for failing to deliver the failed proportion of the crop,[201] but may be liable for failing to produce the successful proportion of the crop.[202]

An example of temporary impossibility is illness. It has been said that although the temporary illness of an employee might not be 'of such a duration

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[197] See generally Bridge (n 9).

[198] Eg Peel (n 7).

[199] ibid 199 [5-007]. See also *Bank of New York Mellon v Cine-UK* (n 112) [211]–[212]; *London Trocadero (2015) LLP v Picturehouse Cinemas Ltd* [2021] EWHC 2591 (Ch) [168]. There was no appeal from this aspect of the decision (and the appeal was, in any event, dismissed): *Bank of NY Mellon v Cine-UK; London Trocadero v Picturehouse* (n 107).

[200] Peel (n 7) 199 [5-007].

[201] Eg *Howell v Coupland* (n 71).

[202] Eg *HR&S Sainsbury Ltd v Street* [1972] 1 WLR 834 (Assizes).

as to frustrate his contract of employment, the employee would not be in breach of the contract through failing to work while ill'.[203] Thus, in *Poussard v Spiers & Ponds Ltd*,[204] Madame Poussard's temporary illness 'was not any breach of contract by the plaintiff'[205] but it seems that had the defendant requested that Madame Poussard perform when she had recovered, she would have been bound to do so.[206]

The modern approach, 'with its focus on the discharge of contracts rather than obligations … consigns these cases to a sort of no-man's land'.[207] By contrast, on the approach put forward in this thesis, the relationship between so-called cases of 'excuses' and so-called cases of 'frustration' is clear and explained by the conditionality of the parties' respective obligations. In cases of partial impossibility, the often conditional nature of the obligation that is impossible to perform means that the party is under no immediate duty to perform that obligation, but this does not necessarily mean that he or she need not perform other contractual obligations. As for cases of temporary impossibility, so long as the impossibility persists that party will not be required to perform provided the possibility condition is in play. If the impossibility is permanent, then the condition has failed and that party will be discharged for

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[203] Peel (n 7) 232 [5-067].

[204] *Poussard v Spiers* (n 96), discussed in Bridge (n 9) 597–598 and Peel (n 7) 233–234 [5-071].

[205] *Poussard v Spiers* (n 96) 414.

[206] Bridge (n 9) 598. For another example, see *Minnevitch v Café de Paris (Londres) Ltd* [1936] 1 All ER 884 (KB), referred to in Peel (n 7) 233 [5-069].

[207] Bridge (n 9) 589.

failure of the condition.[208] Cases involving 'frustration' and cases involving 'excuses' are not expressing a fundamentally different idea; the different result is simply a feature of the different impact an event can have on the relevant condition.

### 5.3.3 Does the not-radically-different condition cover the field?

As mentioned above, the unified doctrine of frustration appears to derive from a number of the war cases identified in s 5.2.3, which were concerned with the not-radically-different condition. Expressed at this level of generality, this condition covers a range of conditions that have been implied into contracts. In fairness then, might it be argued that this condition covers the field—in particular, the possibility condition and the substantial-benefit condition—and in that sense there is a unified doctrine? Indeed, expressing all the conditions in this way, in essence as a test for frustration, 'has the advantage of being flexible and capable of application to a wide range of circumstances'.[209]

While initially attractive, the problem with treating all cases as subsumed under the not-radically-different condition is that it does not reveal in cases of impossibility or failure of the substantial-benefit condition why the circumstances in which performance is called for are 'radically different'. In many cases, expressing the condition at the level of generality of 'not radically different' will only obscure the true reason for discharge.[210] It is true that in some cases, ie those

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[208] On this distinction between 'suspension' and 'discharge', see s 1.3.2.

[209] *Codelfa* (n 196) 380 (Aickin J).

[210] Stannard (n 177) 743.

falling outside of these two categories, often the most that can be said of the relevant condition is that the circumstances in which performance is called for shall not become radically different (and that will be the best way to express the condition), but these cases are exceptional and at the margin. Whenever possible to do so, the condition should be stated with precision.

## 5.4 DEFENDING THE IMPLIED CONDITION VIEW

The implied condition view defended in this chapter is just one view which ascribes the effects of 'frustration' to an implicature in the parties' agreement. Another view, which is not the same as that adopted here, is that the effects of frustration are best explained by an implied 'term' by which the parties are taken to have positively agreed to discharge or terminate their unperformed contractual obligations in the events that have happened. This 'implied term' view differs from the implied condition view because rather than stating (negatively) that the parties simply did not agree to perform in all circumstances, it states (positively) that the parties agreed that in the events that have happened, there should be an additional term that each party is discharged from further performance.

While it is the implied condition view that this chapter defends, it is fair to say that neither the implied condition view nor the implied term view represents current orthodox thinking. Indeed, both views are often dismissed on the basis that they are fictitious.[211] In *Ocean Tramp Tankers Corp v V/O Sovfracht*

[211] See, eg, Trakman (n 146) 41; P S Atiyah, 'Judicial Techniques and the English Law of Contract' (1968) 2 Ottawa Law Review 337, 361; Beatson, Burrows, and Cartwright (n 81) 480; Ewan McKendrick, 'Express Terms' in Hugh Beale (ed), *Chitty on Contracts* (34th edn, Sweet & Maxwell 2021) vol 1 1907, 1913 [26-011].

*(The Eugenia)*,[212] Lord Denning said that 'the theory of an implied term has been discarded by everyone, or nearly everyone, for the simple reason that it does not represent the truth'. And in *James Scott & Sons Ltd v R&N Del Sel*,[213] Lord Sands famously said that the theory of an implied condition involves 'a pious fiction—a fiction because it does not correspond with anything that was in the minds of parties at the time; pious because it seeks to do homage to a very sacred legal principle, the sanctity of contract'.

Unfortunately, the criticisms of these views—particularly insofar as they apply to the implied condition view—have tended to attack a straw man. This section shows (i) how the criticisms have distorted the implied condition view, (ii) how they have rejected it based upon a false premise, and (iii) how the view that has been adopted in its stead, the so-called 'construction theory', is just the implied condition view by another name. It is only once this ground is cleared that we can fairly assess whether the implied condition view is convincing (and it is submitted that it is). Before doing this, however, it is worth clarifying an important feature of the implied condition view being put forward here.

### 5.4.1 Clarification

It is sometimes assumed that any condition must be a condition subsequent operating to defeat 'the contract', rather than a condition precedent to the unperformed obligations of the parties. This has led judges—even those minded to adopt the implied condition view—to suggest that it is 'easier to imply a

[212] [1964] 2 QB 226 (CA) 238.

[213] [1922] SC 592 (Court of Session) 596.

condition precedent defeating a contract before its execution has commenced than a condition subsequent defeating the contract when it is part performed.'[214]

The suggestion that it is the 'contract' that is subject to the condition flows from the tendency to speak of 'contracts' rather than 'obligations' being discharged. Meanwhile, the suggestion that the condition must be a 'condition subsequent' seems to flow from the failure to draw the distinction—explored in Chapter 1—between an obligation that has fallen due and therefore calls for immediate performance and an obligation that requires performance only at some future date.[215] MacKenna J illustrated this distinction in *HR&S Sainsbury Ltd v Street* when he said:

> 'He *shall* be under an obligation to deliver in the future if he produces …' would be in form a condition precedent. 'He *is* under an obligation to deliver in the future but that obligation shall be discharged if he does not produce …' would be in form a condition subsequent. The difference is a matter of words, not of substance.[216]

When cast in the form of a condition precedent, the italicised language of 'shall' refers to the obligation that will fall due in the future (ie the immediate duty of performance). But when cast in the form of a condition subsequent, the italicised language of 'is' refers to the more general obligation to perform in the future that can be described as a present duty. As explained in Chapter 1, the only difference

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[214] *Tamplin* (n 150) 423.

[215] See s 1.3.1.

[216] *HR&S Sainsbury* (n 202) 839 (emphasis added).

between the two is in the level of abstraction at which the obligation is described.[217]

The reason, aside from clarity, that it is important to note that there is an implied condition precedent to the unperformed obligations of the parties is that thinking in terms of a condition subsequent to 'the contract' renders the implied condition view less plausible. It seems less plausible to say that the parties positively agreed (as would be the case with a condition subsequent) that if some unforeseen event should occur, 'the contract' should cease—which implies foresight of the precise event in question—than it is to say, negatively (as is the case with a condition precedent), that the parties simply did not agree to perform in all circumstances: '*non haec in foedera veni*. It was not this I promised to do'.[218] On the implied condition view, the parties do not agree to 'terminate the contract'; they just do not promise to perform in all circumstances.

Having made this clarification, we can now move on to consider the problems with objections to the implied condition view.

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[217] See s 1.3.1.

[218] *Davis Contractors* (n 6) 729 (emphasis added). This distinction between a positive and negative agreement is taken (with modification) from Frederick Wilmot-Smith, *Failure of Condition* (DPhil Thesis, University of Oxford 2013) 251–257; Frederick Wilmot-Smith, 'Termination after breach' (2018) 134 Law Quarterly Review 307, 314.

### 5.4.2 Condition stated with needless precision

The first problem is that objections to the implied condition view have often stated the condition 'with needless precision'.[219] A good example is Lord Sands' 'tiger days excepted' example. He said:

> A tiger has escaped from a travelling menagerie. The milkgirl fails to deliver the milk. Possibly the milkman may be exonerated from any breach of contract; but, even so, it would seem hardly reasonable to base that exoneration on the ground that 'tiger days excepted' must be held as if written into the milk contract.[220]

In *Davis Contractors Ltd v Fareham Urban District Council*,[221] Lord Reid relied upon this example to illustrate the 'artificiality of the theory of an implied term'. The problem with it is that 'the exception is specified with needless precision'.[222] As Dr Frederick Wilmot-Smith has noted, '[i]f the exception were phrased in more abstract terms—if, for example, the exception were: "unless performance is impossible"—the objection is denuded of much of its power'.[223] That is what the first half of this chapter sought to do.

### 5.4.3 Rejected as not corresponding to 'subjective' intentions of parties

Another problem—and a striking feature of the rejections of the implied condition view—is that often the implied condition view is rejected because it does not correspond with the subjective intentions of the parties. So it is said

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[219] Wilmot-Smith, 'Termination after breach' (n 218) 319.

[220] *James Scott & Sons* (n 213) 596.

[221] *Davis Contractors* (n 6) 720.

[222] Wilmot-Smith, 'Termination after breach' (n 218) 318.

[223] ibid 318–319.

that 'the actual intention of the parties was nowhere to be found',[224] that 'we have little ground for supposing that the parties thought of the possibility of fire [in *Taylor v Caldwell*]',[225] or that 'there is something of a logical difficulty in seeing how the parties could even impliedly have provided for something which ex hypothesi they neither expected nor foresaw'.[226] But implication and construction do not depend upon the subjective or 'actual' intentions of the parties.[227] As Oliver Wendell Holmes Jr memorably wrote, 'nothing is more certain than that parties may be bound by a contract to things which neither of them intended'.[228] Dr Jonathan Morgan has put it his way:

> Once we accept that the meaning of contracts does not depend on what either party actually (subjectively) believed, thought or intended, there is no necessary illogicality in implying a term about an unusual occurrence that *ex hypothesi* the actual parties had not considered – contrary to the superficially attractive reasoning in the *Davis Contractors* case.[229]

Admittedly, there are some judicial statements that suggest that the implied condition theory was based upon the subjective intentions of the parties.[230] But these statements run into the problem, mentioned above, that the 'general test for implication of terms on the facts is not subjective but

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[224] Trakman (n 146) 42.

[225] Corbin (n 17) 356 §1331.

[226] *Davis Contractors* (n 6) 728.

[227] For implication, see *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742, 754 [21]; *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408 (HL) 459. For interpretation, see *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) 912–913.

[228] Mr Justice Holmes, 'The Path of the Law' (1897) 10 Harvard Law Review 457, 463.

[229] Jonathan Morgan, 'Common Mistake in Contract: Rare Success and Common Misapprehensions' (2018) 77 Cambridge Law Journal 559, 561.

[230] See, eg, *Hirji Mulji* (n 1) 504.

objective'.[231] Moreover, proponents of this view 'did not put forward a purely subjective version'.[232] In *F A Tamplin Steamship*,[233] Earl Loreburn, focused on the question '[w]hat, in fact, was the true meaning of the contract?', and said that 'from the nature of the contract it cannot be supposed the parties, as reasonable men, intended it to be binding on them under such altered conditions'. On this approach, criticisms premised on the notion that the test is subjective have misunderstood the implied condition view.

### 5.4.4 A false distinction between implication and construction

Perhaps more surprising is that the view which has taken the implied condition view's place as orthodoxy is that whether the parties are discharged for frustration is a matter of construction. The leading statement is that of Lord Reid in *Davis Contractors Ltd v Farham Urban District Council*:

> [F]rustration depends, at least in most cases… on the true construction of the terms which are in the contract read in light of the nature of the contract and of the relevant surrounding circumstances when the contract was made. … The question is whether the contract which they did make is, on its true construction, wide enough to apply to the new situation: if it is not, then it is at an end.[234]

The reason that this is surprising is that to say that on the occurrence of some uncertain event the contractual obligations of the parties cease to bind—because, as a matter of construction, the contract was not intended to be binding in these circumstances—is just another way of saying that the obligations of the

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[231] Beatson, Burrows, and Cartwright (n 81) 480.

[232] Peel (n 80) 1101 [19-124].

[233] *Tamplin* (n 150) 404; quoted in Peel (n 80) 1101 [19-124].

[234] *Davis Contractors* (n 6) 720–721. See also 729 (Lord Radcliffe) expressing a similar idea.

parties are conditional. This appears to have at least been noticed judicially. In *Canary Wharf*,[235] Marcus Smith J said that the construction theory is simply a 'more sophisticated variant' of the 'implied term or implied condition theory'.[236] Academically, it has been said that this theory 'seems to involve nothing other than a process of necessary implication'.[237] And Lord Hoffmann, speaking of the construction theory, has also said:

> But that does not mean that the judges who adopted the implied term theory of frustration were wrong. They were also right because the implication of any implied term in fact is also a question of construction. The ultimate question remains: is this what the contract means?[238]

The invocation of Lord Hoffmann will no doubt bring to mind the familiar debate about whether there is a meaningful distinction between implication and construction.[239] While space does not permit a full analysis of the issue, it seems clear that Lord Hoffmann's view was the better one despite having been rejected by Lord Neuberger in *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd.*[240] Lord Neuberger's statement that '[w]hen one is implying a term or a phrase, one is not construing words, as the words to be implied are ex hypothesi not there to be construed'[241] fails to appreciate that '[t]he meaning which a document (or any other utterance) would convey to a

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[235] *Canary Wharf* (n 126).

[236] ibid [26(4)].

[237] Goldberg (n 2) 467.

[238] Lord Hoffmann, 'Anthropomorphic Justice: The Reasonable Man and His Friends' (1995) 29 The Law Teacher 127, 140.

[239] See, eg, *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988 and *Marks & Spencer* (n 227).

[240] *Marks & Spencer* (n 227).

[241] ibid 756 [27].

reasonable man is not the same thing as the meaning of its words'.[242] In life and in law, 'people often mean more than they say'.[243] A further problem with the rejection of this view in *Marks & Spencer* is that nowhere is it suggested what the justification is for the implication of terms, if not to ascertain the meaning of the contract as a whole.

But the argument here does not depend on accepting this. Even if one agrees with Lord Neuberger generally, the distinction between implication and construction (if any) in this specific context is vanishingly small. This is because the question whether the parties' express promises are implicitly conditional could be seen, not as involving the implication of a new 'term', but simply as establishing an implicit meaning of an express term,[244] similar to Ludwig Wittgenstein's 'game'[245] example (discussed below). Thus, construing the contract or implying a condition 'are in these cases alternative ways of describing the same process'.[246] And if the construction theory today provides the 'most satisfactory explanation of the doctrine of frustration',[247] then it seems the implied condition view has simply been accepted under a different name. We have come full

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[242] *ICS* (n 227) 913.

[243] Lord Hoffmann, 'Language and Lawyers' (2018) 134 Law Quarterly Review 553, 564.

[244] See Frederick Wilmot-Smith, 'Express and Implied Terms' (Draft Manuscript).

[245] Ludwig Wittgenstein, *Philosophical Investigations* (rev 4th edn by PMS Hacker and Joachim Schulte, Wiley-Blackwell 2009) 38.

[246] Peel (n 80) 1103 [19-127]. See also Hoffmann (n 238) 140.

[247] Peel (n 80) 1103 [19-127].

circle—as Sir Frederick Pollock said in 1881, 'the modern tendency … is to reduce all the rules on this subject to rules of construction'.[248]

### 5.4.5 Is the implied condition view nonetheless fictitious?

If it is accepted that the 'construction theory' is the currently preferred explanation in the cases[249] then, as a matter of positive law, it seems clear that frustration is a product of the parties' agreement. And, as explained above, the construction theory is, in substance, no different to the implied condition view. But is the idea that the conditions are found in the parties' agreement convincing?

One problem said to arise with the implied condition view 'is that it turns on a test of what the parties would have said in response to the interjection of the "officious bystander" at the moment of the parties' agreement'.[250] In *Denny Mott & Dickson v James B Fraser & Co Ltd*,[251] Lord Wright said:

> It is not possible, to my mind, to say that, if they had thought of it, they would have said: 'Well, if that happens, all is over between us.' On the contrary, they would almost certainly on the one side or the other have sought to introduce reservations or qualifications or compensations.

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[248] Frederick Pollock, *Principles of Contract being A Treatise on the General Principles Concerning the Validity of Agreements in the Law of England* (3rd edn, Stevens and Sons 1881) 381.

[249] Cf *Canary Wharf* (n 126) [26(5)], but see Peel (n 80) 1103–1104 [19-128].

[250] *Canary Wharf* (n 126) [26(1)]. The reliance on the 'officious bystander' appears, in this context, to have originated from Earl Loreburn in *Tamplin* (n 150) 404.

[251] [1944] AC 265 (HL) 275.

This criticism has been repeated in a number of cases.[252] But it suffers from two key defects. First, like we noted above, it often expresses the relevant event with too great a degree of specificity. So, in *National Carriers v Panalpina*,[253] Lord Hailsham spoke of the officious bystander pointing out 'a temporary closure of Kingston Street pending a public local inquiry into a proposal for demolition after the lease had been running for over five years' and then said, unsurprisingly, 'I have not the least idea what they would have said'. Not only does this express the event with too great a degree of precision, it should also be noted that in *National Carriers v Panalpina* the 'contract' was not 'frustrated', so Lord Hailsham's answer is unsurprising.

The second defect with this criticism flows from the use of the 'officious bystander' test in the first place. As evidenced by the statements made when raising the criticism, the 'officious bystander' test runs the risk of focusing on the actual parties, even though the inquiry is 'irrespective of the individuals concerned, their temperaments and failings, their interest and circumstances'.[254] As Lord Hoffmann explained:

> The vividness of the scene which [the invocation of the officious bystander] creates mean that we cannot avoid having our minds predispositions influenced by what we know of the actual characters of the contracting parties. And yet we know that it is a fundamental principle of the English law of contract that on a question of construction, the characters, minds and subjective intentions of the actual parties are irrelevant and inadmissible.[255]

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[252] See also *The Eugenia* (n 212) 238; *Davis Contractors* (n 6) 720; *National Carriers v Panalpina* (n 104) 687.

[253] *National Carriers v Panalpina* (n 104) 687.

[254] *Hirji Mulji* (n 1) 510.

[255] Hoffmann (n 238) 139.

The combination of these two defects has given unmerited strength to the objections against the implied condition view based on the use of the officious bystander. But when the metaphor of the officious bystander is removed, the position becomes clearer. The fact that had the individual parties known the precise means by which (i) an obligation would become impossible to perform, (ii) one party would be deprived of substantially the whole benefit of the bargain, or (iii) the circumstances would become radically different, they may have bargained for something different, or indeed not bargained at all, is beside the point. The question is what a reasonable person would have understood the parties to mean, and that question is to be assessed objectively at the time of contracting.

The strongest objection is that the implied condition view depends on too capacious a notion of agreement, even when assessed objectively, to be plausible. Wilmot-Smith has noted that whether frustration can be explained in this way 'depends, in particular, upon the plausibility of building a generic exception, such as [the possibility condition] into parties' agreements'.[256] While expressly not engaging in that project, he notes that 'the widespread rejection of the implied terms thesis of frustration illustrates that few believe the contracting parties' agreement is capable of bearing the semantic load Blackburn J must have supposed'.[257]

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[256] Wilmot-Smith, 'Termination after breach' (n 218) 319.

[257] ibid.

It will not be possible in this chapter to address the 'deep questions in the philosophy of action'[258] raised by Wilmot-Smith's doubts.[259] But a few brief points can be made. To begin, and to put the debate into its context, it is well accepted that our utterances can have meanings that are not explicitly or consciously stated. Take Wittgenstein's famous example:

> Someone says to me, 'Show the children a game.' I teach them gambling with dice, and the other says, 'I didn't mean that sort of game'. In that case, must he have had the exclusion of the game with dice before his mind when he gave the order?[260]

The point of the example is that the background context limits the meaning of the words used, even if the speaker did not 'consciously formulate dice as an exclusion'.[261] The answer to the question therefore is 'no'. And as Wilmot-Smith notes, this 'insight is, in substance, widely accepted in the law of contract'.[262] That is why 'the meaning of [a] document is what the parties using those words against the relevant background would reasonably have been understood to mean'.[263] The precise debate in this context is 'about quite *how much* work the more robust concept of meaning can do'.[264]

The debate boils down to whether 'background assumptions' can constitute a condition of our promises to perform. The premise of this debate

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[258] ibid.

[259] Although see Alexander Georgiou, 'Mistaken Payments, Quasi-Contracts, and the "Justice" of Unjust Enrichment' (2022) 42 Oxford Journal of Legal Studies 606; Ferrero (n 148).

[260] Wittgenstein (n 245) 38.

[261] Wilmot-Smith, *Failure of Condition* (n 218) 56.

[262] ibid 56.

[263] *ICS* (n 227) 913; quoted ibid 56.

[264] Wilmot-Smith, *Failure of Condition* (n 218) 56 (emphasis in original).

appears to be that expressions of intentions, or agreements, are construed objectively in a manner consistent with how we understand our subjective intentions to be formed. If our subjective intentions are not conditioned by background assumptions, it seems unlikely that a reasonable person would understand our statements of intentions or promises to be implicitly conditional upon background assumptions remaining true. So, an understanding of how conditional intentions are formed helps us understand how a reasonable person would construe a promise to perform and whether it is implicitly conditional.

An example of a background assumption was given by Professor Lon Fuller:

> The absentminded professor stepping from his office into the hall as he reads a book 'assumes' that the floor of the hall will be there to receive him. His conduct is conditioned and directed by this assumption, even though the possibility that the floor has been removed does not 'occur' to him; that is, it is not present in his conscious mental processes.[265]

Wilmot-Smith argues that these ideas—of a 'condition' and a 'background assumption'—'must be kept apart'.[266] But he accepts that '[t]he distinction between a conditional intention and an intention formed on the basis of a background assumption is an extremely difficult one to draw in individual cases' and that '[t]he precise line between the two is determined by how robust a concept of implicit intention we employ'.[267] Nonetheless, he argues that in cases of frustration 'the underlying normative principle seems to be closer to a

[265] Lon L Fuller and Melvin A Eisenberg, *Basic Contract Law* (8th edn, West Academic Press 2006) 732–3; quoted in Melvin A Eisenberg, *Foundational Principles of Contract Law* (Oxford University Press 2018) 628.

[266] Wilmot-Smith, *Failure of Condition* (n 218) 61.

[267] ibid 63.

background assumption'.[268] By contrast, in a recent piece, Alexander Georgiou argues that all background assumptions form part of our conditions of intention—a much wider claim than we need to accept here—but that only those that are expressly communicated or would be obvious to a reasonable person in the position of the other party form part of any agreement.[269]

In the context of 'frustration', it seems true to say that there is, at least in principle, a distinction between 'conditions' and 'background assumptions'. Not every assumption constitutes a condition of a party's obligation to perform. In *Canary Wharf*,[270] the assumption that the United Kingdom would remain a member of the European Union and therefore that the premises could be used as headquarters, while known to both parties, was not a condition of the EMA's obligation to pay rent. Indeed, the rejection of a broader 'frustration of purpose' doctrine in this chapter, if correct, means that it cannot be the case that every background assumption, known to both parties, is a condition of the obligation to perform. But that does not mean that no background assumption can form part of the conditions to be found in the agreement.

Ultimately, it is submitted that this more robust concept of meaning can still explain the conditions identified in this chapter. To start with the easiest case first—the substantial-benefit condition—it has long been recognised that 'in a bilateral contract parties enter into contracts in order to secure the performance

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[268] ibid 250.

[269] Georgiou (n 259).

[270] *Canary Wharf* (n 126).

of the return promise rather than bargain for a lawsuit'.[271] Would a reasonable person in the position of the parties in *Taylor v Caldwell* have supposed that the plaintiffs were promising to pay even if not provided the use of the Music Hall? Absent any express or implied promise to do so, the answer to this would seem to be no.

As for impossibility, the question of construction appears simply to be whether the parties have promised to perform in the event of an impossibility of the kind that has arisen or not.[272] Did the parties promise to perform 'come Hell or High Water',[273] in which case their respective promises will be construed as absolute and unconditional? In some cases, such as where one party has taken on the risk that performance will not be possible, this will be the case. But often this will not be the proper construction. Parties enter into agreements with the background knowledge that a party will be unable to perform an impossibility, and unless one party has promised for one reason or another that they will perform no matter what, or that they will perform in these particular circumstances of impossibility, then the most natural conclusion is that they did not promise to perform an impossibility. And if there is no promise, then there must be a condition.[274] This might be why in *Taylor v Caldwell*, Blackburn J

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[271] Francis Dawson, 'Readiness and Willingness under the Contractual Remedies Act' (2017) 23 New Zealand Business Law Quarterly 61, 65.

[272] See J C Smith, 'Contracts—Mistake, Frustration and Implied Terms' (1994) 110 Law Quarterly Review 400, 403.

[273] Borrowed from Weir (n 177) 191.

[274] Smith (n 272) 403.

conditioned his proposition on 'the absence of any express or implied warranty that the thing shall exist'.[275]

The hardest cases are those falling under the umbrella of the 'not-radically-different' condition. This is where the distinction between a background assumption and a condition seems most relevant. Indeed, that is why care must be taken to ensure that the not-radically-different condition is only found to have failed in the most 'radical' of cases. As noted earlier, 'it cannot be supposed that any bargain has been made on the tacit condition that [change] will not happen *in any degree*'.[276] But it does seem that some cases can be conceived of in which it would seem fair to say that one party did not promise to perform in the circumstances in which the parties find themselves. Thus, in the example of the escaped tiger from the travelling menagerie given above—which is arguably an instance of this condition—it seems unlikely that a reasonable person would have understood the milk delivery person to be promising to perform at risk to life and limb.

Of course, in all these cases if the parties had wished to make their respective promises conditional, they could have done so expressly. That was the thinking behind the old approach in *Paradine v Jane*. But the 'seductive idea that a contract can … [expressly] articulate every contingency that might arise before, during, or after performance is sheer fantasy'.[277] Put another way: '[I]n

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[275] *Taylor v Caldwell* (1863) 3 B & S 826, 833; 122 ER 309, 312.

[276] *Tamplin* (n 150) 403 (emphasis added).

[277] Randy E Barnett and Nathan B Oman, *Contracts: Cases and Doctrine* (6th edn, Wolters Kluwer 2017) 1065; quoted in Eisenberg, *Foundational Principles of Contract Law* (n 265) 629.

contracting, as in other areas of life, some things go without saying. And a central characteristic of things that go without saying is—they are not said.'[278]

### 5.4.6 Summary

In summary, the implied condition view can explain the discharge of the parties' respective obligations to perform in cases of so-called frustration. The objections to this view have tended to attack a strawman. They have stated the condition with needless precision and have rejected the implied condition view on an incorrect basis—that we are concerned with what the parties subjectively intended. Moreover, the view which appears now to be favoured judicially and academically—the 'construction theory'—properly understood, is the implied condition view in all but name. In particular, the distinction (if any) between implication and construction in this context is meaningless once it is appreciated that this view can be seen not as involving the implication of a new 'term', but as establishing an implicit meaning of an express term. While this does involve a capacious notion of agreement, it is well accepted in life and in law that our utterances can have meanings that are not explicitly or consciously stated. As for how much work this notion of agreement can do, if one accepts that some background assumptions can form part of the conditions of our intentions, then there is no reason why they cannot form part of the conditions found in our agreements. And if this is right, then the conditions in cases of frustration can be found in the parties' agreement.

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[278] Eisenberg, *Foundational Principles of Contract Law* (n 265) 629.

None of this is to say that understanding frustration in this way makes it any easier to determine the scope of the relevant conditions and when they will fail. The implied condition view is not a panacea for these difficult questions of construction, which will often involve line-drawing and differences of opinion. The importance of understanding this view, however, is that it helps us understand why the parties are discharged, and how this form of discharge relates to other instances of discharge in contract law.

## 5.5 IS FRUSTRATION INVARIABLY AUTOMATIC?[279]

The final part of this chapter deals briefly with a question often raised in connection with the relationship between discharge following breach and discharge in cases of so-called frustration: 'is frustration invariably automatic'?[280] On the orthodox approach, discharge following breach depends upon an election to exercise the 'power to terminate', whereas 'frustration' 'brings the contract to an end forthwith, without more and automatically'.[281] On the view put forward in this thesis, however, the distinction between these two instances of discharge is much less significant than it at first sight appears. This is because in both cases the party whose obligation was conditional is discharged immediately upon the failure of the condition. In this limited sense, both discharge following breach and discharge following frustration are 'automatic'.

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[279] See Goldberg (n 2).

[280] ibid. See Wilmot-Smith, 'Termination after breach' (n 218) 314–316; McKendrick (n 64).

[281] *Hirji Mulji* (n 1) 505.

But even on this view, the question arises in another form. In the context of breach, it was said that ordinarily (subject to the limits discussed in Chapter 4) [282] the innocent party may waive the condition and continue to perform and insist upon performance. Is it then possible for the parties in a case of 'frustration' to waive the relevant conditions and continue performing?[283] In *BP Exploration Co (Libya) Ltd v Hunt (No 2)*,[284] Robert Goff J answered this question in the negative. He said:

> [I]t is well established that, if a contract is frustrated, it is forthwith determined as a matter of law. … That being the case, it is somewhat difficult to talk in terms of one party in such circumstances 'waiving frustration of the agreement or any right to rely thereon' or being 'estopped from relying thereon' against the other party.[285]

In a similar vein, in *Joseph Constantine Steamship*,[286] Lord Wright said: '[I]n the case of frustration the contract is ended and dead, simply by the frustrating event. If the parties choose to go on with it, that is in truth entering into a new contract.'

It is apparent from these statements that the reason it is not seen as possible for the parties to continue performance in cases of so-called frustration is that 'the contract' has been determined. But as Professor John Stannard has argued in this context, '[t]his sort of reasoning leads to muddle and confused thinking'.[287] It acts '[a]s if there were some entity called "the contract" which

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[282] See s 4.7.2.2.

[283] This difficulty was identified in Wilmot-Smith, *Failure of Condition* (n 218) 258.

[284] [1979] 1 WLR 783 (QB) 809–810.

[285] ibid.

[286] *Joseph Constantine Steamship* (n 13) 188.

[287] Stannard (n 177) 746.

could be "in existence" one moment and "gone" the next moment!'[288] The conclusion follows from the premise, but the premise is wrong.

In principle, the parties ought to be able to waive the conditions of their obligations to perform—'frustration' need not be 'invariably automatic'.[289] Take a case in which a seller promises to sell to the buyer 100 tons of a crop specifically to be grown on the seller's land but, due to no fault of the seller, most of the crop fails and only 10 tons is harvested. There are three possibilities:

(1) It may be that, on a proper construction of the contract, the price is 'severable', meaning that delivery of 100 tons is not a condition precedent to payment and that each delivery of a ton satisfies the condition precedent to payment of the severed proportion of the price.[290] In such a case, it would make sense to say that the obligation to deliver is also severable (in that it can be broken down into individual obligations), such that the possibility condition only discharges the seller pro tanto.[291] The result would be that the seller is bound to deliver the 10 tons harvested, and the buyer is bound to accept (and pay for) the 10 tons. Waiver is not relevant in this scenario.

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[288] ibid.

[289] Goldberg (n 2). See also McElroy and Williams (n 3) 96–98, 106, 221–231.

[290] See, eg, *Ritchie v Atkinson* (1808) 10 East 295, 103 ER 78.

[291] Eg *Howell v Coupland* (n 71) (although note the ambiguity as to whether the seller was required to deliver the successful proportion, which he had done; the only issue was in respect of the unsuccessful proportion).

(2) Alternatively, although the price and the obligation to deliver are severable, it may be that delivery of 100 tons is a condition of the buyer's obligation to accept (and pay for) the crop. In such a case, the buyer would be under no duty to accept anything less than 100 tons. The seller, on the other hand, would again be discharged only pro tanto by the possibility condition, but prima facie bound to deliver the 10 tons harvested. This would present the buyer with a choice: either the buyer could refuse to accept the delivery (in which case the seller would be discharged due to the failure of the concurrent condition that the buyer be ready, willing, and able to accept delivery), or the buyer could waive the condition of delivery of 100 tons and accept the 10 tons harvested (in which case the seller would be bound to deliver and liable in damages for failing to deliver the 10 tons). This appears to have been the result reached in *HR&S Sainsbury Ltd v Street*.[292] Buyers agreed to purchase 275 tons of barley that was to be grown on the seller's farm. The crop, due to no fault of the seller, only produced 140 tons, which was then sold to a third party. The buyers brought an action for damages for the failure to deliver the 140 tons. MacKenna J held that the seller was liable and that the buyers had the option of requiring delivery of the crops produced.

[292] *HR&S Sainsbury* (n 202).

(3) Finally, it may be that neither the price nor the obligation to deliver are severable in the sense described above, and that on a proper construction of the agreement the seller only promised to deliver 100 tons (no more, no less) and the buyer only promised to accept (and pay for) 100 tons (no more, no less). In such a case, if the seller waives the condition of possibility, the buyer is still under no duty to accept and pay for the goods. If the buyer waives the condition that 100 tons are delivered, the seller is still under no duty to provide the goods. This was the result reached in *Lovatt v Hamilton*.[293] A contract for the sale of 50 tons of palm oil to arrive onboard a particular vessel was entered into but only seven tons arrived. The Court held that the arrival of the oil was a condition precedent and that the buyers were not entitled to the seven tons which had arrived on the basis that it was an 'entire contract'.[294] In such a case, both parties must agree to waive the relevant conditions for it to have any operative effect. But in many cases, the result of this will be to create a new agreement. And here, the difference between a view that says in principle both parties can waive and a view that says they must enter into a new agreement—while a difference nonetheless—is marginal.

There is thus no reason why, in appropriate cases, it should not be possible to waive the relevant conditions, though there may be some limits. For example, it

[293] (1839) 5 M & W 639, 151 ER 271.

[294] *Lovatt v Hamilton* (1839) 5 M & W 639, 644–654; 151 ER 271, 273.

would make little sense for a seller to waive a condition so as to render himself or herself liable in damages when it is not possible to perform at all—and it might be said that in cases of total impossibility no person would be held to such a representation.

By way of a postscript, sometimes on the orthodox approach the opposite question is asked: '[w]hy is termination not automatic',[295] particularly in cases where the breach deprives one party of substantially the whole benefit of the contract? The answer that has been offered is that this is a manifestation of the 'fundamental legal and moral rule that a man should not be allowed to take advantage of his own wrong'.[296] But, as we have seen in Chapter 2, the modern view that it is necessary to 'terminate' the contract is simply the result of series of missteps flowing from loose language, the practical steps which often need to be taken in order to negate any suggestion of waiver of the condition, and the tendency to apply statements about needing to 'accept' a repudiation (in the sense of renunciation) to cases of actual breach.[297] Orthodoxy starts from the position that the effects of the two events (discharge following breach and discharge in cases of 'frustration') are very different and then seeks to offer an explanation for that difference. But on the approach taken here, the effects should not be different and they ought to be treated the same.

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[295] Wilmot-Smith, 'Termination after breach' (n 218) 314.

[296] *Hongkong Fir* (n 91) 66. See also Wilmot-Smith, 'Termination after breach' (n 218) 314–316.

[297] See, in particular, s 2.2.4.3 and s 2.3.2.

## 5.6 CONCLUSION

This chapter has been concerned to defend the view that the best explanation of the discharge of each party in cases of frustration is the failure of an implied condition. This is the explanation that has been given traditionally and is consistent with the repeated statements over the years that 'no Court has an absolving power'.[298] The first part of this chapter sought to demonstrate the operation of the various conditions in play. The second explained the unfortunate side effects of the modern unified 'doctrine' of frustration which came about as a result of the war cases. The third, and arguably the most important part, defended the view that these are conditions to be found in the parties' agreement. It was seen that objections to this view have tended to attack a straw man and that the preferred 'construction theory' is simply a variant of the implied condition view. Finally, the chapter concluded by explaining why, at least in principle, the parties ought to be able to waive the conditions of their obligations to perform.

The purpose of this analysis is not to cling to the past. Some legal developments are desirable. But unfortunately the law of 'frustration' has developed in a way that obscures its proper basis and its relationship with other instances of discharge. Once so-called frustration is understood as an instance of failure of condition, the relationship between it and other forms of discharge becomes much clearer. Often, the only difference between instances of discharge

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[298] *Tamplin* (n 150) 404; *Joseph Constantine Steamship* (n 13) 185; *Denny, Mott & Dickson* (n 251) 281; *Metropolitan Water Board* (n 152) 127; *British Movietonews Ltd v London and Distict Cinemas Ltd* [1952] AC 166 (HL) 183.

for failure of condition considered elsewhere in this thesis[299] and in this chapter is that the former involves a breach of duty. And in the next chapter, it will be seen that in cases of so-called 'common mistake' the only feature that sets those cases apart from cases of 'frustration' is timing. In cases of 'frustration', the condition fails after the contract is formed; in cases of 'common mistake', the condition fails from the beginning.

[299] Such as those considered in Chapter 3.

# CHAPTER 6: COMMON MISTAKE



## 6.1 INTRODUCTION

A widespread view is that English law recognises a 'doctrine of common mistake' which provides that '[w]here both parties share the same mistake of fact or law … the contract may be void'.[1] By way of contrast, the central argument of this chapter is that the best explanation of the so-called doctrine of common mistake is that it depends on implied conditions to be found in the parties' agreement.[2] Whether the parties were 'mistaken' ultimately has no impact at all on what is a

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[1] Jack Beatson, Andrew Burrows, and John Cartwright, *Anson's Law of Contract* (31st edn, Oxford University Press 2020) 296. See too John Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (5th edn, Sweet & Maxwell 2019) 543–544 [15-19]. Compare Hugh Beale, 'Common Mistake' in Hugh Beale (ed), *Chitty on Contracts* (34th edn, Sweet & Maxwell 2021) vol 1 673, 678–679 [8-011]; Edwin Peel, *The Law of Contract* (15th edn, Sweet & Maxwell 2020) 356 [8-006].

[2] S Martin Leake, *A Digest of Principles of the Law of Contracts* (3rd edn, Stevens and Sons Ltd 1892) 282–290; C J Slade, 'The Myth of Mistake in the English Law of Contract' (1954) 70 Law Quarterly Review 385, 396–403; K O 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; J C Smith, 'Contracts—Mistake, Frustration and Implied Terms' (1994) 110 Law Quarterly Review 400; Stephen A Smith, *Contract Theory* (Oxford University Press 2004) 297–304; Jonathan Morgan, 'Common Mistake in Contract: Rare Success and Common Misapprehensions' (2018) 77 Cambridge Law Journal 559. For the similar, if not identical, view that it is a matter of the construction of the agreement see: P S Atiyah, '*Couturier v Hastie* and the Sale of Non-existent Goods' (1957) 73 Law Quarterly Review 340; P S Atiyah and F A R 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.

question of construction: did the parties agree to perform in all events? And, as we saw in the previous chapter, rarely do the parties promise to perform 'no matter what'. Instead, often the obligations of each party are conditional on the existence of particular facts or the occurrence of particular events. Where those facts do not exist or the events cannot occur at the time the agreement is made, the obligations of the parties are 'inoperative'.[3]

The chapter proceeds in four sections. The first section clarifies why, on the view put forward here, the contract is not 'void' other than in a loose sense of the term. The second section illustrates the different conditions that operate in cases said to be within the doctrine of common mistake and how those cases can instead be explained on the implied condition view. The third section—in light of the rejection of this view by the Court of Appeal in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd*[4] (*The Great Peace*)—responds to common objections to the implied condition view and explains the problems with the supposed doctrine of common mistake. Finally, the fourth section considers briefly whether there should be a doctrine of common mistake in equity[5] and concludes that there should not.

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[3] Atiyah and Bennion (n 2) 427.

[4] [2002] EWCA Civ 1407, [2003] QB 679.

[5] Eg *Solle v Butcher* [1950] 1 KB 671 (CA), but see now ibid 725 [157].

## 6.2 INOPERATIVE NOT VOID

An initial difficulty with the view put forward in this chapter is that orthodoxy suggests that common mistake renders a contract 'void'.[6] A contract can be 'void' because there is no agreement or 'void' because there is an agreement but, for some reason, it takes no effect as a contract. In the context of 'unilateral mistake', which is not the focus of this chapter, it is said that the contract is 'void' because mistake operates to 'negative'[7] consent (to show that there never was an agreement at all). By contrast, in cases of 'common mistake', the contract is said to be 'void' because the shared mistake of the parties operates to 'nullify'[8] consent. There is an agreement, but its terms are completely ineffective.[9]

How can the implied condition view put forward in this chapter be reconciled with the idea that in cases of so-called common mistake the contract is void? As Professor Patrick Atiyah and Francis Bennion noted, '[t]he circularity of saying that a contract is void, that is to say totally ineffective, because of the effect of one of its terms, is obvious'.[10] If the effect of common mistake is to render the contract void, in the sense of it having no effect, then this view looks doomed from the start.

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[6] See, eg, *Bell v Lever Brothers Ltd* [1932] AC 161 (HL) 217–218; *Associated Japanese Bank (International) Ltd v Crédit du Nord* [1989] 1 WLR 255 (QB) 268.

[7] *Bell v Lever Brothers* (n 6) 217.

[8] ibid.

[9] See generally, Cartwright (n 1) 543–531–532 [15-03].

[10] Atiyah and Bennion (n 2) 427. See also Slade (n 2) 399 fn 67.

One response is to suggest that the condition is to be implied not into the contract, but into the offer and acceptance.[11] This was the argument of Sir Christopher Slade: 'there is consensus but at no time is there a contract'.[12] On this view, and contrary to the sense in which condition has been used in the rest of this thesis, the condition would be an 'external condition' (a condition to the formation of a contract) rather than an 'internal condition' (a condition that qualifies an obligation to perform).[13] It is akin to saying that the parties have not reached a binding agreement because, objectively construed, each only intended to contract if the relevant condition was satisfied. The contract would then be void in a similar sense to that used in 'unilateral' or 'mutual' mistake cases.

The problem with this response is that it seems misleading to suggest that there is no binding agreement in common mistake cases. As we shall see, in cases said to be within the so-called doctrine of common mistake, the parties have agreed on all the essential terms of the contract, even if the contractual obligations of the parties are not to be performed unless certain conditions are satisfied.[14] The better view is that there is an agreement which has taken effect as a contract, the contract contains the relevant conditions, and where those conditions have already failed at the time of contracting the parties are discharged from their obligations ab initio.[15] To put it another way, the

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[11] Slade (n 2) 399.

[12] ibid 399 fn 67.

[13] See the discussion in s 1.3.1.2.

[14] Smith, 'Contracts—Mistake, Frustration and Implied Terms' (n 2) 410; Atiyah and Bennion (n 2) 427.

[15] Shatwell (n 2) 182.

obligations of the parties are 'inoperative'.[16] On this view, to say that the contract is 'void' is simply a loose way of saying that the contractual obligations of the parties are inoperative.

This approach also avoids difficulties that arise on the view that the contract is 'void' in the more usual sense of that term (ie having no effect). One such difficulty is the effect of clauses that are not premised upon performance, such as arbitration and jurisdiction clauses.[17] In *Harrison & Jones Ltd v Bunten & Lancaster Ltd*,[18] it was accepted by Pilcher J that if the contracts there in issue were 'void on the ground of mutual fundamental mistake' then 'there never were any contracts and consequently, … there never was an arbitration clause under which the parties could arbitrate their disputes'. This problem has now been remedied by legislation,[19] but it could have been avoided altogether. That is because on the view taken in this chapter, the reason the parties are not required to perform in cases of common mistake is that most (but not all) of their obligations are conditional. An arbitration clause, which itself is premised upon non-performance for whatever reason, is not usually conditional and thus can take effect. The contract is not 'void' in the usual sense of that term.

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[16] Atiyah and Bennion (n 2) 427; Smith, 'Contracts—Mistake, Frustration and Implied Terms'(n 2) 410.

[17] See Stevens, 'The Meaning of Words and the Intentions of Persons' (n 2) 179.

[18] [1953] 1 QB 646 (QB) 653.

[19] Arbitration Act 1996, s 7.

## 6.3 THE CONDITIONS IN CASES OF 'COMMON MISTAKE'

The central argument of this chapter is that the so-called doctrine of common mistake is best explained as a matter of construing the parties' agreement and determining the implicit conditions contained in it. But as with the cases said to fall within the so-called doctrine of frustration, there are certain conditions that are commonly found in contracts that can explain the discharge of one or both parties in cases of common mistake. These include the 'possibility condition', the 'substantial-benefit condition', and the 'not-radically-different condition'. That the same conditions are commonly in play in cases of frustration and cases of common mistake is not surprising, given that the distinction between the two is simply a matter of timing, as is discussed further below.[20]

### 6.3.1 The possibility condition

It will be recalled that the 'possibility' condition is the condition of a party's obligation, generally but not always found, that it is possible to perform the obligation.[21] In Chapter 5, we dealt with cases where the condition failed after the making of the agreement (subsequent impossibility). In this section, we deal with cases where the condition, unbeknownst to the parties,[22] has already failed at the time the agreement is made (antecedent impossibility). The principles are, however, no different. Whether this condition is found is ultimately a question of

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[20] See s 6.4.2.4.

[21] Eg, *Taylor v Caldwell* (1863) 3 B & S 826, 122 ER 309.

[22] Cf where the impossibility was objectively apparent: Frederick Pollock, *Principles of Contract at Law and in Equity* (1st edn, Stevens and Sons 1876) 324. See also *Clifford v Watts* (1870) LR 5 CP 577 (Comm Pleas) 588.

construction. Two early cases that demonstrate this are *Bute v Thompson*[23] and *Clifford v Watts*.[24]

#### *6.3.1.1 Bute v Thompson and Clifford v Watts*

In *Bute v Thompson*, the plaintiff demised his interest in a coal mine to the defendants for 50 years. The defendants in return covenanted that they would mine 13,000 tons of coal each year and pay a royalty equating to 8d per ton as a fixed rent 'whether the coals shall be worked or not'.[25] In an action by the plaintiff, it was alleged that the defendants had breached the covenant to mine 13,000 tons of coal in each year and had failed to pay the rent. The defendants responded by pleading that at the beginning of the period for which rent was due the mine was 'greatly exhausted' and that only a small amount of coal, less than a quarter of the 13,000 tons, remained to be worked out of the ground.[26] On a demurrer, Pollock CB held that this was no defence. Focusing on the fact that there was a 'fixed rent', he said that the covenant:

> does not carry with it, by any implication, a condition that there shall be coals to that amount capable of being wrought. … [W]e cannot import into that covenant a condition that there should be coals to that extent. If that was the intention of the parties, they should so have expressed it.[27]

This was not, strictly speaking, an impossibility case. Although a breach of the covenant to mine 13,000 tons of coal each year was alleged, the true

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[23] (1844) 13 M & W 487, 153 ER 202 (Exch).

[24] *Clifford v Watts* (n 22).

[25] *Bute v Thompson* (1844) 13 M & W 487, 488; 153 ER 202, 203. Plus 9d per ton for any quantity above 13,000 tons.

[26] *Bute v Thompson* (1844) 13 M & W 487, 489; 153 ER 202, 204.

[27] *Bute v Thompson* (1844) 13 M & W 487, 494; 153 ER 202, 206.

nature of the action was one for the recovery of the rent, and it was not impossible to perform the obligation to pay the money. But the case is analogous to one in which the possibility condition is relied upon because the question was whether the obligation to pay the rent was conditional upon it being possible to raise 13,000 tons of coal out of the ground. The answer to this question was 'no' because the fixed rent was expressed to be payable whether the coal was mined or not.

By contrast, *Clifford v Watts* was an impossibility case. The plaintiff demised to the defendant a clay pit. The defendant in return undertook to dig no less than 1,000 tons per year and to pay a royalty of 2s 6d per ton. The plaintiff sued the defendant for breach of the covenant to dig 1,000 tons per year. The defendant denied the breach on the basis that there was not enough clay in the land to dig 1,000 tons per year and thus the performance of the defendant's covenant was, at the time of making it, impossible.

The Court of Common Pleas (Willes, Montague Smith, and Brett JJ), on a demurrer, found for the defendant and held that the plea was a good defence to the action. Willes J said that the question was 'whether the defendant ha[d] by this covenant contracted to perform an impossibility'.[28] He thought that the most 'natural and ordinary construction of the covenant' was that it was inapplicable if '[i]t turned out that there was no clay of the descriptions mentioned on the land'.[29] The covenant therefore had not been breached. Montague Smith J agreed

[28] *Clifford v Watts* (n 22) 583.

[29] ibid 585.

and said that 'the covenantor did not undertake to perform an impossibility, but merely to dig and remove such clay as should be found in the land, to the extent stipulated for.'[30]

The Court distinguished *Bute v Thompson* on the basis that in that case there was a covenant for a minimum rent, irrespective of whether the coal was worked or not.[31] But although there was a covenant for minimum rent 'whether the coals shall be worked or not' in *Bute v Thompson*, it is likely that this was 'intended merely to reinforce the covenant to extract the coal'[32] and that the clause itself presupposed that there was in fact coal to be extracted. As Atiyah and Bennion explained, a better explanation for the difference between these two cases is that 'by the time *Clifford v Watts* was decided a change had taken place in the attitude of courts towards reading implied [conditions] into the literal contract'.[33] In particular, by this time *Taylor v Caldwell* had been decided.[34] As we saw in Chapter 5, the incremental change brought about by *Taylor v Caldwell* was to express a greater willingness on the part of courts to find implied conditions where they had not been expressly stated.[35]

Whatever view one takes of the results in *Bute v Thompson* and *Clifford v Watts*, these cases demonstrate that whether impossibility operates to discharge a party from his or her obligation to perform ultimately depends upon

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[30] ibid 588. See also 588 (Brett J).

[31] ibid 587 (Willes J), 588 (Montague-Smith J).

[32] Atiyah and Bennion (n 2) 436.

[33] ibid 435–436.

[34] Relied upon in argument: *Clifford v Watts* (n 22) 580. A point noted in ibid 436 fn 41.

[35] See s 5.2.1.2.

whether that party has promised to perform an impossibility of the kind raised or not.[36] In *Clifford v Watts*, it was expressly stated by Willes J[37] and Brett J[38] that there is no principle which prevents a person from contracting to do that which is impossible.

#### *6.3.1.2 McRae v Commonwealth Disposals Commission*

Decisions in other common law jurisdictions also demonstrate that whether an agreement contains the possibility condition is a question of construction. The most important is the decision of the High Court of Australia in *McRae v Commonwealth Disposals Commission*.[39] The Commonwealth Disposals Commission agreed to sell to the plaintiffs a wrecked oil tanker and its contents, which were believed to be lying on Jourmaund Reef, 100 miles north of Samarai Island, Papua New Guinea. As it turned out, there was no oil tanker near that location. The plaintiffs, sharing the defendants' belief that there was a tanker, entered into the contract, paid the purchase price, and then expended a large sum of money fitting a ship with diving and salvage equipment and engaging workers to proceed to New Guinea, which the workers did.[40] Upon discovering that there was no tanker, the plaintiffs claimed damages for 'breach of a contract to sell a tanker lying at a particular place'.[41] The High Court upheld the plaintiffs' claim

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[36] See Atiyah and Bennion (n 2) 435. Contrast *Sheikh Bros Ltd v Ochsner* [1957] AC 136 (PC) and see Atiyah and Bennion (n 2) 436.

[37] *Clifford v Watts* (n 22) 585–586.

[38] ibid 588.

[39] (1951) 84 CLR 377 (HCA).

[40] ibid 400.

[41] ibid.

and rejected the defendants' argument that the contract was 'void' for common mistake.[42]

Dixon and Fullagar JJ (with whom McTiernan J agreed) said that 'the problem is fundamentally one of construction'[43] and that when asking 'whether a promisor was excused from performance by existing or supervening impossibility', the common law:

> has always regarded the fundamental question as being: 'What did the promisor really promise?' Did he promise to perform his part at all events, or only subject to the mutually contemplated original or continued existence of a particular subject-matter?[44]

It was held that it was not possible to imply a condition precedent into the parties' agreement. This was because the 'terms of the contract and the surrounding circumstances clearly exclude[d] any such implication'.[45] Instead, '[t]he only proper construction of the contract [was] that it included a promise by the Commission that there was a tanker in the position specified'.[46] And the existence of the promise, meant that there was no room for a condition.[47]

### 6.3.2 The substantial-benefit condition (failure of consideration)

In Chapter 5, we saw how a number of cases within the scope of the so-called doctrine of frustration were concerned with the substantial-benefit condition. The same is true of cases involving the apparent doctrine of common mistake.

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[42] ibid 402–410.

[43] ibid 408, referring to *Clifford v Watts* (n 22).

[44] *McRae v Commonwealth Disposals Commission* (n 39) 408.

[45] ibid 409.

[46] ibid 410.

[47] Smith, 'Contracts—Mistake, Frustration and Implied Terms' (n 2) 402–403.

As we shall see, almost all of the leading cases fall into this category and it is here that we find the origins of the supposed doctrine of common mistake.

#### *6.3.2.1 Couturier v Hastie*

An early case that illustrates the importance of determining what the parties were buying and selling is *Couturier v Hastie*.[48] The plaintiffs sold a cargo of corn being shipped from Salonica (Thessaloniki) through the defendants, who were agents, on a *del credere* commission—a relationship in which the agent 'undertakes to indemnify the seller against the non-payment by the buyer of the price or other sums for which the buyer may be liable under the contract'.[49] Unknown to any of the parties involved in the sale, before the agreement was entered into, the cargo had become overheated and was sold off at Tunis to prevent further deterioration. The purchaser, upon discovering this, repudiated his liability under the contract and the plaintiffs brought an action for the price against the defendants on the basis of the commission. The defendants denied that the purchaser was bound on the grounds that the contract was for the sale of a specific cargo of corn and the corn did not exist in a form capable of being sold at the time the agreement was made.[50] The plaintiffs, in contrast, argued that the contract was for the purchase of the shipping documents and the chance of the cargo being in existence.[51] The Court of Exchequer Chamber and the House of

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[48] (1852) 8 Ex 40, 155 ER 1250 (Exch); (1853) 9 Ex 102, 156 ER 43 (Exch Chamb); (1856) 5 HLC 673, 10 ER 1065 (HL).

[49] Michael Bridge (ed), *Benjamin's Sale of Goods* (11th edn, Sweet & Maxwell 2021) 152 [3-004].

[50] See, eg, *Couturier v Hastie* (1852) 8 Ex 40, 48; 155 ER 1250, 1254.

[51] *Couturier v Hastie* (1852) 8 Ex 40, 52–53; 155 ER 1250, 1256.

Lords, disagreeing with the Court of Exchequer, held that the purchaser was not bound and the plaintiffs' claim failed.

At all levels, the judges agreed that the 'the whole question turn[ed] upon the construction of the contract which was entered into between the parties'.[52] In the House of Lords, Lord Cranworth LC said:

> The contract plainly imports that there was something which was to be sold at the time of the contract, and something to be purchased. No such thing existing, I think the Court of Exchequer Chamber has come to the only reasonable conclusion upon it…[53]

If we ask 'what did the parties intend to buy and sell', the answer given by the Court of Exchequer Chamber and the House of Lords is that the parties intended to buy and sell a specific cargo of corn. The fact that the specific cargo of corn could not be provided was enough to discharge the purchaser (and therefore the defendants as *del credere* agents) from his obligation to pay the price. He did not get what he bargained for and therefore was not liable. Analysed in this way, *Couturier v Hastie* is a simple application of the substantial-benefit condition.

For some time, however, *Couturier v Hastie* was 'commonly treated in the text-books as a case of a contract avoided by a mutual mistake'.[54] Indeed, the

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[52] *Couturier v Hastie* (1856) 5 HLC 673, 681; 10 ER 1065, 1068. See also *Couturier v Hastie* (1852) 8 Ex 40, 53; 155 ER 1250, 1256; *Couturier v Hastie* (1853) 9 Ex 102, 107; 156 ER 43, 45.

[53] *Couturier v Hastie* (1856) 5 HLC 673, 681–682; 10 ER 1065, 1069.

[54] *McRae v Commonwealth Disposals Commission* (n 39) 402. See, eg, Sir William R Anson, *Principles of the English Law of Contract* (1st edn, Clarendon Press 1879) 121. See further David Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press 2001) 228.

belief that 'the sale was held to be void'[55] caused Sir Mackenzie Chalmers to draft s 6 of the Sale of Goods Act 1893, which provided (and still provides in its current form) that '[w]here there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void.'[56]

That this was the interpretation given to *Couturier v Hastie* is surprising because (i) 'mistake' is not mentioned in any of the arguments of counsel, or by any of the judges that heard the case,[57] and (ii) it was not necessary to decide, and no judge did decide, whether the contract was 'void', the sole issue being whether the purchaser was liable to pay the price.[58] In fact, had the liability of the vendors been in issue, it is possible that the court would have held that the vendors were liable to pay damages for breach on the basis that they had implicitly 'promised that the goods were in existence'.[59]

It is now generally accepted that *Couturier v Hastie* was not decided on the ground of a mistake rendering the contract void.[60] Properly understood, the case makes clear that whether one party is discharged on the ground that they did not get what they bargained for depends on what precisely was the consideration for

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[55] M D Chalmers, *The Sale of Goods Act, 1893, including The Factors Acts, 1889 & 1890* (William Clowes and Sons Ltd 1894) 17.

[56] See now Sale of Goods Act 1979, s 6.

[57] Atiyah (n 2) 342–343; Peel (n 1) 358 [8-009]; Beatson, Burrows, and Cartwright (n 1) 302.

[58] Atiyah (n 2) 346; Beale (n 1) 683 [8-019]; *McRae v Commonwealth Disposals Commission* (n 39) 406–407.

[59] *McRae v Commonwealth Disposals Commission* (n 39) 407 (emphasis removed). See also Beale (n 1) 683–684 [8-019]. Cf *Barrow, Lane & Ballard Ltd v Phillips & Co Ltd* [1929] 1 KB 574 (KB) 582; Peel (n 1) 358 [8-009].

[60] Beale (n 1) 683 [8-019]; Atiyah (n 2); *McRae v Commonwealth Disposals Commission* (n 39) 402–408. Although cf the suggestion in Beatson, Burrows, and Cartwright (n 1) 302.

(and therefore the condition of) their promise. It is a question of construction, not one of a supposed doctrine of common mistake.

#### *6.3.2.2 Kennedy v Panama*

The cases considered thus far have illustrated the common law approach of treating issues that might today be analysed as involving mistake as involving a question of construction. But in *Kennedy v Panama, New Zealand, and Australian Royal Mail Co Ltd*,[61] Blackburn J, drawing on the civil law, took a very different approach. It is here that we find the origins of the supposed doctrine of common mistake.[62]

The plaintiff in *Kennedy v Panama* had been induced to buy shares by a statement in the defendant company's prospectus that the company had entered into a valuable contract with the government of New Zealand. When the plaintiff found out that the contract was disputed—and it was ultimately held to be ultra vires—he claimed that he was no longer a shareholder. He brought an action seeking to recover instalments on the shares he had paid, while the company brought an action to recover the remaining instalment due.

The plaintiff's argument was put on two bases.[63] First he argued that the statement was a misrepresentation made fraudulently 'on the part of the directors.'[64] This latter part of the plea was necessary as the case was heard by a

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[61] (1867) LR 2 QB 580 (QB).

[62] Catharine MacMillan, *Mistakes in Contract Law* (Hart Publishing 2011) 190.

[63] See further ibid 199–200.

[64] *Kennedy v Panama* (n 61) 581.

common law court in 1867 prior to the procedural fusion of law and equity effected by the Judicature Acts and the decision in *Redgrave v Hurd*,[65] which recognised the power to rescind for any misrepresentation, whether fraudulent or innocent.[66] Secondly, the plaintiff argued that the statement in the prospectus 'amounted to a condition, and was not a mere representation'.[67] On this basis, the plaintiff would simply never have come under any immediate duty to pay the instalments of the price for the shares. The company's response to both arguments was that 'the statement in the prospectus was a mere representation honestly made, and not a condition the non-performance of which avoided the contract of [the plaintiff] to take the new shares'.[68]

The Court (Cockburn CJ, Blackburn, Mellor, and Shee JJ) gave judgment for the company. Blackburn J, who delivered the Court's judgment, held on the first issue of misrepresentation that the directors had made 'an honest mistake, and not a fraudulent misrepresentation'.[69] As for the second issue, Blackburn J 'did not consider [the plaintiff's] condition precedent argument in the way in which it had been argued'.[70] Indeed, he appeared to reject an approach based upon implied conditions or, at the very least, only treat it as 'analogous'.[71] Instead,

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[65] (1881) 20 Ch D 1 (CA) 12–13.

[66] See John Cartwright, 'The rise and fall of mistake in the English law of contract' in Ruth Sefton-Green (ed), *Mistake, Fraud and Duties to Inform in European Contract Law* (Cambridge University Press 2009) 65, 70 fn 20; F H Lawson, 'Error in Substantia' (1936) 52 Law Quarterly Review 79, 88; Daniel Friedman, 'The Objective Principle and Mistake' (2003) 119 Law Quarterly Review 68, 76.

[67] *Kennedy v Panama* (n 61) 581.

[68] ibid 581–582.

[69] ibid 586.

[70] MacMillan (n 62) 202.

[71] *Kennedy v Panama* (n 61) 588.

Blackburn J characterised the plaintiff's argument as being that he 'was entitled to return the shares … on the ground that he had applied for one thing and got another'.[72] Treating cases of innocent 'misrepresentation' as equivalent to cases of 'misapprehension', he said:

> where there has been an innocent misrepresentation or misapprehension, it does not authorize a rescission, unless it is such as to shew that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration.[73]

Blackburn J relied upon the 'civil law' to support this proposition. He noted that the Digest laid down the general rule that 'where the parties are not at one as to the subject of the contract there is no agreement',[74] and he observed that this rule applies where there is a 'misapprehension as to the substance of the thing'[75] (*error in substantia*). After referring to the Digest, he said: 'the principle of our law is the same as that of the civil law'.[76] Ultimately, he held that the plaintiff could not succeed on this argument because he 'got the shares in the very company for shares in which he had applied'.[77] The 'misapprehension' concerned 'a material part of the motive'[78] of the plaintiff in buying the shares, but it did not prevent the plaintiff from getting in substance what he had bargained for.

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[72] ibid 586.

[73] ibid 587.

[74] ibid.

[75] ibid 588.

[76] ibid.

[77] ibid 589.

[78] ibid.

On the assumption that Blackburn J intended to import a doctrine of *error in substantia* into English law, it has been argued that the doctrine was misapplied by him[79] and that which he purported to recognise was not the same as the 'civil law' doctrine.[80] More charitably, it has been suggested that Blackburn J 'intended only to support the common law approach to a failure of consideration with an analogy to the elegance of Roman jurisprudence'.[81] After all, Blackburn J had referred to the 'civil law' in the past in support of common law jurisprudence,[82] including in *Taylor v Caldwell*.[83] So understood, *Kennedy v Panama* could be explained as an instance of failure of the substantial-benefit condition which, as we have noted, often travels under the label of 'failure of consideration'.[84]

Whichever the correct interpretation may be, one thing is clear: *Kennedy v Panama* ultimately contributed to the suggestion that there is a 'doctrine' of mistake.[85] But Blackburn J's reliance on a 'civil law' doctrine also created a conflict between the approach taken by the civil law and the approach that had hitherto been taken by the common law. While '[c]ontinental doctrines… treated

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[79] Lawson (n 66) 88–89; *The Great Peace* (n 4) 699 [59].

[80] Cartwright (n 66) 71; Michele De Gregorio, 'Impossible Performance of Excused Performance? Common Mistake and Frustration after *Great Peace Shipping*' (2005) 16 King's Law Journal 69, 79.

[81] MacMillan (n 62) 203.

[82] See Cartwright (n 66) 68–71.

[83] *Taylor v Caldwell* (1863) 3 B & S 826, 834–835; 122 ER 309, 312–313.

[84] Although Blackburn J appears not to have treated failure of consideration as resting upon an implied condition

[85] MacMillan (n 62) 205–207.

mistake as a way of showing that there was no consensus, and therefore no contract' the common law said that there was a consensus:

> [b]ut the agreement, the consensus, included an implied condition to the effect that the state of affairs existed; if it did not, the contract was not off because the parties had failed to agree, but because that was what the parties had agreed.[86]

As we shall see, the conflict between these two approaches continued throughout the nineteenth and twentieth century and still lingers today.

#### *6.3.2.3 The coronation cases*

This conflict referred to above is well illustrated by two cases arising out the cancelled coronation procession for King Edward VII: *Clark v Lindsay*[87] and *Griffith v Brymer*.[88] These cases are also explicable in terms of the substantial-benefit condition.

In *Clark v Lindsay*, the plaintiff agreed to pay £50 to obtain the use of the defendant's rooms in Ludgate Hill for the purpose of viewing the coronation procession scheduled for 27 June 1902. It was a term of the agreement that the rooms were to be 'used only for the purpose of viewing the Coronation Procession'.[89] The agreement was entered into on 24 June and the plaintiff paid around twelve noon that day. Twenty minutes later, it was announced that the procession would be postponed due to the King's ill health. It was found that, at the time of contracting, the King's health was such that the procession could not

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[86] Simpson (n 85) 268 (emphasis removed).

[87] (1903) 88 LT 198 (KB).

[88] (1903) 19 TLR 434 (KB).

[89] *Clark v Lindsay* (n 87) 199.

go ahead (albeit that this fact was not known to the parties).[90] After seeing the announcement, the plaintiff immediately went back to the defendant. He initially demanded his money back but after negotiations, and on the assumption that the postponement would only be a for a day or two, agreed to the insertion of a term that in the event the coronation procession was postponed, the plaintiff would have the use of the rooms on similar terms. When the postponed procession did not take place as planned,[91] the plaintiff sought recovery of the £50 paid. The case was concerned with the recovery of money paid, but the assumption appears to have been that if 'the contract was altogether inoperative' then 'the party who had paid his money was entitled to get it back'.[92] The focus was therefore on the two agreements made between the parties.

The High Court held that if matters had stood as they were after the original agreement was concluded, the plaintiff would have been able to recover the money paid. Unfortunately for the plaintiff, Lord Alverstone CJ (with whom Wills J agreed, Channell J concurring) held that the effect of the second agreement for a postponed procession, a procession which on the plaintiff's argument was subsequently abandoned,[93] was to bring it within the then-current rule in *Blakeley v Muller & Co.*[94] That rule precluded recovery of money paid pursuant to a contract in cases of subsequent impossibility (ie cases of

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[90] ibid 199–200.

[91] The plaintiff argued that the postponement agreement contemplated '[t]he Coronation Procession with the foreign princes, and so forth', which never took place: ibid 200.

[92] ibid 202.

[93] See n 91.

[94] (1903) 19 TLR 186 (KB).

'frustration') 'unless there be a condition providing for the return of the money paid or payable before the event has been ascertained'.[95] This would later become known as the rule in *Chandler v Webster*,[96] and it was not overturned until the decision of the House of Lords in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*.[97] But there is perhaps a better explanation for the result. Channell J said that at the time of the second agreement '[t]he doubt was known and each party took his chance', with the result that no condition could be implied.[98]

In any event, our focus here is on the first agreement. Lord Alverstone CJ, after stating that '[t]he first thing in all these cases is to ascertain what the contract really is',[99] said:

> [I]t seems to me quite impossible to say that the procession was only the object or motive that induced the persons to enter into this contract. … [I]t really is the happening of the event—namely, the procession taking place—which is the substance of that which is contracted about and is contracted for.[100]

The references in Lord Alverstone CJ's judgment to the 'substance' of the contract appear to be references to *Kennedy v Panama* in which the same language was used by Blackburn J.[101] This would support the existence of a doctrine of common mistake. But Channell J, who wished to be clear that he 'did not in any way differ from what ha[d] been said by' the Chief Justice, said that

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[95] *Clark v Lindsay* (n 87) 201.

[96] [1904] 1 KB 493 (CA).

[97] [1943] AC 32 (HL).

[98] *Clark v Lindsay* (n 87) 202. See too Peel (n 7) 294 [7-011].

[99] *Clark v Lindsay* (n 87) 201.

[100] ibid.

[101] See argument of counsel: ibid 200.

the case fell within the principle in *Taylor v Caldwell* as depending upon an 'implied condition' and that '[t]he principle of the matter is exactly the same whether the thing contracted for is or is not in existence at the time the contract is entered into'.[102] Channell J said that the contract was a 'good contract' but:

> as originally made… was subject to an implied condition that, if the intention to hold the procession which existed, as the parties believed, at the time of the contract being made, was subsequently abandoned, then neither party was to be further bound by the contract.[103]

Channell J added that just as where the procession was abandoned after the making of the contract, 'if the procession had been abandoned before the contract was made, the contract was altogether inoperative, and … the party who had paid his money was entitled to get it back.[104]

Channell J's implied condition approach was followed in *Griffith v Brymer*.[105] In that case, the plaintiff sought to recover £100 paid by him pursuant to an oral agreement reached at 11am on June 24. The decision to operate on the King was reached at 10am, making it the case that at the time the agreement was made the procession could not take place. Neither party was aware of the postponement, which was not announced until later that day. Wright J held that the plaintiff was entitled to recover. He is reported as having 'expressed his agreement with the law as laid down by Mr Justice Channell in

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[102] ibid 202.

[103] ibid.

[104] ibid.

[105] *Griffith v Brymer* (n 88).

"*Clark v Lindsay*""[106] although, perhaps adding to the confusion between the civil and common law approaches, he said that the contract was 'void'.

#### *6.3.2.4 Bell v Lever Brothers Ltd*

The distinction between the common law and civilian approaches came to the fore in the decision in *Bell v Lever Brothers Ltd*.[107] The decision is valuable for its discussion of these approaches. It is also discussed here because, as will be seen, the best explanation of this leading case is that it had nothing to do with 'mistake' and everything to do with the substantial-benefit condition.

The case concerned two defendants, Bell and Snelling, who had acted as directors and as the Chairman and Vice-Chairman (respectively) of the Niger Company, which traded in West African products, including cocoa. Lever Brothers held 99.5% of the shares in the Niger Company. Both directors were appointed and maintained by Lever Brothers (in its capacity as the majority shareholder) pursuant to separate contracts of service. In 1929, the Niger Company merged with its primary competitor, and a new company was formed. There was no need for the two defendants in this new company. As such, an agreement was reached pursuant to which both defendants would 'retire from the Boards of the Niger Company and its subsidiaries'[108] in exchange for which Lever Brothers would pay Bell £30,000 and Snelling £20,000 in full satisfaction

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[106] ibid 434.

[107] *Bell v Lever Brothers* (n 6).

[108] ibid 178, 179.

of any claims they might have against Lever Brothers, the Niger Company, or any associated company.

After the agreements had been performed, it came to light that a couple of years earlier, Bell and Snelling had engaged in coca dealings on their own account, and kept these dealings and the resultant profits secret from the Niger Company. These breaches of duty by Bell and Snelling meant that Lever Brothers would have been 'justified in stopping any further payments to them, and would [have been] relieved from the obligation of further maintaining them in their offices'.[109] Lever Brothers brought an action seeking to recover the amounts that had been paid to each of the defendants on the ground that the agreements were entered 'into under such mutual mistake of fact as to render them not binding'.[110]

There was an issue as to whether an argument about 'mutual mistake' was open to Lever Brothers in light of the pleadings and how the case was run at trial. In the House of Lords, Lord Blanesburgh dismissed the case on that basis and Lord Atkin said that 'much may be said for [the] contention' that the argument was not open to Lever Brothers.[111] In any event, a majority of the House of Lords (Lord Atkin and Lord Thankerton, Lord Blanesburgh agreeing; Lord Warrington and Lord Hailsham dissenting) held that the claim could not succeed on the ground of 'mutual mistake'.

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[109] ibid 173.

[110] *Lever Brothers Ltd v Bell* [1931] 1 KB 557 (CA) 561.

[111] *Bell v Lever Brothers* (n 6) 217.

Lord Atkin expressed his conclusion on two alternative bases, reflecting the two approaches discussed above. The first basis was that there are some cases of mistake that 'nullify' (as opposed to 'negative')[112] consent. Such cases would include mistakes as to the existence of the subject-matter of the contract[113] and mistakes as to title.[114] He then added:

> Mistake as to quality of the thing contracted for raises more difficult questions. In such a case a mistake will not affect assent unless it is the mistake of both parties, and is as to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be.[115]

Applying the 'law as to mistake' to the present case, Lord Atkin said:

> [I]t would be wrong to decide that an agreement to terminate a definite specified contract is void if it turns out that the agreement had already been broken and could have been terminated otherwise. The contract released is the identical contract in both cases, and the party paying for release gets exactly what he bargains for. It seems immaterial that he could have got the same result in another way, or that if he had known the true facts he would not have entered into the bargain.[116]

The second basis of Lord Atkin's speech was stated as 'the alternative mode of expressing the result of a mutual mistake',[117] namely, that there is an implied condition in the contract.[118] However, Lord Atkin warned:

> The implications to be made are to be no more than are 'necessary' for giving business efficacy to the transaction, and it appears to me that, both as to existing facts and future facts, a condition would not be implied unless the new state of facts

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[112] ibid 217 (emphasis added).

[113] Eg *Couturier v Hastie* (n 48); Sale of Goods Act 1979, s 6.

[114] Eg *Cooper v Phibbs* (1867) LR 2 HL 149 (HL).

[115] *Bell v Lever Brothers* (n 6) 218.

[116] ibid 223–224.

[117] ibid 224.

[118] ibid 224–227.

> makes the contract something different in kind from the contract in the original state of facts.[119]

After suggesting that this gave 'a common standard for mutual mistake, and implied conditions whether as to existing or as to future facts', Lord Atkin concluded that 'in the present case the identity of the subject-matter was not destroyed'.[120]

It has been suggested that Lord Atkin saw the implied condition approach 'as having more explanatory power as to when the contract will fail'.[121] But it is equally true that he saw the two approaches as different ways of getting to the same result. Lord Thankerton, by contrast, rejected the implied condition approach.[122] Lord Atkin's speech has certainly been the most influential, but it is fair to record that the other member of the majority, Lord Blanesburgh, agreed with both Law Lords. At its highest, *Bell v Lever Brothers* appears to be supportive of both approaches.

The result in *Bell v Lever Brothers* has been described as 'controversial',[123] 'quite exceptional',[124] and 'puzzling'.[125] Starting from the premise that the subject-matter of each contract was the 'contract of service',[126] it has been argued that

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[119] ibid 226.

[120] ibid 226–227.

[121] Beale (n 1) 689 [8-029].

[122] *Bell v Lever Brothers* (n 6) 237.

[123] Atiyah and Bennion (n 2) 438.

[124] *Associated Japanese Bank* (n 6) 267.

[125] Smith, 'Contracts—Mistake, Frustration and Implied Terms' (n 2) 411.

[126] See, eg, ibid 412; Peel (n 1) 363 [8-018].

there is 'an apparent contradiction'[127] between Lord Atkin's statement in relation to 'mistakes as to quality' and the decision in the case. For example, Sir John Cyril Smith argued:

> The subject-matter, as the parties believed it to be, was worth £30,000; as it in fact was, it was worth nothing. As it is impossible to envisage a mistake as to quality which is more fundamental that that in *Bell v Lever Bros*, it is argued that no common assumption as to the quality of the subject-matter will be regarded as sufficiently basic to avoid the contract.[128]

But the result is readily justifiable when one looks at what precisely the parties were buying and selling (to continue the sale analogy). According to the terms of the contract, Lever Brothers paid £50,000 total to Bell and Snelling in return for them 'retir[ing] from the Boards of the Niger Company and its subsidiaries'.[129] This is exactly what Bell and Snelling did. The fact that, due to the breaches of duty by Bell and Snelling, Lever Brothers could have used its voting powers as shareholders of Niger to remove them without being in breach of their agreement does not change the fact that the consideration for Lever Brothers' undertaking to pay was in fact the directors stepping down. This is precisely what occurred. On this view, Lever Brothers got exactly what it bargained for. In other words, the substantial-benefit condition had not failed.

Part of the key to understanding the case in this way is that Lever Brothers had the power to remove the directors at any time by virtue of it being a majority shareholder of the Niger Company. The service agreements were

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[127] Smith, 'Contracts—Mistake, Frustration and Implied Terms' (n 2) 411. See also De Gregorio (n 80) 85.

[128] Smith, 'Contracts—Mistake, Frustration and Implied Terms' (n 2) 412.

[129] *Bell v Lever Brothers* (n 6) 178, 179.

simply agreements to maintain Bell and Snelling in those positions 'so long only as they fulfilled their prescribed duties as officers of Niger'.[130] As Lord Blanesburgh was at pains to point out:

> So soon as they defaulted in these respects Levers would be justified in stopping any further payments to them, and would be relieved from the obligation of further maintaining them in their offices. But that would be all. For results more drastic Levers had to rely only on their voting power as shareholders of Niger.[131]

Suppose that the service agreements had never existed at all. Could it be said that if Lever Brothers agreed to pay £50,000 to the directors in exchange for them stepping down, and they did, that Lever Brothers had not got what it bargained for? Of course not. It might be said to be a bad deal given that Lever Brothers could remove them by the exercise of its shareholder voting powers for free, but this does not change the construction of the agreement. The position should not change simply because there is a service agreement and Lever Brothers mistakenly believed that it would be in breach of that agreement if it removed the directors. Lever Brothers bargained for the two directors to step down, and the two directors did. The fact that they could have got it for free is neither here nor there.

The above demonstrates that the result in *Bell v Lever Brothers Ltd* is readily explicable as an instance of the non-failure of the substantial-benefit condition. Although the result is also explicable in terms of Lord Atkin's narrow doctrine of 'mistake', it is submitted that references to 'mistake', based upon theories of subjective consent, only serve to obscure what is a simple question involving the

[130] ibid 172.

[131] ibid 172–173.

substantial-benefit condition: did the party get what it bargained for? For example, Professor Catharine MacMillan has said:

> If we base our doctrine of mistake upon a consensual theory of contract, which Lord Atkin clearly does, it is hard to imagine a more destructive force to consent. This is not a case where change makes the bargain less desirable; it is a case where the bargain would never be made.[132]

Quite so. But it is only when one looks at the case through the prism of 'mistake' that the result looks so odd. If one focuses on the proper construction of the agreement, and on when the substantial-benefit condition fails, the result is entirely orthodox.

#### *6.3.2.5 The Great Peace*

The most recent leading case that can be analysed as turning upon the application of the substantial-benefit condition is the decision of the Court of Appeal in *The Great Peace*.[133] In that case a vessel, the *Cape Providence*, was damaged in the South Indian Ocean. The defendants were a salvage company that had offered their services. They engaged a firm of brokers and asked them to find a vessel in the vicinity of the *Cape Providence* that could assist. The brokers were informed by a third party company that there were four vessels in the area and were given the estimated position of the *Great Peace*. The brokers thereupon contacted the *Great Peace's* managers and said that they believed the *Great Peace* was the closest vessel to *Cape Providence*.

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[132] Catharine MacMillan, 'How temptation led to mistake: an explanation of *Bell v Lever Brothers Ltd*' (2003) 119 Law Quarterly Review 625, 658.

[133] *The Great Peace* (n 4).

The defendants agreed through their brokers to charter the *Great Peace* for a minimum period of five days at a rate of US $16,500 per day. Shortly after the contract was concluded, it came to light that the vessels were in fact 410 miles away from each other. Had the information from the third party company been correct the vessels would only have been 35 miles away from each other. Upon discovering this, the defendants told their brokers that they were 'looking to cancel the "Great Peace", but not yet'[134] because they wanted to 'know if there was a nearer available vessel which could provide assistance'.[135] By chance, shortly thereafter a vessel that was being chartered by the charterers of the *Cape Providence* passed by. The defendants thus instructed their brokers to cancel the charter of the *Great Peace*, which they did. The plaintiffs claimed $82,500, representing five days' loss of hire. The defendants, among other things, pleaded that the agreement was 'void in law for fundamental mistake', the relevant mistake being that 'both parties proceeded on the fundamental assumption of fact that the "Great Peace" was "in close proximity" to the "Cape Providence" when she was not'.[136] At first instance and on appeal, it was held that the defendants were liable to pay the $82,500.

At first instance, Toulson J explained that the 'effect of a mutual mistake … depends on the proper analysis of the contract and the rights and obligations thereby created'.[137] He said that:

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[134] *The Great Peace* (2001) 151 NLJ 1696 (QB) [21].

[135] ibid [21].

[136] ibid [27].

[137] ibid [50].

> the contractual specification of the services to be provided by the Great Peace involved the necessary implication that the Great Peace was capable of providing the services specified. If, to take an extreme case, the Great Peace had been 5 days' sailing away from the 'Cape Providence', there would have been a failure of that implied condition precedent.[138]

Toulson J went on to say, however, that the condition had not failed. He noted that the *Great Peace* could have changed course[139] and he thought that the reaction of the defendants upon learning of the vessels' true position was telling: '[e]vidently the defendants did not regard the contract as devoid of purpose, or they would have cancelled at once'.[140]

Toulson J's decision was upheld by the Court of Appeal (Lord Phillips MR, May, and Laws LJJ). After a lengthy examination of the authorities and after rejecting the proposition that 'the doctrine of common mistake can be satisfactorily explained by an implied term'[141]—a point which will be discussed in the next section—Lord Phillips MR asked: '[w]as the distance between the two vessels so great as to … render the contractual adventure impossible of performance?'[142] The answer to that question was 'no'. Lord Phillips MR agreed with Toulson J that the defendants' reaction to learning of the true position of the vessels was a 'telling indication' that the services to be provided by the Great Peace were not 'essentially different from those which the

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[138] ibid [55].

[139] ibid [56], although note the criticism of this suggestion in the Court of Appeal: *The Great Peace* (n 4) 727 [164].

[140] *The Great Peace* (n 134) [56].

[141] *The Great Peace* (n 4) 704 [82].

[142] ibid 726 [162].

parties had envisaged when the contract was concluded'.[143] The distance between the vessels 'did not mean that it was impossible to perform the contractual adventure'.[144]

The language here of the 'impossibility' of performing the 'contractual adventure' should not be taken to suggest that this case was concerned with the possibility condition. The party seeking to be discharged here was the party who was to receive the performance and they sought to be discharged from their obligation to pay. This is a question involving the substantial-benefit condition: would the distance between the vessels, now discovered, mean that the defendants would not get what they bargained for? The answer both courts gave to that question was 'no'.

### 6.3.3 The 'not-radically-different' condition

As explained in the previous chapter,[145] this final category is not a single condition but a more abstract label referring to an amalgamation of different conditions that have been held in various cases to be implicit in contracts. These are cases that cannot be explained by the possibility condition or the substantial-benefit condition, but where nonetheless the continued existence to some degree of the circumstances supposed to be prevailing at the time of contracting was a condition on which the contractual obligations of both parties are dependent.

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[143] ibid 727 [164].

[144] ibid 727 [165].

[145] Section 5.2.3.

#### *6.3.3.1 Associated Japanese Bank*

One such case is *Associated Japanese Bank (International) Ltd v Crédit du Nord SA*.[146] Mr Bennett had entered into two contracts to sell and leaseback four machines with the plaintiff, Associated Japanese Bank. This was a means of raising finance. The defendant, Crédit du Nord, had guaranteed the obligations of Mr Bennett under the leaseback agreement. It later turned out that Mr Bennett was a fraudster and, despite the assumptions made by the plaintiff and the defendant, the machines did not exist. Mr Bennett was subsequently adjudged bankrupt and the plaintiff sought to recover from the defendant under the terms of the guarantee. The Court held that the plaintiff could not recover.

Steyn J based his decision on two grounds. The first was based on clause 6 of the guarantee, which provided that the plaintiff's rights were not to be affected 'by the substitution of any other goods comprised in [the lease]'[147] provided the defendant consented to the substitution. Steyn J thought that clause 6 'contemplated the existence of the machines' and that therefore 'the guarantee was subject to an express condition precedent that there was a lease in respect of four existing machines'.[148] The second ground was that if this conclusion were wrong, 'the guarantee contained an implied condition precedent that the lease related to existing machines'.[149]

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[146] *Associated Japanese Bank* (n 6).

[147] ibid 263.

[148] ibid.

[149] ibid.

Although it was not necessary to do so to resolve the case, given the role that the arguments had played in the hearing,[150] Steyn J then went on to discuss the law regarding so-called common mistake. He said:

> For both parties the guarantee of obligations under a lease with non-existent machines was essentially different from a guarantee of a lease with four machines which both parties at the time of the contract believed to exist. … In my judgment the stringent test of common law mistake is satisfied: the guarantee is void ab initio.[151]

As Smith has noted, the implied condition view 'is in one respect supported, but in another, contradicted'[152] by Steyn J's judgment. On the one hand, as will be explored fully below,[153] the implied condition view left no room for an independent doctrine of 'common mistake'. On the other hand, Steyn J did clearly separate the two ideas.[154] In any event, the case is readily explicable as turning upon a specific instance of the not-radically-different condition. This is because to say that the guarantee 'contemplated the existence of the machines'[155] is simply a more specific way of saying that 'the guarantee of obligations under a lease with non-existent machines was essentially different from a guarantee of a lease with four machines'.[156] The specific condition found by Steyn J is merely a specific instance of the group of conditions that has been referred to in this thesis as the 'not-radically-different' condition.

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[150] ibid 264.

[151] ibid 269.

[152] Smith, 'Contracts—Mistake, Frustration and Implied Terms' (n 2) 400.

[153] See s 6.5.3.

[154] G H Treitel, 'Mistake in contact' (1988) 104 Law Quarterly Review 501, 503.

[155] *Associated Japanese Bank* (n 6) 263.

[156] ibid 269.

It should also be noted, for completeness, that the language of 'essentially different' was used in this case in a different sense to the way in which it was used in *Bell v Lever Brothers Ltd*. In the latter case, the language of 'essentially different' was a proxy for whether the plaintiff got what they bargained for—Lord Atkin referred to 'the thing contracted for'[157] as being that which must be essentially different. By contrast, in *Associated Japanese Bank*, the language of 'essentially different' was being used by one party to say that the performance of its guarantee obligations in these circumstances would be essentially different; in other words, that the circumstances in which performance would be called for were 'essentially' or 'radically' different from those which were supposed to be prevailing at the time of contracting. That is why the case can be analysed as involving the not-radically-different condition.

#### *6.3.3.2 The Great Peace*

Another case which can be seen as involving the not-radically-different condition is the decision in *The Great Peace*, which was examined above. As we saw, the case is explicable primarily as an application of the substantial-benefit condition. But the defendants had also pleaded their case as being that it was a fundamental assumption of fact that the *Cape Providence* was in close proximity to the *Great Peace* when in truth it was not. Could it be argued that this circumstance, supposed by both parties to have obtained at the time of contracting, was a condition upon which the obligation of both parties was dependent?

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[157] *Bell v Lever Brothers* (n 6) 218.

The answer that Toulson J gave was 'no'. He thought that it would be 'wrong in the circumstances to elevate the facts reported … into terms of the subsequent contract between the parties'[158] and that '[i]f the defendants had wished for a contractual stipulation from the claimants as to the position of the Great Peace, they could have asked for it.'[159] This conclusion seems correct and reflects the fact, noted in the previous chapter,[160] that it is not a tacit condition of every agreement that some change will not happen 'in any degree'.[161] Although the vessels were further apart than supposed, it did not radically change the circumstances in which performance of either party was called for.

#### *6.3.3.3 British Red Cross v Werry*

A final case that illustrates a specific instantiation of the not-radically-different condition is *British Red Cross v Werry*.[162] The case concerned an agreement to settle an action under the Inheritance (Provision for Family and Dependants) Act 1975. The action had been brought by the unmarried partner (Miss Deeley) of the deceased (Mr Harding) against individuals that received property under the intestacy rules (the 'intestacy beneficiaries') 'on the basis that the rules of intestacy left [Miss Deeley] without reasonable provision for her maintenance.'[163] After Miss Deeley's death a few years later, and in the course of cleaning out the

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158 *The Great Peace* (n 134) [60].

159 ibid [61].

160 Section 5.2.3.

161 *F A Tamplin Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd* [1916] 2 AC 397 (HL) 403.

162 [2017] EWHC 875 (Ch).

163 ibid [6].

family home which both had occupied, Mr Harding's will was discovered. The will gave Miss Deeley considerably more than she had obtained under the settlement agreement.

The beneficiaries of Miss Deeley's will—five charities—sought leave to appeal from the order approving the settlement agreement on the basis that the agreement was 'void' for common mistake. Deputy Judge Elizabeth Cook allowed the appeal on the basis that it was 'beyond dispute that the settlement agreement was entered into on the basis of a common mistake'.[164] She said that 'the mistake [was] as fundamental as … where a party contracted to purchase land that he or she already owned'.[165]

This is a case in which the circumstances in which the agreement took effect were radically different from those which were supposed to be prevailing at the time of contract. But it is clear that the condition can be expressed with a greater degree of specificity than this: the obligations of the parties under the agreement were simply conditional upon there being an intestacy, the existence of which 'was necessarily the basis for the compromise agreement'.[166]

### 6.3.4 Unconditional agreements

It was stated at the beginning of this chapter that rarely do the parties promise to perform 'no matter what'. But, as we saw in Chapter 5,[167] where the parties really

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[164] ibid [23]. The order was unopposed: [17].

[165] ibid [22].

[166] Morgan (n 2) 568.

[167] See s 5.2.4.

do promise to perform 'no matter what', effect will be given to that expression of intention. The position is no different in cases said to be concerned with the 'doctrine' of common mistake. Thus, in *Triple Seven Msn 27251 Ltd v Azman Air Services Ltd*,[168] the claimants leased to the defendant two aircrafts, each for a period of five years. The purpose, known to both parties, of the defendant in entering into the agreements was to 'transport passengers from West Africa to the Kingdom of Saudi Arabia for the Hajj and Umrah pilgrimages'.[169] A few days before the lease agreements were entered into—but unbeknownst to either party—the General Authority of Civil Aviation of Saudi Arabia sent a letter refusing permission for the defendant to participate in the transport of pilgrims to Saudi Arabia for the 2016 Hajj pilgrimage. The letter was received by the defendant a few hours after the agreements had been entered into. When the defendant failed to take delivery of the aircraft or pay the first instalments of rent, the claimant terminated the contractual obligations of the parties pursuant to a clause in the contract and commenced proceedings, among other things, seeking damages for breach of contract. The defendant's primary defence was that the leases were 'void' for common mistake.

Peter MacDonald Eggers QC, sitting as a Deputy High Court Judge, ultimately held that the 'mistaken assumption shared by the parties was not sufficiently fundamental' to render the lease agreements 'void'.[170] But even if this had not been the case, he would not have found that the lease agreements were

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[168] [2018] EWHC 1348 (Comm), [2018] 4 WLR 97.

[169] ibid [2].

[170] ibid [89].

void in part due to a clause in the agreements which provided that the lessee's obligations were 'absolute and unconditional, irrespective of any contingency or circumstance whatsoever'.[171] This clause meant that the lessor really did promise to perform 'no matter what'. And where that is the case, the parties ought to be held to their contracts.

## 6.4 DEFENDING THE IMPLIED CONDITION VIEW

As the previous section showed, not only can cases involving so-called common mistake be explained on the basis of an implied condition, there was significant judicial support for this view prior to the decision in *The Great Peace*. Indeed, it is well recognised that the early cases, such as *Clifford v Watts* and *Couturier v Hastie*, 'tended to reason not from a doctrine of mistake, but from the construction of the terms of the agreement'.[172] In later cases too, this was at least one dominant way of explaining the result. We saw this in the coronation cases—*Clark v Lindsay* and *Griffith v Brymer*—which turned upon an implied condition, and in *Bell v Lever Brothers Ltd*, where Lord Atkin saw the implied condition approach as being at least an 'alternative mode of expressing the result of a mutual mistake'.[173] Similarly, at first instance in *The Great Peace*, Toulson J said that 'to speak of a mistake vitiating a contract is an alternative mode of analysing the effects of a

[171] ibid [91].

[172] Cartwright (n 66) 67.

[173] *Bell v Lever Brothers* (n 6) 224.

mistake according to the true interpretation of the contract'.[174] There is also, as we have seen, significant academic support for the implied condition view.[175]

Despite this significant judicial and academic support, the implied condition view was rejected by the Court of Appeal in *The Great Peace* for reasons similar to those given for the rejection of this view of frustration in *Davis Contractors Ltd v Fareham Urban District Council*.[176] Lord Phillips MR said:

> [T]he theory of the implied term is as unrealistic when considering common mistake as when considering frustration. Where a fundamental assumption upon which an agreement is founded proves to be mistaken, it is not realistic to ask whether the parties impliedly agreed that in those circumstances the contract would not be binding.[177]

It would be natural to think that the Court of Appeal was rejecting the implied condition view here in favour of a doctrine of common mistake concerned with what the parties subjectively intended. But curiously, it seems that this is not the case. In *Dana Gas PJSC v Dana Gas Sukuk Ltd*,[178] Leggatt J observed that the *The Great Peace* had rejected 'the conception of the doctrine of mistake which treats the subjective beliefs of the parties as relevant'. Instead, as Leggatt J noted,[179] Lord Phillips MR in *The Great Peace* stated that the doctrine was based on 'a rule of law under which, if it transpires that one or both parties have agreed to do something which it is impossible to perform, no obligation

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[174] *The Great Peace* (n 134) [98].

[175] See n 2.

[176] [1956] AC 696 (HL) 728. See Morgan (n 2) 561.

[177] *The Great Peace* (n 4) 703 [73].

[178] [2017] EWHC 2928 (Comm), [2018] 1 Lloyd's Rep 177, 186 [60].

[179] ibid.

arises out of that agreement.'[180] This rejection of the subjective doctrine of common mistake leads to the odd result that there apparently is a doctrine of common mistake but it has nothing to do with actual mistakes. The apparent justification for the doctrine, based on impossibility, is discussed below.[181]

### 6.4.1 Common objections

The argument of this chapter, of course, is that both the rejection of the implied condition view and the theory adopted in its stead are wrong. The problems with the supposed doctrine of common mistake—however it is conceived—are examined below. As for the objections to the implied condition view, the common objections to this view in the context of frustration have already been addressed in Chapter 5[182] and the responses given there apply with equal force here. In particular, in relation to the possible objection that in cases of common mistake the implication of a condition is unrealistic because the parties did not turn their mind to the possibility that the relevant assumption was not true, the objection only bites if implication or construction depends upon the subjective or actual intentions of the parties. They plainly do not.[183]

Moreover, at least one recent case has rejected the view that 'common mistake' rests 'on the notion that the parties have impliedly agreed what is to happen in the event that an assumption underlying the contract proves to be false', only to go on immediately to say that:

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[180] *The Great Peace* (n 4) 703 [73].

[181] See s 6.5.2.

[182] See ss 5.4.2–5.4.4.

[183] See n 227 in s 5.4.3. See also in this context: Morgan (n 2) 561.

> [Common mistake] does, however, involve a question of construction of the contract. It is only where it is to be inferred from the terms of the contract or the surrounding circumstances that the contract was never intended to apply in the situation which in reality existed when the contract was made that the doctrine will apply.[184]

To repeat what was said in Chapter 5 in relation to the 'construction theory' of frustration,[185] to say that 'the contract was never intended to apply in the situation which in reality existed'[186] is just another way of saying that the obligations of the parties were conditional. It is true that it seems less plausible to say that the parties positively agreed that if the facts were not as they were supposed to be then 'the contract' should cease. But the implied condition view does not say this. It states, negatively, that the parties do not promise to perform in all circumstances—'that is, after all, what non-satisfaction of a condition precedent means'.[187]

### 6.4.2 Problems with the 'doctrine' of common mistake

Not only is the implied condition view capable of explaining the positive law, there are in fact several problems with the supposed doctrine of common mistake, all of which demonstrate that the implied condition view is to be preferred.

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[184] *Dana Gas* (n 178) 186 [61].

[185] See s 5.4.4.

[186] *Dana Gas* (n 178) 186 [61].

[187] Frederick Wilmot-Smith, *Failure of Condition* (DPhil Thesis, University of Oxford 2013) 257.

#### *6.4.2.1 Subjective mistake inconsistent with common law's objective approach*

The first problem is that 'the doctrine of mistake, whatever it is, is … one intimately associated with the now repudiated doctrine of reality of consent'.[188] The very idea that a common mistake should invalidate a contract is one which was influenced by the 'will theory' of contract and the writings of the French jurist Robert Joseph Pothier.[189] Pothier's theory was that 'contractual liability stemmed from the mutual [subjective] assent of the parties'[190] and that where this assent was not present there was no contract. This principle covered not just cases where the parties were at cross-purposes, but 'situations in which the contract had been entered into under some material misapprehension'.[191]

This theory, however, has always been in tension with the common law's objective approach to contract formation and interpretation.[192] The leading authority is the decision in *Smith v Hughes*,[193] which stands for the proposition that, absent fraud or misrepresentation, there is no principle of English law that prevents a person from relying upon a mistake made by the other as to the

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[188] Simpson (n 85) 269.

[189] See generally, ibid 264–269; Ibbetson (n 54) 225–229.

[190] Ibbetson (n 54) 220. See also Goodhart (n 2) 99, 100.

[191] Ibbetson (n 54) 226. See Robert Joseph Pothier, *A Treatise on Obligations, Considered in a Moral and Legal View* (Francois-Xavier Martin tr, Newbern NC 1802) 14.

[192] Cartwright (n 66) 72. See *Dana Gas* (n 178) 186 [60].

[193] (1871) LR 6 QB 597 (QB).

subject-matter of the contract.[194] In a statement that is often quoted as embodying the objective approach, Blackburn J said:

> If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.[195]

Whatever may be said of other legal systems, it is clear that the will theory does not represent English contract law.[196] And if the doctrine of mistake is—as it is commonly supposed to be—a doctrine based upon the subjective beliefs of the parties, then there is no role for it in 'a system which interprets its contracts by a purely objective standard'.[197] As Dixon and Fullagar JJ put the point in *McRae v Commonwealth Disposals Commission*: 'once the common law had made up its mind that a promise supported by consideration ought to be performed, it was inevitable that the theorisings of the civilians about "mistake" should mean little or nothing to it.'[198]

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[194] The position in relation to a belief as to the 'terms' of the contract is slightly more complicated: see ibid 608; *Hartog v Colin & Shields* [1939] 3 All ER 566 (KB); Peel (n 1) 382–383 [8-047]. This is sometimes referred to as a 'mistake as to terms', but it is perhaps better understood simply as a circumstance where A can no longer rely upon the objective meaning of the agreement, if 'he knows that the objective impression of agreement created is false': Stevens, 'Objectivity, Mistake and the Parol Evidence Rule' (n 2) 104.

[195] *Smith v Hughes* (n 193) 607. Blackburn J here actually appears to have been subscribing to a subjective theory of assent and he relied upon estoppel as a rule of evidence for this statement of principle: *Smith v Hughes* (n 193) 607. See Ibbetson (n 54) 222 fn 9. Despite this, the objective approach is not a principle of estoppel: see Davies (n 194) 19. For a more recent endorsement of the objective approach without relying on estoppel, see *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG* [2010] UKSC 14, [2010] 1 WLR 753, 771 [45].

[196] Goodhart (n 2) 101.

[197] ibid 102.

[198] *McRae v Commonwealth Disposals Commission* (n 39) 407.

Moreover, a doctrine that is based upon the parties subjectively having made a common mistake cannot easily explain those cases in which both parties are mistaken but there is no relief.[199] A case in point is *Barr v Gibson*.[200] The defendant had sold to the plaintiff title to a ship and covenanted that he had the power to sell. Unbeknownst to both parties, the ship had run ashore. Despite the fact that both parties were clearly mistaken, Parke B held that the transfer purported to be absolute and therefore that if the ship had been physically destroyed or had ceased to answer the description of a ship then the defendant would have been in breach of the covenant.[201]

Of course, the answer given by proponents of the doctrine of common mistake is that the doctrine does not apply if the contract expressly allocates the risk or if one party warrants the existence of the state of affairs.[202] But that response only reveals that the doctrine has nothing to do with subjective mistakes, for a party may give an express warranty about purported facts as to which both parties are mistaken.[203]

#### *6.4.2.2 No justification for the doctrine*

For the reasons given above, the doctrine cannot be one based upon the subjective common mistake of the parties. But, as was noted in the previous

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[199] Atiyah and Bennion (n 2) 422.

[200] (1838) 3 M & W 390, 150 ER 1196 (Exch). *McRae v Commonwealth Disposals Commission* (n 39) is another example.

[201] On the facts, it was held that the ship had not ceased to exist for this purpose.

[202] *The Great Peace* (n 4) 703 [75].

[203] Atiyah and Bennion (n 2) 425–426.

section, according to Leggatt J in *Dana Gas*,[204] 'the conception of the doctrine of mistake which treats the subjective beliefs of the parties as relevant has not been accepted' in English law. This then leads to the next problem: what is the justification for a doctrine of common mistake? After all, 'no Court has an absolving power'[205] and 'the court has no power to improve upon the instrument which it is called upon to construe'.[206]

One justification which has been offered is that common mistake is a doctrine concerned with 'impossibility'. As noted above, in *The Great Peace*, Lord Phillips MR suggested that the 'doctrine' of common mistake:

> results from a rule of law under which, if it transpires that one or both of the parties have agreed to do something which it is impossible to perform, no obligation arises out of that agreement.[207]

There are two reasons to doubt this justification. The first is that there has been confusion about what Lord Phillips MR meant by this and, in particular, about the apparent requirement that 'the non-existence of the state of affairs must render performance of the contract impossible'.[208] Later in his judgment he spoke of 'a fundamental assumption which renders performance of the *essence* of

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[204] *Dana Gas* (n 178) 186 [60].

[205] *Tamplin* (n 161) 404; *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd* [1942] AC 154 (HL) 185; *Denny, Mott & Dickson Ltd v James B Fraser & Co Ltd* [1944] AC 265 (HL) 281; *Metropolitan Water Board v Dick, Kerr & Co* [1918] AC 119 (HL) 127; *British Movietonews Ltd v London and Distict Cinemas Ltd* [1952] AC 166 (HL) 183.

[206] *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988, 1993 [16].

[207] *The Great Peace* (n 4) 703 [73].

[208] ibid 703 [76]. See *Brennan v Bolt Burdon* [2004] EWCA Civ 1017, [2005] QB 303, 316 [22], 323 [58]–[60]; *Kyle Bay Ltd t/a Astons Nightclub v Underwriters* [2007] EWCA Civ 57, [2007] 1 CLC 164, 169–170 [21]–[25]; *Apvodedo NV v Collins* [2008] EWHC 775 (Ch) [43]–[46]; *Dana Gas* (n 178) 187 [65]; *Triple Seven* (n 168) [60]–[65], [75]–[76].

the obligation impossible'.[209] Most recent cases have treated this statement as merely one formulation of when a 'mistake is sufficiently fundamental'.[210]

The second, more fundamental, reason to doubt Lord Phillips MR's justification is that, as we saw in Chapter 5, there is no principle in English law that prevents parties from contracting to do that which is impossible.[211] In *Clifford v Watts*,[212] Brett J said that 'it is not competent to a defendant to say that there is no binding contract, merely because he has engaged to do something which is physically impossible.' There is no 'rule of law' that no obligation arises out of an agreement that is impossible to perform.

#### *6.4.2.3 No room for a doctrine of common mistake*

The third problem with a doctrine of common mistake is that it is unnecessary. Sir John Cyril Smith famously argued that 'there is no room for the application of a distinct doctrine of mistake'.[213] Smith had in mind the decision of *Associated Japanese Bank*, where Steyn J had said:

> Logically, before one can turn to the rules as to mistake, whether at common law or in equity, one must first determine whether the contract itself, by express or implied condition precedent or otherwise, provides who bears the risk of the relevant mistake. It is at this hurdle that many pleas of mistake will either fail or prove

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[209] *The Great Peace* (n 4) 704 [82] (emphasis added).

[210] *Dana Gas* (n 178) 187 [65]. The other formulation is when the mistake renders 'the subject-matter of the contract essentially and radically different from the subject-matter which the parties believed to exist': *Associated Japanese Bank* (n 6) 268. See *Kyle Bay* (n 208) 170 [24]–[25]; *Dana Gas* (n 178) 187 [65]; *Triple Seven* (n 168) [75]–[76].

[211] See s 5.2.1.

[212] *Clifford v Watts* (n 22) 588.

[213] Smith, 'Contracts—Mistake, Frustration and Implied Terms' (n 2) 400. See also Morgan (n 2).

> to have been unnecessary. Only if the contract is silent on the point, is there scope for invoking mistake.[214]

In *Associated Japanese Bank*, Steyn J had in fact gone on to consider whether the contract might be 'void' for common mistake. But, as he noted in the quote above, this was unnecessary. In *Graves v Graves*,[215] an argument was advanced that a lease between a landlord and his former wife was 'void' for common mistake. In particular, the tenancy had been granted on the basis that the rent would be paid by the wife from the receipt of a housing benefit. The housing benefit was not payable. The Court of Appeal (Thomas LJ with whom Hughes LJ and Mr Justice Coleridge agreed) held that it was unnecessary to consider whether the contract was 'void' for common mistake[216] because there was 'an implied condition that if housing benefit was not payable, the tenancy would come to an end'.[217]

To be fair, in *Associated Japanese Bank* Steyn J clearly contemplated that a plea of mistake could pass this hurdle,[218] but herein lies the problem: once it has been ascertained whether the obligations of the parties are or are not conditional, the risk has been allocated and the contract should 'bind according to its terms'.[219] To hold otherwise would 'contradict the intention of the parties' as expressed in the contract.[220] In Smith's words:

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[214] *Associated Japanese Bank* (n 6) 268.

[215] [2007] EWCA Civ 660.

[216] ibid [43].

[217] ibid [41].

[218] Treitel (n 154) 503.

[219] Morgan (n 2) 568 (emphasis removed).

[220] Smith, 'Contracts—Mistake, Frustration and Implied Terms' (n 2) 407.

> Suppose that the court in the *Japanese Bank* case had found that there was no express or implied condition precedent that the machines existed. It would then have established that the parties did *not* intend that the contract should be invalidated if it turned out that the machines did not exist. That, it is submitted, should have been the end of the matter.[221]

In this sense, there is no room for a doctrine of common mistake.

#### *6.4.2.4 Obscures the relationship with other areas of contract law*

The last problem with the supposed existence of a separate doctrine of common mistake is that it leads to an arbitrary line being drawn between cases of 'common mistake' and cases of 'frustration'. It also leads to false analogies being drawn with other areas in an attempt to unify the different cases of 'mistake' in the law of contract.

To take the first proposition, on the current orthodoxy there is no doubt that there is a close relationship between the 'doctrine' of frustration and the 'doctrine' of common mistake. In *The Great Peace*, the Court of Appeal recognised that 'the law of frustration and common mistake had advanced hand in hand on the foundation of a common principle'.[222] Yet orthodoxy refuses to go further[223] and recognise that these are simply two instances of failure of condition, differentiated only by the point in time at which the condition fails.[224]

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[221] ibid 407–408. See also *The Great Peace* (n 134) [98].

[222] *The Great Peace* (n 4) 700 [61].

[223] See, eg, Andrew Burrows, *A Casebook on Contract* (7th edn, Hart Publishing 2020) 791.

[224] Smith, 'Contracts—Mistake, Frustration and Implied Terms' (n 2) 402; Stevens, 'Objectivity, Mistake and the Parol Evidence Rule' (n 2) 105; Wilmot-Smith (n 187) 220.

That the difference between frustration and common mistake is only a matter of timing is illustrated by contrasting coronation cases such as *Griffith v Brymer*[225] (common mistake) and *Krell v Henry*[226] (frustration). It is also helpfully illustrated by *Amalgamated Investment & Property Co Ltd v John Walker & Sons Ltd.*[227] On 25 September 1973, the plaintiffs entered into a contract to purchase title to land on which a warehouse was situated. On 26 September, the day after the contract, the vendor was notified that the property had been selected for inclusion on a list of buildings of special architectural or historical significance, which was about to be given legal effect. The list was signed on behalf of the Secretary of State on 27 September. The listing of the building significantly impacted the redevelopment potential of the site such that, so long as it was listed and building consent could not be obtained, the value of the land would be reduced from £1.7 million to £200,000. The purchasers subsequently argued that the contract was void for common mistake and argued that the relevant event was the inclusion of the property on the list for signing, which had occurred before the contract was concluded. The Court of Appeal, agreeing with the primary judge, held that there was no mistake at the time of the contract because the relevant event was not the inclusion of the property on the list, but the signing of that list on behalf of the Secretary of State and that occurred on September 27 (two days after the contract was concluded). The Court therefore

[225] *Griffith v Brymer* (n 88).

[226] [1903] 2 KB 740 (CA).

[227] [1977] 1 WLR 164 (CA).

went on to apply the law relating to 'frustration', though ultimately it held that the purchasers were not entitled to succeed.[228]

It makes no sense for the question whether one doctrine or the other applies to turn upon such fine and arbitrary distinctions. By contrast, on the approach taken in this thesis, both 'frustration' and 'common mistake' are instances of failure of condition in which the court's role is to ascertain what were the conditions to each party's obligation to perform and whether those conditions have failed. As Professor Robert Stevens has noted, '[t]he court's essential task does not differ according to whether the unforeseen event occurred ten minutes before or ten minutes after the contract is entered into'.[229]

A related, and in some ways inverse, problem with a doctrine of common mistake is that it leads to attempts to analogise with other apparent instances of mistake in contract law—in particular, 'unilateral mistake' and its sub-category 'mutual mistake'.[230] When these cases are treated together, the relationship between them is uneasy. As Professor Hugh Beale notes, 'it is certainly hard to discern a single "doctrine" of mistake when the two categories of case … are subject to quite different rules'.[231]

Moreover, it seems that neither category—common mistake on the one hand and unilateral or mutual mistake on the other—has anything to do with mistake. In particular, an argument which cannot be developed here, is that most

[228] ibid 173.

[229] Stevens, 'Objectivity, Mistake and the Parol Evidence Rule' (n 2) 106.

[230] Eg Beatson, Burrows, and Cartwright (n 1) Ch 8.

[231] Beale (n 1) 679 [8-011].

cases that fall under the umbrella of unilateral or mutual mistake fall to be treated alongside the cases on offer and acceptance.[232] In *The Law of Contract*, Professor Edwin Peel states that '[i]n some respects, therefore, unilateral mistake and common mistake are not that closely related to each other and might have been assessed separately in other parts of this book.'[233] Attempts to unify these separate instances and create a unified doctrine of mistake in the law of contract will only serve to hinder rather than assist our understanding of the subject.

### 6.4.3 Summary

The implied condition view is 'superior in principle'[234] to an alternative approach based upon a doctrine of mistake. As this section explained, it commands significant judicial and academic support and the alternative approach faces a number of objections. First, if based upon the parties' subjective beliefs and a theory of subjective assent, it is inconsistent with the common law's objective approach to contract formation and interpretation. Secondly, if not based upon the parties' subjective beliefs, there appears to be no plausible justification for the doctrine. Contrary to Lord Phillips MR's suggestion, there is no principle of English law that no obligation can arise out of an agreement to do the impossible. Thirdly, if one begins by construing the agreement and asking whether the parties' obligations are conditional, there is no need for a doctrine of

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[232] Slade (n 2) 386–390; Shatwell (n 2) 188–193; P S Atiyah, 'Judicial Techniques and the English Law of Contract' (1968) 2 Ottawa Law Review 337, 344–350.

[233] Peel (n 1) 352 [8-001].

[234] Morgan (n 2) 561.

common mistake: 'the additional stage is unnecessary, indeed unhelpful'.[235] Finally, as we have just seen, the suggestion of a doctrine of common mistake causes us both to fail to draw connections between related cases and to draw false connections between unrelated ones.

## 6.5 A DOCTRINE OF COMMON MISTAKE IN EQUITY?

The last part of this chapter briefly considers whether there ought to be a doctrine of common mistake in equity. The point of departure in any discussion of this topic is the decision of the Court of Appeal in *Solle v Butcher*[236] in which Denning LJ recognised a doctrine of common mistake in equity that renders a contract voidable and liable to be set aside (on terms if necessary).

Denning LJ's starting point was that at common law, where the parties had objectively reached an agreement, neither party could rely upon a 'mistake' to say that a contract was 'a nullity from the beginning'[237] whether one party knew about the mistake and '[a] fortiori, if the other party did not know of the mistake but shared it.'[238] The cases, he said, really involved 'contracts which [were] not void for mistake but [were] void by reason of an implied condition precedent.'[239] This starting point is consistent with the thesis of this chapter that instances of 'common mistake' are just particular instances of failure of condition.

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[235] ibid 560.

[236] *Solle v Butcher* (n 5).

[237] ibid 691.

[238] ibid.

[239] ibid 691–692.

However, Denning LJ then went on to consider 'mistakes which render a contract voidable, that is, liable to be set aside on some equitable ground'.[240] Relying principally upon the House of Lords decision in *Cooper v Phibbs*,[241] Denning LJ thought that the authorities supported a jurisdiction in equity to set aside a contract for a 'fundamental' common mistake and, where necessary, on terms.[242]

The decision in *Solle v Butcher* was then followed in '[a] number of cases, albeit small in number'[243] in the fifty years following the decision.[244] But it was also met with criticism.[245] First, an important practical problem with the doctrine was 'how serious a mistake must be to justify equitable intervention (when it does not make the contract void at law)'.[246] The best guidance given was that the mistake had to be 'fundamental',[247] that '[e]quity [would] give relief against common mistake in cases where the common law [would] not',[248] and that 'equity

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[240] ibid 692.

[241] *Cooper v Phibbs* (n 114).

[242] *Solle v Butcher* (n 5) 693–694.

[243] *The Great Peace* (n 4) 724 [153].

[244] *Grist v Bailey* [1967] Ch 532 (Ch); *Magee v Pennine Insurance Co Ltd* [1969] 2 QB 507 (CA); *Laurence v Lexcourt Holdings Ltd* [1978] 1 WLR 1128 (CA). See also *Associated Japanese Bank* (n 6) and the discussion in *The Great Peace* (n 4) 719–724 [133]–[153].

[245] Atiyah and Bennion (n 2) 440–442; Slade (n 2) 403–407; A L Goodhart, 'Rescission of Lease on the Ground of Mistake' (1950) 66 Law Quarterly Review 169; Smith, 'Contracts—Mistake, Frustration and Implied Terms' (n 2) 417–419.

[246] Treitel (n 154) 504. See also Smith, 'Contracts—Mistake, Frustration and Implied Terms' (n 2) 418; *The Great Peace* (n 4) 719 [131]; *The Great Peace* (n 134) [117]–[118]; Beale (n 1) 704–705 [8-057].

[247] *Solle v Butcher* (n 5) 693.

[248] *Associated Japanese Bank* (n 6) 270.

[could] have regard to a wider and perhaps unlimited category of "fundamental" mistake."[249]

Secondly, some scholars doubted whether the cases upon which Denning LJ relied really did establish an equitable jurisdiction to set aside a contract for a common mistake—or at least one as broad as he suggested.[250] In *Cooper v Phibbs*,[251] the leading decision upon which Denning LJ relied, a nephew entered into an agreement to lease a fishery with the trustee of a settlement for his uncle's five daughters. Prior to his death, the uncle had represented to the nephew that the uncle held the fee simple to the fishery outright. As it turned out, the uncle only held the fee simple as trustee for the nephew, who was an equitable life tenant under a strict settlement. The House of Lords held that the nephew was entitled to have the agreement for lease set aside. Lord Westbury, who gave one of two reasoned speeches, said:

> [I]f parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded upon a common mistake.[252]

Slade argued that Lord Westbury's comments here were merely obiter, on the ground that there had been an 'active, albeit innocent, misrepresentation on the part of [the uncle]'[253] and that 'the court had undoubted jurisdiction to grant

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[249] *William Sindall Plc v Cambridgeshire CC* [1994] 1 WLR 1016 (CA) 1035.

[250] Goodhart (n 245); Slade (n 2) 403–407; F M B Reynolds, 'Reconsider the Contract Textbooks' (2003) 119 Law Quarterly Review 177, 179.

[251] *Cooper v Phibbs* (n 114).

[252] ibid 170.

[253] Slade (n 2) 405.

rescission on that ground'.[254] In particular, Lord Cranworth, who gave the only other reasoned speech, said 'in this case the [nephew] was led into the mistake by the misinformation given to him by his uncle, who is now represented by [the trustee and the uncle's five daughters]'.[255]

But Lord Cranworth only offered misrepresentation as an alternative ground for his decision, primarily basing his decision on the fact that the nephew had 'entered into the agreement under a common mistake, and [was] entitled to be relieved from the consequences of it'.[256] Moreover, Lord Cranworth relied upon the earlier decision in *Bingham v Bingham*[257] in support of that proposition. That was a case in which the plaintiff sought to have moneys refunded following the purported sale of an estate by the defendant, which it turned out the plaintiff already held. The report to the case states that 'there was a plain mistake, such as the court was warranted to relieve against, and not to suffer the defendant to run away with the money in consideration of the sale of an estate, to which he had no right'.[258] In *Cooper v Phibbs*, Lord Cranworth said of *Bingham v Bingham*, that 'the doctrine there acted upon was perfectly correct'.[259] It seems therefore,

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[254] ibid.

[255] *Cooper v Phibbs* (n 114) 164.

[256] ibid 164.

[257] (1748) 1 Ves Sen 126, 27 ER 934.

[258] *Bingham v Bingham* (1748) 1 Ves Sen 126, 127; 27 ER 934, 934.

[259] *Cooper v Phibbs* (n 114) 164.

contrary to Slade's view, that the ground of the decision in *Cooper v Phibbs* was common mistake.[260]

The third criticism of the decision in *Solle v Butcher* was that it was not clear how the decision was to be reconciled with *Bell v Lever Brothers*, in which *Cooper v Phibbs* was discussed, and no mention was made of the equitable doctrine.[261] It was principally for this last reason that the Court of Appeal in *The Great Peace* 'effectively overruled'[262] *Solle v Butcher*, which was described as an attempt by Denning LJ to 'outflank'[263] *Bell v Lever Brothers*. Lord Phillips MR said that it was 'impossible to reconcile' the two decisions and that coherence could only 'be restored to this area of law… by declaring that there is no jurisdiction to grant rescission of a contract on the ground of common mistake where that contract is valid and enforceable on ordinary principles of contract law.'[264]

On balance, the overruling of *Solle v Butcher* should be supported but subject to two qualifications. First, as a matter of precedent, it is questionable whether it was open to the Court of Appeal to depart from *Solle v Butcher*, which was also a decision of the Court of Appeal, even if it was inconsistent with the earlier decision of the House of Lords in *Bell v Lever Bros Ltd*.[265]

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[260] As the Court of Appeal accepted in *The Great Peace* (n 4) 713 [109]. See also MacMillan (n 62) 62–65.

[261] Smith, 'Contracts—Mistake, Frustration and Implied Terms' (n 2) 418.

[262] *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108, 153 [115].

[263] *The Great Peace* (n 4) 718 [126]. See also *The Great Peace* (n 134) [69].

[264] *The Great Peace* (n 4) 725 [157]. See also 726 [160].

[265] S B Midwinter, '*The Great Peace* and precedent' (2003) 119 Law Quarterly Review 180; Davies (n 194) 350.

Secondly, contrary to some of the criticisms outlined above,[266] it has been demonstrated persuasively by Professor Catharine MacMillan that, historically, equity did have a jurisdiction to rescind agreements entered into as a result of a mistake.[267] Although as she explains:

> Equitable relief for mistake was not based upon a failure of consent in the formation of the contract. … Equity recognised mistake as a factor, like fraud, accident or surprise, which could affect the conscience of the individual.[268]

Given that equity did have such a jurisdiction, it seems that if the overruling of *Solle v Butcher* is to be defended it must be 'on the grounds of legal policy and not precedent'.[269]

The overruling of *Solle v Butcher*, however, should be supported as a matter of legal policy. It is difficult to see what the justification is for a jurisdiction to relieve against the consequences of a common mistake in circumstances where there is an agreement supported by consideration.[270] As we have seen, once the court has determined, on a proper construction of the contract, that performance was to occur in the circumstances that have arisen, the court's role is to give effect to the parties' agreement,[271] at least by way of making available an action for damages. If the obligations of the parties are unconditional, then the parties ought to be held to that agreement, no more and

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[266] See n 250.

[267] MacMillan (n 62) 61–67.

[268] ibid 38. See also 314.

[269] ibid 316.

[270] Compare *Pitt v Holt* (n 262).

[271] Smith, 'Contracts—Mistake, Frustration and Implied Terms' (n 2) 407–408.

no less than if their obligations were conditional. There is no injustice in this result and therefore no need for equity to supplement the common law.[272]

This is not to say that 'mistake' cannot have any role in equity. The fact that one or both parties were mistaken may be a reason for a court to refuse to award specific performance[273] and confine one party to damages. Similarly, if a mistake of one party is induced by a representation by the other party, even if that other party is mistaken, it may be a ground for setting the contract aside for misrepresentation.[274] But there is no need or room for a doctrine of 'common mistake' in equity. As a matter of legal policy therefore it should not exist.

## 6.6 CONCLUSION

The aim of this chapter has been to reject the now-orthodox position that English law recognises a doctrine of common mistake that renders a contract void. Instead, it has been argued that the doctrine of common mistake is simply an instance of failure of condition. As we have seen, the early cases strongly supported this view. Unfortunately, despite the significant judicial and academic support for the implied condition view, it was rejected by the Court of Appeal in *The Great Peace*. But the reasons it gave for rejecting the implied condition view in this context were the same 'superficial'[275] reasons that had been given for rejecting this view in the context of 'frustration', and they do not withstand scrutiny. Similarly, the supposed doctrine of common mistake faces several

[272] See further Stevens, 'Objectivity, Mistake and the Parol Evidence Rule' (n 2) 106.

[273] *Malins v Freeman* (1837) 2 Keen 25, 48 ER 537.

[274] *Redgrave v Hurd* (n 65).

[275] Morgan (n 2) 561.

problems. The end result is that cases of 'common mistake' are best explained without reference to mistake at all. They are simply cases in which the parties' respective obligations to perform were conditional upon facts that did not exist or events that could not occur. There is certainly no need for a doctrine of common mistake at law, and the position is no different in equity.

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