THE NATURE OF "PROMISSORY CONDITIONS"

Jordan English*

1 INTRODUCTION

English lawyers are commonly told that in contract law a "condition", in its promissory sense, is a term the breach of which gives the innocent party a "power to terminate".[1] Exercising the power discharges both parties from their unperformed obligations, but unless and until it is exercised the innocent party remains bound to perform. The precise justification for the "power to terminate" remains unsettled,[2] 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 a contract was a "promissory condition" or "promissory condition precedent" was simultaneously to say (i) that one party had *promised* to ensure that some event would occur (or that some fact were true), and (ii) that the performance (or fulfilment) of that promise was a *condition* of the other party's obligation to perform. The effect of one party "breaching"[3] a promissory condition was that the 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.[4]

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. Modern orthodoxy, however, asserts that the law has moved on. Frederick Wilmot-Smith, for example, observes that promises "used to be thought of as either independent or dependent" and therefore "no question of termination could arise."[5] But he then argues:

> "By the late 19th century, the way contracts were understood had changed. The term 'condition' had come to denote a broken stipulation. This is quite a different concept from conditions precedent: breach of such a stipulation would not prevent counter-performance being due, though it might entitle the counterparty to terminate."[6]

Professor Sir Guenter Treitel in particular argued that the language of "promissory conditions" obscures two distinct concepts: (i) a promissory "condition precedent" in the sense of an uncertain fact or event upon which the existence of an obligation to perform depends; and (ii) a promissory "condition" in the sense of a term breach of which gives rise to a "power to terminate".[7] Moreover, he said that it is possible for a term to be a "condition" in the second sense without being a "condition precedent" in the first sense.[8]

*Supernumerary Teaching Fellow in Law, St John's College (Oxford). I am grateful to Birke Häcker, Edwin Peel, Alexander Georgiou and Jaamae Hafeez-Baig for their comments on an earlier draft.

[1] Edwin Peel, *The Law of Contract*, 15th edn (London: Sweet & Maxwell, 2020) at 981 [18–043]; Andrew Burrows, *A Restatement of the English Law of Contract* (Oxford: Oxford University Press, 2016) at 113. Cf Jack Beatson, Andrew Burrows, and John Cartwright, *Anson's Law of Contract*, 30th edn (Oxford: Oxford University Press, 2016) at 149–150.

[2] See Frederick Wilmot-Smith, "Termination after breach" (2018) 134 L.Q.R. 307 at 311–312.

[3] An unfortunate, but ingrained, misuse of language: see text accompanying fn 56.

[4] *Bentsen v Taylor, Sons & Co* [1893] 2 Q.B. 274 (*Bentsen v Taylor*).

[5] Frederick Wilmot-Smith, "Termination after breach" (2018) 134 L.Q.R. 307 at 307.

[6] Frederick Wilmot-Smith, "Termination after breach" (2018) 134 L.Q.R. 307 at 308.

[7] G.H. Treitel, "'Conditions' and 'Conditions Precedent'" (1990) 106 L.Q.R. 185 at 185.

[8] G.H. Treitel, "'Conditions' and 'Conditions Precedent'" (1990) 106 L.Q.R. 185 at 188.

The central argument of this article is that the modern orthodoxy is wrong and there is no distinction between a "condition" and "condition precedent", even when both terms are used in their *promissory* sense.[9] Specifically, this article rejects the notion that a "promissory condition" is 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 this second sense. Finally, after explaining that the view put forward is not a version of the discredited automatic discharge theory, the article 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 "promissory condition".

2 INDEPENDENT AND DEPENDENT PROMISES

In order to understand the true nature of "promissory conditions", 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, one party could sue for the non-performance of the counter-party's promise without having to plead and prove performance of his or her own promise.[11] But if promises were dependent, a party suing the other for non-performance had to plead and prove (i) performance of his or her own promise,[12] or (ii) in some cases, that he or she was at least ready, willing, and able to perform.[13]

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] Thus in *Nichols v Raynbred*,[15] 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".[16] This was not an isolated case: the rule was applied "in all kinds of bilateral contracts".[17]

Seventeenth century: shift towards a construction approach

The decision in *Pordage v Cole*[18] marked a shift in focus away from the technical words used by the parties. In that case, the defendant covenanted to give to the plaintiff "£775 for all his lands" with "the money to be paid before Midsummer, 1668".[19] The plaintiff subsequently brought an action for the price.[20] The defendant resisted on the grounds that the plaintiff did not plead that he had conveyed, or tendered a

[9] We are not concerned with uncertain facts or events that neither party has promised is true or will occur ("non-promissory" or "contingent" conditions).
[10] See generally, S.J. Stoljar, "Dependent and Independent Promises: A Study in the History of Contract" (1957) 2 Syd. L.R. 217; J.W. Carter and C. Hodgekiss, "Conditions and Warranties: Forebears and Descendants" (1976) 8 Syd. L.R. 31.
[11] *Pordage v Cole* (1669) 1 Wms. Saund. 319 at 320; 85 E.R. 449 at 451.
[12] *Pordage v Cole* (1669) 1 Wms. Saund. 319 at 320; 85 E.R. 449 at 451.
[13] See J.W. Carter and Wayne Courtney, "'Ready and willing to perform': discharge for breach and damages" [2020] L.M.C.L.Q. 251 at 252–255.
[14] Arthur Corbin, *Corbin on Contracts: A Comprehensive Treatise on the Rules of Contract Law* (St Paul: West Publishing Co, 1960) vol 3A at 136 §654 (*Corbin on Contracts*).
[15] (1614) Hob. 88; 80 E.R. 238.
[16] *Nichols v Raynbred* (1614) Hob. 88; 80 E.R. 238.
[17] Arthur Corbin, *Corbin on Contracts* (St Paul: West Publishing Co, 1960) vol 3A at 170 §661. The cases are collected in: C. Langdell, *A Selection of Cases on the Law of Contracts with a Summary of the Topics Covered by the Cases*, 2nd edn (Boston: Little Brown, and Company, 1879) Part II at 619–625.
[18] (1669) 1 Wms. Saund. 319, 85 E.R. 449.
[19] *Pordage v Cole* (1669) 1 Wms. Saund. 319 at 320; 85 E.R. 449 at 450.
[20] Less five shillings paid as a deposit.

conveyance, of the lands. The defendant argued "that the word ['for'] made a condition in things executory"—that the technical formula made the obligations dependent.[21] 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"[22] and to focus on "what construction would best serve the intention of the parties".[23] Thus a year later, in *Hunlocke v Blacklowe*,[24] the Court rejected the argument that the words "[i]n consideration of the performance thereof" amounted to a condition precedent because "such a construction would entirely defeat the intention of the parties".

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 a proper construction of the contract.[25] It was these developments that allowed Lord Mansfield in *Kingston v Preston*[26] 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". The decision is also important due to Lord Mansfield's statement that there are three kinds of covenants: (i) 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"; (ii) dependent covenants which are conditions, "in which the performance of one depends on the prior performance of another"; and (iii) 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".[27]

Lord Mansfield's judgment proved enormously influential, and provided "a basis for the modern law".[28] We should, however, note that Lord Mansfield's third category was not strictly one of conditions precedent but rather "concurrent conditions". Where performance was to occur at the same time, the performance of one obligation could not be a condition precedent to the other obligation, for there would be an obvious stalemate. In *Jones v Barkley*,[29] Lord Mansfield 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." Unfortunately, the distinction between these two categories is often obscured.

The decided cases so far all dealt with problems relating to non-performance in executory contracts.[30] 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*.[31] The plaintiff conveyed to the defendant the equity of redemption of a plantation in the West Indies, together with title

[21] *Pordage v Cole* (1669) 1 Wms. Saund. 319 at 320; 85 E.R. 449 at 450.
[22] S.J. Stoljar, "Dependent and Independent Promises: A Study in the History of Contract" (1957) 2 Syd. L.R. 217 at 229.
[23] J.W. Carter and C. Hodgekiss, "Conditions and Warranties: Forebears and Descendants" (1976) 8 Syd. L.R. 31 at 33.
[24] (1670) 2 Wms. Saund. 156 at 156–157; 85 E.R. 893 at 895–896.
[25] *Thorp v Thorp* (1702) 12 Mod. 455 at 460; 88 E.R. 1448 at 1451.
[26] (1773) 2 Doug. 689 at 691; 99 E.R. 436 at 438.
[27] *Kingston v Preston* (1773) 2 Doug. 689 at 690–691; 99 E.R. 436 at 437–438.
[28] Francis Dawson, "Metaphors and Anticipatory Breach of Contract" [1981] C.L.J. 83 at 88.
[29] (1781) 2 Doug. 684 at 694; 99 E.R. 434 at 440.
[30] J.W. Carter and C. Hodgekiss, "Conditions and Warranties: Forebears and Descendants" (1976) 8 Syd. L.R. 31 at 34.
[31] (1777) 1 H. BL. 273n; 126 E.R. 160n.

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 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, Lord Mansfield gave judgment for the plaintiff, 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."[32]

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 pay the annuity, because the fulfilment of this particular promise was not a condition precedent to that obligation.

Nineteenth century: development of the promissory condition

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 *Davidson v Gwynne*,[33] the Court held that a stipulation to sail with the first convoy was not a condition precedent. Lord Ellenborough C.J. thought it was "useless to go over the same subject again, which has been so often discussed of late".[34] He 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."[35]

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*,[36] 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 defendant 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".[37] Chief Baron Pollock agreed. After noting that the argument was founded on the rules laid down in *Boone v Eyre*, Pollock C.B. said:

> "[T]he obligation to serve depends upon the corresponding obligation to teach as an apprentice; and if the master is not ready to teach in the very trade which he has stipulated to teach, the apprentice was not bound

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[32] *Boone v Eyre* (1777) 1 H. BL. 273n; 126 E.R. 160n .
[33] (1810) 12 East 381; 104 E.R. 149.
[34] (1810) 12 East 381 at 389; 104 E.R. 149 at 152.
[35] *Davidson v Gwynne* (1810) 12 East 381 at 389; 104 E.R. 149 at 152.
[36] (1851) 6 Ex. 424; 155 E.R. 609.
[37] *Ellen v Topp* (1851) 6 Ex. 424 at 430; 155 E.R. 609 at 612.

> to serve. To this particular covenant to serve, the relative duty to teach seems to us to be directly a condition precedent…"[38]

The Common Law Procedure Act 1852: A shift in emphasis

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. This required the plaintiff to identify, at his or her own risk, what facts or events were conditions, irrespective of whether they were express, implied, or constructive.[39] 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 section's effect was to make a general allegation of the performance of all conditions precedent by the plaintiff sufficient.[40] The defendant then had to specify which condition he or she alleged had not been performed.

Importantly, s 57 did not change the legal relations of the parties. The underlying substantive position remained the same, and the ultimate burden of proof still remained on the plaintiff.[41] However, it 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 consequence was that the defendant now had to say "the plaintiff has broken this key stipulation, performance of which was a condition precedent to my obligation".[42] The focus therefore shifted to the particular term or promise that the defendant alleged had been breached.[43] This shift in emphasis, combined with loose language, also led judges to begin to speak of conditions (rather than covenants or promises) being "breached".[44]

Nonetheless, the Common Law Procedure Act did not change the contemporary understanding of "promissory conditions". An illustrative case is *Bettini v Gye*.[45] 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. The plaintiff pleaded that he had complied with conditions precedent generally, 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 commencement was not a condition precedent. The Court ultimately agreed. Blackburn J. said that the question was whether the plaintiff's failure to arrive six days prior "justified the

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[38] *Ellen v Topp* (1851) 6 Ex. 424 at 442; 155 E.R. 609 at 616.
[39] Samuel Williston, "Fashions in Law with Illustrations from the Law of Contracts" (1942) 21 Texas L.R. 117, 128; Francis Dawson, 'Metaphors and Anticipatory Breach of Contract' [1981] C.L.J. 83 at 89 fn 27.
[40] Until 1999 when the rules lapsed, R.S.C. 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.
[41] *Bentsen v Taylor* [1893] 2 Q.B. 274 at 283; *Jefferson v Paskell* [1916] 1 K.B. 58. See also Samuel Williston, "Fashions in Law with Illustrations from the Law of Contracts" (1942) 21 Texas L.R. 117 at 129; Francis Dawson, "Metaphors and Anticipatory Breach of Contract" [1981] C.L.J. 83 at 89 fn 27.
[42] See e.g. *Graves v Legg* (1854) 9 Ex. 709 at 715–716; 156 E.R. 304 at 306.
[43] Francis Dawson, "Metaphors and Anticipatory Breach of Contract" [1981] C.L.J. 83 at 89 fn 27.
[44] See e.g. *Graves v Legg* (1854) 9 Ex 709, 715–716; 156 E.R. 304 at 306.
[45] (1876) 1 Q.B.D. 183.

defendant in refusing to proceed with the engagement, and fulfil his, the defendant's part".[46] 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."[47]

The language here of a breach which may "justify a repudiation of the contract" 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 it is simply a reference to the defendant refusing to perform his side of the bargain. 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*, which spoke in terms of the dependency or independency of promises.

Waiver of condition: the next step

In *Bentsen v Taylor*,[48] 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 held that: (i) the clause was a condition precedent not a "mere warranty";[49] (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, subject to their own ability to bring a claim for damages. In particular, after the ship had failed to sail, the defendants had advised the plaintiff's brokers of their "intention to load under protest, claiming damages for freight and increased insurance".[50] Bowen L.J. 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. …"[51]

Bowen L.J. found that the defendants "did not intend to rely upon that as a failure of a condition precedent, but only as a breach of warranty".[52]

This is an important case insofar as it illustrates the nature of waiver or, as it is commonly called today, "affirmation". Bowen L.J.'s approach was that the effect of the non-performance of a condition precedent by the defaulting party is that the innocent party's duty of performance does not fall due, but the innocent party may waive the condition with the result that both parties will be bound by the contract to continue to perform.

However, the case is also important in that it may help us understand why modern academics and judges have come to think of the innocent party as having to "elect to terminate" in order to bring about a

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[46] *Bettini v Gye* (1876) 1 Q.B.D. 183 at 187.
[47] *Bettini v Gye* (1876) 1 Q.B.D. 183 at 187.
[48] [1893] 2 Q.B. 274.
[49] *Bentsen v Taylor* [1893] 2 Q.B. 274 at 284.
[50] *Bentsen v Taylor* [1893] 2 Q.B. 274 at 276.
[51] *Bentsen v Taylor* [1893] 2 Q.B. 274 at 283–284.
[52] *Bentsen v Taylor* [1893] 2 Q.B. 274 at 284.

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".[53] 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".[54] 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 *Bentsen v Taylor* is, therefore, arguably the birthplace of the modern "election theory" of termination.

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 words "condition precedent" or "condition" had begun to be used to refer to the term itself (i.e. the promise). Strictly speaking, however, it was, and still is, the performance of A's promise that was a condition precedent to B's obligation. As 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".[55]

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 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 obligation to perform depends. 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 condition). The defendant has in fact committed a breach, but it is a breach of *duty*, not a breach of condition."[56]

The use of this language was criticised,[57] 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* (i.e. the uncertain fact or event upon which the existence of an obligation depended) and the *promise*; it referred to both.[58]

3 SALE OF GOODS ACT 1893

The Sale of Goods Act 1893 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 giving rise to a power to terminate.[59] However, 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, discussing the distinction drawn

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[53] Francis Dawson, "Metaphors and Anticipatory Breach of Contract" [1981] C.L.J. 83 at 90.
[54] Charles Morison, *Rescission of Contracts* (London: Stevens & Haynes, 1916) at 18.
[55] Robert Bradgate, "Termination for Breach" in John Birds, Robert Bradgate, and Charlotte Villiers (eds), *Termination of Contracts* (London: Wiley Chancery, 1995) 15 at 42.
[56] Arthur Corbin, "Supervening Impossibility of Performing Conditions Precedent" (1922) 22 Colum. L.R. 421 at 423.
[57] E.g. Samuel Williston, *The Law of Contracts* (New York: Baker, Voorhis & Co, 1920) vol 2 at 1282–1283 §665. See also J.L. Montrose, "Conditions and Promises" (1960) 23 M.L.R. 434 at 484–485; F.M.B. Reynolds, "Discharge of Contract by Breach" (1982) 97 L.Q.R. 541 at 542.
[58] See also F.M.B. Reynolds, "Warranty, Condition and Fundamental Term" (1963) 79 L.Q.R. 534 at 536.
[59] E.g. Frederick Wilmot-Smith, "Termination after breach" (2018) 134 L.Q.R. 307 at 308 fn 10.

between conditions and warranties,[60] he wrote: "[a]s used in the Act, 'condition' is the equivalent to the old term 'dependent covenant,' while 'warranty' is equivalent to the old term 'independent covenant.'"[61]

It has been argued that Chalmers' "use of the term 'condition' was a misuse of the term 'condition precedent'", and that "[f]undamentally, Chalmers … failed to distinguish promises from conditions".[62] The most serious charge levelled at Chalmers is that he "simply misunderstood the previous law on this subject".[63] 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."[64]

While there are undoubtedly problems with using the same word to refer to these two different concepts, judges were, as noted above, doing this prior to the Sale of Goods Act. At most, Chalmers can be criticised for perpetuating this confusing use of language. A fairer criticism is found in *Benjamin on Sale*, published in 1906:

> "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."[65]

As for Chalmers' use of the word "warranty", this might be criticised because a warranty (in the sense of a guarantee) can also amount to a condition precedent and many cases, especially in the insurance context, had used the word in that sense.[66] 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.[67] Moreover, this was not new. Indeed, in cases such as *Bentsen v Taylor*,[68] 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. Anson, for example, writing some 15 years before the Act came into force, contrasted "subsidiary promises, or *warranties*" with "*conditions* or terms on which the right to performance depends".[69]

4 TWENTIETH-CENTURY DEVELOPMENTS

It seems that this understanding of the nature of "promissory conditions" held the field for at least the first half of the twentieth century. Thus in 1952 in *Trans Trust SPRL v Danubian Trading Co Ltd*,[70]

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[60] Sale of Goods Act 1893, s 11(1)(b).
[61] Chalmers, *The Sale of Goods Act, 1893* (London: William Clowes and Sons Ltd, 1894) at 24–25. See also at 168.
[62] J.W. Carter and C. Hodgekiss, "Conditions and Warranties: Forebears and Descendants" (1976) 8 Syd. L.R. 31 at 43–44.
[63] John Stannard and David Capper, *Termination for Breach of Contract* (Oxford: Oxford University Press, 2014) at 37 [2.11].
[64] Chalmers, *The Sale of Goods Act, 1893* (London: William Clowes and Sons Ltd, 1894) at 164.
[65] W.C.A. Ker and A.R. Butterworth, *A Treatise on the Law of Sale of Personal Property*, 5th edn (London: Sweet & Maxwell, 1906) at 557–558 fn 6.
[66] *Behn v Burness* (1863) 3 B. & S. 751 at 753; 122 E.R. 281 at 282; *The Good Luck* [1992] 1 A.C. 233 at 263; [1991] 3 All E.R. 1 at 16.
[67] Chalmers, *The Sale of Goods Act, 1893* (London: William Clowes and Sons Ltd, 1894) at 168– 69.
[68] [1893] 2 Q.B. 274.
[69] Anson, *Principles of the English Law of Contract* 1st edn (Oxford: Clarendon Press, 1879) at 284 (emphasis in original).
[70] [1952] 2 Q.B. 297; [1952] 1 All E.R. 970.

Denning L.J. considered a term of the contract that the buyer should open a confirmed credit in favour of the seller. He said:

> "What is the legal position of such a stipulation? Sometimes it is a condition precedent to the formation of a contract … In other cases a contract is concluded and the stipulation for a credit is a condition which is an essential term of the contract. In those cases the provision of the credit is a condition precedent, not to the formation of a contract, but to the obligation of the seller to deliver the goods. If the buyer fails to provide the credit, the seller can treat himself as discharged from any further performance of the contract and can sue the buyer for damages for not providing the credit."[71]

This case is still referred to in leading textbooks as illustrating the nature of promissory conditions (as contrasted with non-promissory conditions).[72] There is no suggestion in it that there is a distinction between "conditions" and "conditions precedent".

Hongkong Fir

A plausible candidate for the alleged shift in thinking about the nature of "promissory conditions" is *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*.[73] 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 repudiated the charterparty. The owners brought an action for wrongful repudiation. The charterers in their defence alleged that the owners had breached the seaworthiness obligation, which they argued was a condition of the contract, or alternatively, that the charterparty was frustrated by reason of the breakdowns, repairs and delay. The Court of Appeal held that the seaworthiness obligation was not a condition, and that the delays were not so great as frustrate the commercial purpose of the charterparty.

In explaining why the seaworthiness obligation was not a condition, Sellers L.J. 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."[74]

It is possible here that Sellers L.J. is 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 Lordship's judgment this distinction (if it were intended to be one) disappears in favour of the latter concept. Indeed, in the dispositive part of his judgment, Sellers L.J. states "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*."[75]

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[71] *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 Q.B. 297 at 304.
[72] See e.g. Jack Beatson, Andrew Burrows, and John Cartwright, *Anson's Law of Contract*, 30th edn (Oxford: Oxford University Press, 2016) at 150–151; Ewan McKendrick, "Express Terms" in Hugh Beale (ed), *Chitty on Contracts*, 33rd ed (London: Sweet & Maxwell, 2018) vol 1 1013 at 1027 [13–027].
[73] [1962] 2 Q.B. 26; [1962] 1 All E.R. 474 (*Hongkong Fir*).
[74] *Hongkong Fir* [1962] 2 Q.B. 26 at 56.
[75] *Hongkong Fir* [1962] 2 Q.B. 26 at 58 (emphasis added).

Upjohn L.J.'s judgment is even clearer. His Lordship said:

> "A condition, or a condition precedent, to give it its proper title under the old system of pleading, was a condition performance of which had to be averred by the plaintiff in the declaration in order to establish his claim against the defendant. It was decided in the great plantation case of *Boone v Eyre*, however, that it was only necessary to aver as a condition precedent a condition which went to the whole consideration of both sides."[76]

As for Diplock L.J.'s seminal judgment, his Lordship's central point was that it was an *event*, rather than the breach itself, which relieved one party of his undertakings under the contract.[77] Speaking of "conditions precedent" his Lordship 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".[78] Furthermore, after referring to a number of the cases discussed above, Diplock L.J. 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…"[79]

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.

It should be noted that Diplock L.J. did subsequently speak of "an event which relieves the charterer of further performance of his undertakings *if he so elects*".[80] And his Lordship 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".[81] An explanation for why judges came to think of discharge as depending upon an "election" has already been given.[82] Moreover, Diplock L.J. never suggested that the concept of a "promissory condition" had anything other than its historical meaning. Finally, while our focus is on discharge following breach of a "promissory condition", an explanation for how discharge following breach of the so-called "innominate" term operates (and is explicable in terms of conditions) is given below in relation to Example 2.

Post-*Hongkong Fir*: A period of confusion

The position up to and including *Hongkong Fir* appears to have been that there was no distinction between "condition precedent" and "condition" when used in their promissory senses. This understanding was also maintained by at least some academics. Indeed in 1963, Francis Reynolds referred to the account given by Diplock L.J. in *Hongkong Fir* of the development of conditions, and said:

> "The result was, *and is*, that where A breaks a promise forming substantially the whole of the consideration, B can repudiate the contract because A is unable to prove the condition precedent to B's liability viz, that he himself has performed or is ready to do so, and thus cannot successfully sue B for non-performance."[83]

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[76] *Hongkong Fir* [1962] 2 Q.B. 26 at 63.
[77] 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* (Oxford: Hart Publishing, 2018) 269 at 286.
[78] *Hongkong Fir* [1962] 2 Q.B. 26 at 67.
[79] *Hongkong Fir* [1962] 2 Q.B. 26 at 68.
[80] *Hongkong Fir* [1962] 2 Q.B. 26 at 71 (emphasis added).
[81] *Hongkong Fir* [1962] 2 Q.B. 26 at 72 (emphasis added).
[82] See above discussion of *Bentsen v Taylor*.
[83] F.M.B. Reynolds, "Warranty, Condition and Fundamental Term" (1963) 79 L.Q.R. 534 at 535 (emphasis in original).

One inescapable truth, however, is that a number of cases around this time, and continuing into the second half of the twentieth century, spoke about the innocent party having an "election" following breach of a condition. Thus, in *The Mihalis Angelos*,[84] Lord Denning MR said that the innocent party was "entitled, at his election, to treat himself as discharged from any further performance". And in *Schuler AG v Wickman Machine Tools Sales Ltd*,[85] Lord Reid said that a condition is "a term the breach of which by one party gives to the other an option either to terminate the contract or to let the contract proceed and … sue for damages for the breach". Finally, in his celebrated speech in *Photo Production Ltd v Securicor Transport Ltd*,[86] Lord Diplock referred to "breach of a condition" as the situation:

> "Where the contracting parties have agreed, whether by express words or by implication of law, that any failure by one party to perform a particular primary obligation … irrespective of the gravity of the event that has in fact resulted from the breach, shall entitle *the other party to elect to put an end to all primary obligations* of both parties remaining unperformed."

However, in none of these cases was any distinction drawn between "conditions" and "conditions precedent". Moreover, as we have seen, this language of election appears simply to be a misstep flowing from the fact that often, in order to negate any suggestion of waiver of the condition, the innocent party will *practically* need to communicate his or her intention not to perform or accept further performance.

The fact that the truth was being obscured by this language was observed by Francis Dawson in 1981. He explained how traditionally "because the defaulting party could not enforce the contract [upon the non-performance of a condition], the innocent party could treat himself as excused from further performance" and added:

> "[I]t 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… Where the innocent party is not seeking to assert an affirmative right but is merely standing on the defensive, 'he need do nothing except refrain from performance or receiving performance until he is sued.'"[87]

It was also around this time that 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*".[88] 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."[89]

The final decision to mention is *Bunge Corporation v Tradax Export SA*.[90] The issue 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.[91] The House of Lords held that the clause was a condition. Lord Roskill, who delivered the leading speech, said:

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[84] [1971] 1 Q.B. 164 at 193; [1970] 3 All E.R. 125 at 128. See also [1971] 1 Q.B. 164 at 205 (Megaw L.J.).
[85] [1974] A.C. 235 at 251; [1973] 2 All E.R. 39. See also [1974] A.C. 235 at 265 (Lord Simon), 271 (Lord Kilbrandon).
[86] [1980] A.C. 827 at 849; [1980] 1 All E.R. 556 at 566–567 (emphasis added).
[87] Francis Dawson, "Metaphors and Anticipatory Breach of Contract" [1981] C.L.J. 83 at 89–90.
[88] A.M. Shea, "Discharge from Performance of Contracts by Failure of Condition" (1979) M.L.R. 623 at 623.
[89] A.M. Shea, "Discharge from Performance of Contracts by Failure of Condition" (1979) M.L.R. 623 at 624.
[90] [1981] 1 W.L.R. 711; [1981] 2 All E.R. 513 (*Bunge*).
[91] *Bunge* [1981] 1 W.L.R. 711 at 714.

> "[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."[92]

Michael Bridge, writing shortly after *Bunge*, 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 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*, had not been considered by the House of Lords or Court of Appeal.[93] The key point is that neither *Bunge* nor the cases which preceded it is strong authority for the proposition that English law had developed a concept of a "promissory condition" which was distinct from the way in which that term had been traditionally understood.

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. To say that a term of the contract was a "condition" was to say that one party had *promised* to ensure that some event would occur (or that some fact were true), and simultaneously that the performance (or fulfilment) of that promise was a *condition* of the other party's obligation to perform. Where a defaulting party failed to perform a "promissory condition", the failure of the condition (i.e. the non-occurrence of the event) operated to discharge the innocent party immediately, unless he or she chose to waive the condition.

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 promissory condition is not something which upon its failure automatically 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 distinction between "conditions" and "conditions precedent". Taken at its highest, it could be said that this was becoming a possibility, albeit one which had never been clearly adopted.

6 TREITEL ON "CONDITIONS" AND "CONDITIONS PRECEDENT"

Modern authors, however, assert that the law has moved on.[94] Treitel 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.[95] He said that when speaking of the order of performance "condition precedent" was to be contrasted with "concurrent condition" and "independent covenant".[96] But when speaking of the conformity of performance, "condition" was to be contrasted with "warranty" (and "intermediate term" or "innominate term").[97]

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

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[92] *Bunge* [1981] 1 W.L.R. 711 at 729.
[93] Michael Bridge, "Discharge for Breach of the Contract of Sale of Goods" (1983) 28 McGill L.J. 867 at 904.
[94] Frederick Wilmot-Smith, "Termination after breach" (2018) 134 L.Q.R. 307 at 308; John Stannard and David Capper, *Termination for Breach of Contract* (Oxford: Oxford University Press, 2014) at 32–38 [2.02]–[2.12].
[95] G.H. Treitel, "'Conditions' and 'Conditions Precedent'" (1990) 106 L.Q.R. 185 at 185.
[96] G.H. Treitel, "'Conditions' and 'Conditions Precedent'" (1990) 106 L.Q.R. 185 at 185–186.
[97] G.H. Treitel, "'Conditions' and 'Conditions Precedent'" (1990) 106 L.Q.R. 185 at 185–186.

distinction".[98] 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* (i.e. 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)."[99]

Is there a distinction between order and conformity?

It was noted above that, prior to *Boone v Eyre*, the reported cases had dealt with problems relating to non-performance in executory contracts. *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", whereas *Boone v Eyre* was dealing with "the problem posed by *defective* performance by a party of his obligations under a contract".[100] 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 Peel notes, "[t]he phrase "defective performance" arguably 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".[101] To establish a breach of contract, one party cannot simply allege 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 "defective performance" are really cases in which one party has performed some of his or her obligations but failed to perform all of them.

Thirdly, 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 can be a condition precedent of 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 of 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.

In short, the suggestion that some cases are concerned only with the order of performance, and not conformity, and vice versa, relies upon an intuitive but false distinction. The cases pre-*Boone v Eyre were* concerned with conformity, namely the failure to render any performance. The later cases about partial performance were a logical extension of that same principle, but simply required the parties to identify the

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[98] G.H. Treitel, "'Conditions' and 'Conditions Precedent'" (1990) 106 L.Q.R. 185 at 186.
[99] G.H. Treitel, "'Conditions' and 'Conditions Precedent'" (1990) 106 L.Q.R. 185 at 186.
[100] J.W. Carter and C. Hodgekiss, "Conditions and Warranties: Forebears and Descendants" (1976) 8 Syd. L.R. 31 at 34 (emphasis added).
[101] Edwin Peel, *The Law of Contract*, 15th edn (London: Sweet & Maxwell, 2020) at 932 [17–056].

particular promises performance of which could be said to be a condition precedent to the other party's obligation to perform.

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.

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'."[102]

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, 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 to negate any suggestion of waiver of the condition. This rule, found in s 11(4) of the Sale of Goods Act 1979,[103] was based upon an old common law rule[104] 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.[105] In *Ellen v Topp*,[106] Pollock C.B. adopted the rule, but observed that it was "remarkable" that a contract could be construed "ex post facto" and that "that which is a condition precedent when the deed is executed may cease to be so by the subsequent conduct of the covenantee in accepting less." 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 condition.[107] In short, it appears to have been an instance of waiver.[108] None of this detracts from the fact that (absent waiver) the buyer's duty 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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[102] Treitel, *The Law of Contract*, 8th edn (London: Sweet & Maxwell, 1991) at 690–691. See now Edwin Peel, *The Law of Contract*, 15th edn (London: Sweet & Maxwell, 2020) at 982 [18–044].
[103] Originally Sale of Goods Act 1893, s 11(1)(c).
[104] Based on Serjeant Williams' observations of *Boone v Eyre*: see *Pordage v Cole* (1669) 1 Wms. Saund. 319 at 320; 85 E.R. 449 at 453.
[105] *Behn v Burness* (1863) 3 B. & S. 751 at 755; 122 E.R. 281 at 283.
[106] (1851) 6 Ex. 424 at 441–442; 155 E.R. 609 at 616.
[107] *Graves v Legg* (1854) 9 Ex. 709 at 717; 156 E.R. 304 at 307 (Parke B); *Behn v Burness* (1863) 3 B. & S. 751 at 755; 122 E.R. 281 at 283.
[108] Charles Morison, *Rescission of Contracts* (London: Stevens & Haynes, 1916) at 100–105.

Example 2: "Defective" building work

Professor Ewan McKendrick has 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 house-holder 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 performance."[109]

It is first necessary to clarify that it is not (as seems to be suggested) completion of the work simpliciter which is a condition precedent to the obligation to pay but rather *substantial* completion or performance of the work. The language of "substantial performance" means "something less than full and exact performance of that duty".[110] This is the principle derived from cases such as *Hoenig v Isaacs*.[111] As Corbin has explained in the context of building work:

> "It is substantial performance of what the builder promised to do, of the construction work, of the equivalent for which the owner has promised to pay, that is the 'condition' of the owner's duty to pay. It is not substantial performance of 'a condition' that must be rendered; 'substantial performance' *is* the condition—the fact that must exist before payment is due."[112]

Note that this is not the same thing as a "promissory condition". Although the focus of this article is on "promissory conditions" a brief excursus into other kinds of conditions is necessary to explain the example.

Unlike in the case of a promissory condition, in this case the "condition" and the "duty" are not identical. 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. The promise (duty) and condition are co-extensive—hence the label "promissory condition".

In this case, however, the promise or duty of the builder is to perform the contract exactly—it is no defence to an action for damages that he or she "substantially performed".[113] 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*,[114] Denning L.J. implicitly 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."

An underappreciated point is that this is the same condition that was ultimately recognised in *Hongkong Fir* (for brevity, the "substantial benefit" condition). In that case the contractual duty was to perform the "seaworthiness" obligation exactly; it would have been no defence to an action for damages that the ship was only missing a single nail. But the condition of the charterer's obligation to pay was the "substantial benefit" condition: such performance by the owners that gave the charterers substantially the whole benefit

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[109] Ewan McKendrick, *Contract Law: Text, Cases, and Materials*, 8th edn (Oxford: Oxford University Press, 2018) at 751.
[110] Arthur Corbin, *Corbin on Contracts* (St Paul: West Publishing Co, 1960) vol 3A at 315 §702.
[111] [1952] 2 All E.R. 176.
[112] Arthur Corbin, *Corbin on Contracts* (St Paul: West Publishing Co, 1960) vol 3A at 314 §701.
[113] Arthur Corbin, *Corbin on Contracts* (St Paul: West Publishing Co, 1960) vol 3A at 315–316 §702.
[114] [1952] 2 All E.R. 176 at 180–181.

of the contract.[115] This explains why breach of the so-called "innominate" term will sometimes, but not always, bring about a discharge. This is because not every breach of an "innominate" term (i.e. 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.

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 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 or not the non-performance of the promise discharges the householder from his or her obligation to pay. And, on the assumption that the builder completed the work but breached a "promissory 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" can only operate for the future and would not divest the builder of rights "which have already been unconditionally acquired".[116]

The only relevant question in this example 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 householder's obligation to pay conditional upon performance by the builder of *all* of his or her promises. Thus it is sometimes suggested that "entire performance [is] a condition precedent to payment".[117] But "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".[118] Indeed, in *Hoenig v Isaacs*,[119] Somervell L.J. expressly referred to *Boone v Eyre* for the "principle that fulfilment of every term is not necessarily a condition precedent in a contract for a lump sum". This is consistent with the proposition that cases of "defective performance" are really cases where a party has performed some, but not all of his or her obligations.

The more likely position is that the obligation of the householder will be conditional upon performance by the builder of *some* of his promises, namely, those that are "promissory conditions" (in addition to the "substantial benefit" condition discussed above). 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,[120] 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 precedent would mean that an event which was the condition of the householder's obligation to pay had

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[115] F.M.B. Reynolds, "Discharge of Contract by Breach" (1982) 97 L.Q.R. 541 at 542.
[116] *Johnson v Agnew* [1980] A.C. 367 at 396; [1979] 1 All E.R. 883 at 892 (Lord Wilberforce).
[117] *Hoenig v Isaacs* [1952] 2 All E.R. 176 at 180 (Denning L.J.).
[118] *Hoenig v Isaacs* [1952] 2 All E.R. 176 at 180.
[119] [1952] 2 All E.R. 176 at 178.
[120] *Schuler AG v Wickman Machine Tools Sales Ltd* [1974] A.C. 235.

not occurred and, if the builder refused to cure the defect, the condition would fail. The householder would therefore be discharged in the sense that his or her obligation to pay the price would not fall due.

Example 3: Failure to tender the price

Another example given by Treitel is 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."[121]

Treitel is correct to note that A's failure to tender the price will mean that B's duty to deliver does not fall due. He is 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 obligation to deliver the goods. However, by resorting to the "power to terminate" analysis, Treitel fails 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 is important because the non-occurrence of a condition has two effects.[122] First, in all cases, the non-occurrence of a condition, unless excused, will *prevent* the performance of the duty from becoming due. This is sometimes referred to as the *suspension* of the duty (although in truth the duty never fell due in the first place). In these cases, the subsequent occurrence of the condition will cause the duty to become due. Secondly, in cases where the condition can no longer occur, the condition has *failed*—the performance of the duty can never become due unless the condition is waived. In such cases, it can be said that the duty is permanently *discharged*. Treitel's example does not acknowledge this fact, nor does it acknowledge that there may be more than one type of condition in play. To understand this, it is 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*—this is a "promissory condition". If A is 10 minutes late in tendering the purchase price, provided that B was ready, willing, and able to deliver, the condition has failed, and B is discharged.[123] A cannot unwind the clock and comply with the condition, 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 at the time 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.

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[121] Treitel, *The Law of Contract*, 7th edn (London: Sweet & Maxwell, 1987) 581. See now Edwin Peel, *The Law of Contract*, 15th edn (London: Sweet & Maxwell, 2020) at 912 [17–024].
[122] See American Law Institute, *Restatement of the Law Second: Contracts 2d* (St Paul: American Law Institute Publishers 1981) at 165 §225 comment (a).
[123] *Union Eagle Ltd v Golden Achievement* [1997] A.C. 514; [1997] 2 All E.R. 215.

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".[124] 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 subject to the "substantial benefit" condition.[125] 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 unless the condition is waived.

Secondly, the circumstances of A's delay in tendering the price may be such as to indicate that one or both of these conditions can no longer occur either (i) due to disablement, or (ii) because A has demonstrated an intention not to fulfil the contract, or to do so in a manner substantially inconsistent with A's obligations (renunciation).[126] In such a case, B is discharged from the duty to deliver the goods on the ground that the condition(s) of B's obligation can no longer occur.[127] In cases of disablement, the condition cannot occur as a matter of fact, keeping in mind that "the law never requires absolute certainty and does not take account of bare possibilities".[128] In cases of renunciation the condition is deemed not to be able to occur by allowing the innocent party to hold the renunciating party to his or her word that they will not perform.[129]

In sum, the examples given lend no support to the supposed distinction between "conditions" and "conditions precedent". Each example fails to identify accurately the "conditions" upon which the innocent party might seek to rely. And each example is explicable on the traditional understanding, indicating that there is no need for the concept of a "promissory condition" in the modern sense of a term breach of which gives rise to a "power to terminate".

Does the authority relied upon support the distinction?

Treitel claimed that support for the distinction between the two senses of "promissory condition" was provided by the 1989 decision of the Court of Appeal in *State Trading Corp of India Ltd v M Golodetz & Co Inc Ltd*.[130] The dispute 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 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 contract (also 18 December). The sellers opened the performance bond guarantee, but failed to open the counter-trade guarantee. The buyers also failed to open the letter of credit by 18 December.

The sellers treated the buyers' failure to open the letter of credit as a wrongful repudiation bringing the contractual obligations to an end and claimed damages equal to the price of the sugar. The buyers claimed that the sellers' failure to provide the counter-trade guarantee by 18 December excused the buyers' breach

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[124] *Urban 1 (Blonk Street) Ltd v Ayres* [2013] EWCA Civ 816; [2014] 1 W.L.R. 756 at 767 [44].
[125] *United Scientific Holdings Ltd v Burnley Borough Council* [1978] A.C. 904 at 928; [1977] 2 All E.R. 62 at 70 (Lord Diplock).
[126] *Urban 1 (Blonk Street) Ltd v Ayres* [2013] EWCA Civ 816; [2014] 1 W.L.R. 756 at 768 [44]; *Federal Commerce & Navigation Co Ltd Respondents v Molena Alpha Inc* [1979] A.C. 757 at 778–779; [1979] 1 All E.R. 307 at 313–314.
[127] American Law Institute, *Restatement of the Law Second: Contracts 2d* (St Paul: American Law Institute Publishers 1981) at 165 §225.
[128] *Universal Cargo Carriers Corporation v Citati* [1957] 2 Q.B. 401 at 438; [1957] 2 All E.R. 70 at 85.
[129] *Universal Cargo Carriers Corporation v Citati* [1957] 2 Q.B. 401 at 438.
[130] [1989] 2 Lloyd's Rep. 277 (*Golodetz*).

in failing to open the letter of credit (this obligation was admitted to be a "condition"). 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 a "condition", whether "this excused [the buyer's] breach in failing to open the letter of credit".[131] The Court of Appeal found in favour of the sellers. On the first issue, Kerr L.J. (with whom Lloyd L.J. and Butler-Sloss L.J. 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".[132] While his Lordship 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.

Although the second issue did not arise, Kerr L.J. was of the view that, even if both parties had been in breach of a "condition", this made no difference. His Lordship 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."[133]

These obiter comments undoubtedly support Treitel's view. But they are difficult to reconcile with the earlier decision of the House of Lords in *Bremer Vulkan v South India Shipping Company*.[134] 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 repudiatory breach of the arbitration agreement entitling the plaintiffs to "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".[135] 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."[136]

In *Golodetz* Kerr L.J. made no reference to *Bremer Vulkan*.[137] 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 in *Bremer Vulkan*.[138]

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[131] *Golodetz* [1989] 2 Lloyd's Rep. 277 at 279.
[132] *Golodetz* [1989] 2 Lloyd's Rep. 277 at 284.
[133] *Golodetz* [1989] 2 Lloyd's Rep. 277 at 286.
[134] [1981] A.C. 909; [1981] 1 All E.R. 289 (*Bremer Vulkan*).
[135] *Bremer Vulkan* [1981] A.C. 909 at 986.
[136] *Bremer Vulkan* [1981] A.C. 909 at 988.
[137] Cf at first instance: [1988] 2 Lloyd's Rep 182 at 189 (Evans J.).
[138] G.H. Treitel, "'Conditions' and 'Conditions Precedent'" (1990) 106 L.Q.R. 185 at 190.

Ultimately, Treitel argued that "logic and policy favour the assumption made in [*Golodetz*]".[139] 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, logic would favour the result in *Bremer Vulkan*. As for policy, it might be said that allowing either party to "terminate" promotes certainty, but against this are other considerations. First, the "orthodox rule is that only the terminating party is entitled to damages for [the loss of the bargain]".[140] 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".[141] 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".[142] 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.[143] The ratio in *Bremer Vulkan* is that where both parties are in "breach" of a mutual condition, 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.

7 SHOULD WE DEPART FROM THE TRADITIONAL UNDERSTANDING?

The final part of this article considers the normative question: *should* English law depart from the traditional understanding of promissory conditions? The answer put forward is a resounding "no".

No logical incompatibility

It must be conceded that there is no logical incompatibility between the two concepts. 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". However, the experience of other legal systems which 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".[144]

In 1979, the New Zealand legislature expressly adopted the "power to terminate" model in the Contractual Remedies Act 1979. 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.[145] However, the New Zealand Supreme Court has, on no less than five occasions,[146] "resolved contractual disputes involving breach and non-performance by reference to reasoning based on readiness and

[139] G.H. Treitel, "'Conditions' and 'Conditions Precedent'" (1990) 106 L.Q.R. 185 at 190. .
[140] Wayne Courtney, "Termination by a Party in Breach" (2008) 3 J.B.L. 226 at 243.
[141] Wayne Courtney, "Termination by a Party in Breach" (2008) 3 J.B.L. 226 at 243–244.
[142] Wayne Courtney, "Termination by a Party in Breach" (2008) 3 J.B.L. 226 at 243–244.
[143] Wayne Courtney, "Termination by a Party in Breach" (2008) 3 J.B.L. 226 at 234.
[144] Francis Dawson, "Readiness and Willingness under the Contractual Remedies Act'" (2017) 23 N.Z.B.L.Q. 61 at 64.
[145] C.R.A. 1979 (NZ), s 7(1); C.C.L.A. 2017 (NZ), s 40(1).
[146] *Bahramitash v Kumar* [2005] NZSC 39; [2006] 1 N.Z.L.R. 577; *Property Ventures Investments Ltd v Regalwood Holdings Ltd* [2010] NZSC 47; [2010] 3 N.Z.L.R. 231; *Ingram v Patcroft Properties Ltd* [2011] NZSC 49; [2011] 3 N.Z.L.R. 433; *Kumar v Station Properties Ltd* [2015] NZSC 34; [2016] 1 N.Z.L.R. 99; *Kawarau Village Holdings Ltd v Ho Kok Sun* [2017] NZSC 150; [2018] 1 N.Z.L.R. 378.

willingness and failure of condition precedent rather than by reference to … the discharge of a contractual obligation consequent on the cancellation of the contract".[147]

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 of a "condition", may not be more beneficial to the innocent party.[148] 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,[149] either on the basis that the obligations are mutually dependent[150] or on the basis that the party in breach was repudiating the contract.[151] Thus in *Kumar v Station Properties Ltd*,[152] 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.

Conceptually awkward

A further difficulty is that the existence of both models:

> "would be conceptually awkward in that the modern approach to contractual termination, exemplified by cases such as *Photo Production* … would make it hard in practice to distinguish the suspension and the termination of a contract. There would also be difficulties in applying the principle of waiver."[153]

This problem is further exacerbated by the fact that English law appears to 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".[154] And as Lord Roskill observed in *Bunge*,[155] the "basic and long standing rules for determining whether a particular term in a contract is or is not a condition … are enshrined in the oft quoted judgment of Bowen L.J. in *Bentsen v Taylor*", where his Lordship 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

[147] Francis Dawson, "Essential terms and condition precedent" (2017) 133 L.Q.R. 183 at 187.
[148] Indeed, Treitel argued the opposite: G.H. Treitel, "'Conditions' and 'Conditions Precedent'" (1990) 106 L.Q.R. 185 at 191–192.
[149] *Kumar v Station Properties Ltd* [2016] 1 N.Z.L.R. 99 at 131 [94]; *Kawarau Village Holdings Ltd v Ho Kok Sun* [2018] 1 N.Z.L.R. 378 at 410 [108] (Ellen France J.).
[150] *Property Ventures Investments Ltd v Regalwood Holdings Ltd* [2010] 3 N.Z.L.R. 231 at 264 [82].
[151] *Ingram v Patcroft Properties Ltd* [2011] 3 N.Z.L.R. 433 at 443 [31]–[41].
[152] [2016] 1 N.Z.L.R. 99 at 131 [94].
[153] Michael Bridge, "Discharge for Breach of the Contract of Sale of Goods" (1983) 28 McGill L.J. 867 at 904 fn 191.
[154] *Golodetz* [1989] 2 Lloyd's Rep. 277, 282.
[155] [1981] 1 W.L.R. 711 at 725.

> 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."[156]

This passage has been described as "well known"[157] and "well recognised"[158] and is quoted in *Chitty on Contracts*.[159] The problem is that Bowen L.J. was speaking of "promissory conditions" in the traditional sense, not of the modern "condition". In explaining why his Lordship had "no hesitation in saying" that he believed the "now sailed or 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 may be equally made a condition precedent."[160]

There can be no doubt that Bowen L.J. is speaking of a "condition precedent" in the sense of a representation or promise, the truth or fulfilment of which is a *condition* of the other party's obligation to perform.

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 in discussing *Golodetz*, the "power to terminate" model has given rise to conflicting answers to a "deceptively simple" question: "can A … terminate the contract for B's serious breach or repudiation, if A is, at the same time, in breach of the contract?"[161] In England, this issue is "not yet authoritatively settled".[162] On the view put forward in this article, 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, B's subsequent conduct is not a breach. If the performance of A and B's relevant promises are concurrent conditions, then neither party is in breach while the other party is not performing.

Secondly, one of the "most intractable"[163] issues within the law of contract has been 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.[164] On the "power to terminate" model, the current state of the law (which denies loss of bargain damages for termination pursuant to an express power) is difficult to defend. On the account given here, 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 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 a *power*—in the sense of a capacity to change legal relations—to terminate the parties' contractual obligations. Unless the innocent party is already discharged as a result of a failure of condition, it will be

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[156] *Bentsen v Taylor* [1893] 2 Q.B. 274, 281.
[157] *Bunge* [1981] 1 W.L.R. 711 at 725 (Lord Roskill); *Golodetz* [1989] 2 Lloyd's Rep. 277 at 282 (Kerr L.J.).
[158] *Hongkong Fir* [1962] 2 Q.B. 26 at 60 (Sellers L.J.).
[159] Ewan McKendrick, "Express Terms" in Hugh Beale (ed), *Chitty on Contracts*, 33rd ed (London: Sweet & Maxwell, 2018) vol 1 1013 at 1026 [13–026].
[160] *Bentsen v Taylor* [1893] 2 Q.B. 274 at 283.
[161] Wayne Courtney, "Termination by a Party in Breach" (2008) 3 J.B.L. 226 at 226.
[162] Wayne Courtney, "Termination by a Party in Breach" (2008) 3 J.B.L. 226 at 244.
[163] Frederick Wilmot-Smith, "Termination after breach" (2018) 134 L.Q.R. 307 at 323.
[164] Edwin Peel, 'Loss of Bargain Damages' [2020] L.M.C.L.Q. 442; Frederick Wilmot-Smith, "Termination after breach" (2018) 134 L.Q.R. 307 at 323–324; Edwin Peel, 'The termination paradox' [2013] L.M.C.L.Q. 519 at 522 et seq. Compare *Financings v Baldock* [1963] 2 Q.B. 104; [1963] 1 All E.R. 443 with *Lombard North Central v Butterworth* [1987] Q.B. 527; [1987] 1 All E.R. 267.

his or her act in exercising the express power to terminate that causes the loss of the bargain, not the defaulting party's breach.[165]

The relation to other instances of discharge

A further reason why 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. In particular, a claim which cannot be fully developed or defended here is that the discharge of contractual obligations following breach, frustration, and common mistake are all instances of a general principle: discharge for *failure of condition*. To summarise the claim, where a party breaches a "promissory condition" the innocent party is discharged because the condition fails. Where a party breaches a so-called "innominate term" the innocent party is discharged only if the "substantial benefit" condition fails. The same general principle, failure of condition, also underlies the doctrines of frustration and common mistake. That is how these doctrines were traditionally understood.[166] Moreover, understanding frustration in this way provides a means by which to remove the barrier between cases of "frustration" and cases of "excused performance" falling short of frustration (such as the temporary illness in *Poussard v Spiers & Ponds Ltd*)[167] which, at present, are treated separately. As Michael Bridge writes in this volume, "[i]n separating frustration with its automatic effect from other cases of excused non-performance, English law compromises an understanding of the greater whole."[168] And as for the relationship between frustration and common mistake, whether the contract never imposes any obligations upon the parties, or whether it does but the parties are subsequently discharged, is simply a matter of timing.[169]

Not a version of the automatic discharge theory

The view put forward in this article is *not* simply a version of the automatic discharge theory. That is the theory, rejected in the authorities, by which "a contract-breaker may in some circumstances by his breach unilaterally bring the contract to an end in law".[170] In contrast, it is said that "[a] breach which justifies termination … does not automatically determine the contract".[171] In *Geys v Société Générale*,[172] Lord Hope explained that the reason for this is that "the party who is in the wrong should not be permitted to benefit from his own wrong", and if he or she were able to unilaterally bring performance of the contract to an end, the defaulting party "may well be tempted to play this to his advantage".

It should be apparent from what has been said already that while the failure of a condition will operate to discharge the innocent party from his or her obligation to perform automatically, the decision as to whether to continue performing, or to insist upon performance, remains firmly in the hands of the innocent party. This is because by waiving the condition and continuing to render or accept performance, "the promisee may, if he wishes, enforce the promises of the defaulter—he may insist that the defaulter perform his

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[165] This does mean that *Phones 4U Limited (in administration) v EE Limited* [2018] E.W.H.C. 49 (Comm); [2018] 2 All E.R. (Comm) 315 is wrongly decided.
[166] *Taylor v Caldwell* (1863) 3 B. & S. 826 at 833–834; 122 E.R. 309 at 312 (Blackburn J.); *Bell v Lever Brothers Ltd* [1932] A.C. 161 at 224–227; [1931] All E.R. Rep. 1 at 31–32 (Lord Atkin).
[167] (1876) 1 Q.B.D. 410, discussed in Michael Bridge, "Frustration and Excused Non-performance" (2021) 137 L.Q.R XX, XX.
[168] Michael Bridge, "Frustration and Excused Non-performance" (2021) 137 L.Q.R XX, XX.
[169] Compare *Krell v Henry* [1903] 2 K.B. 740; [1900-3] All E.R. Rep. 20 with *Griffiths v Brymer* (1903) 19 T.L.R. 434.
[170] *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 W.L.R. 361 at 370; [1971] 2 All E.R. 216 at 223 (Salmon L.J.). See also *Heyman v Darwins Ltd* [1942] A.C. 356 at 361; [1942] 1 All E.R. 337 at 341 (Viscount Simon LC).
[171] Edwin Peel, *The Law of Contract*, 15th edn (London: Sweet & Maxwell, 2020) at 957 [18–005].
[172] [2012] UKSC 63; [2013] 1 A.C. 523 at 537 [18]. See also at 559–560 [93]–[94] (Lord Wilson).

promises."[173] Thus, it remains true to say that "one party cannot unilaterally bring his own obligations to an end by breaking his contract".[174]

CONCLUSION

This article has been concerned with the nature of "promissory conditions". Modern orthodoxy suggests that the concept of a "promissory condition" in English law is used in two senses. In one sense, a "promissory condition" is a promise or representation the fulfilment or truth 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 "promissory condition" is simply an important or "essential term", breach of which does not prevent counter-performance being due, 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 article has been to reject the suggestion that "promissory condition" should be understood in the second of these two senses. In particular, it has been argued that the view that breach of a "promissory condition" gives rise to a "power to terminate" is mistaken. It seems that the true nature of "promissory conditions" has been lost in modern times, in part due to the inability of English lawyers to distinguish between the *promise* and the *condition*.[175] The great jurist, Samuel Williston, commenting on the conflation of the two in English contract law books, once wrote: "[t]he difference between conditions and promises is so radical in its consequence that there is no excuse for a nomenclature which fails to recognize the distinction."[176] While it is probably a "cry for the moon"[177] to insist that English lawyers abandon misleading phrases such as "breach of condition", 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.

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[173] A.M. Shea, "Discharge from Performance of Contracts by Failure of Condition" (1979) M.L.R. 623 at 631.
[174] A.M. Shea, "Discharge from Performance of Contracts by Failure of Condition" (1979) M.L.R. 623 at 631.
[175] See Samuel Williston, *The Law of Contracts* (New York: Baker, Voorhis & Co, 1920) vol 2 at 1282–1283 §665; Arthur Corbin, *Corbin on Contracts* (St Paul: West Publishing Co, 1960) vol 3A at 25–36 §633–634; J.L. Montrose, "Conditions and Promises" (1960) 23 M.L.R. 434 at 484–485.
[176] Samuel Williston, *The Law of Contracts* (New York: Baker, Voorhis & Co, 1920) vol 2 at 1282 §665.
[177] *Photo Production* [1980] A.C. 827 at 844 (Lord Wilberforce).