THE LAW OF INTERNATIONAL TRADE AND CARRIAGE OF GOODS

DISCHARGE OF CONTRACTS

Obligations created by a contract continue to bind the parties until discharged in some way. A contract may be discharged by

- performance,
- agreement,
- breach, or
- frustration.

The common law rules are important because statute only governs the Sale of Goods (and services to a limited extent) by virtue of the Sale of Goods Act, which is not a complete code. General contracts not involving sale of goods such as contracts for services are governed by the common law. Contracts for the carriage of goods, warehousing and other related import / export services are subject to the general rules. Certain specialist areas such as financial services and marine insurance are subject to statutory regimes.

1) DISCHARGE BY PERFORMANCE

Most contracts are discharged by performance of the obligations of both parties to their mutual satisfaction. In order to discharge a contract by performance both parties must completely and exactly perform their obligations in precisely the manner required by the contract. If a party fails to do so he will be in breach of contract. In **Cutter v Powell,**[1] Cutter was signed up as second mate on the Governor Parry from Kingston Jamaica to Liverpool. The vessel sailed on the 31st July and he died shortly before the vessel arrived at Liverpool. His widow as administratrix sued for the wages she claimed he had earned up to the time of his death. The court held that the contract was for the whole voyage. He failed to complete the contract. No wages were due. Under a modern weekly / monthly contract this would not occur.

In **Metcalfe v Britannia Iron Works,**[2] the court held that a shipowner who fails to reach the port of destination receives nothing. A vessel was chartered to Tagamrog with cargo. Ice in the Sea of Azof prevented the vessel sailing beyond Kertch. 300 miles from Tagamrog. Despite the consignee's objection the captain discharged the cargo and placed it in a custom house and claimed a lien on the cargo for unpaid freight. In the absence of a provision covering delivery elsewhere no freitht was payable. Similarly in **Sumpter v Hedges**,[3] the court held that a builder who contracts to build a house for a lump sum but fails to complete it gets nothing.

Criticisms of the Rule that Performance must be complete and exact.

a). It frequently leads to unjust enrichment as for example for the employer in **Cutter v Powell** or the person who commissions work as in **Sumpter v Hedges**.

b). There is no alternative remedy such a Quantum Meruit since there is a subsisting contract to pay the full sum for the whole work and therefore there cannot be an inconsistent implied promise to pay a reasonable sum for partial performance. [4]

Exceptions to the rule that performance must be complete and exact.

These are as important as the rule itself. What then, amounts to performance of the contractual obligations ?

Severable or divisible contracts. If a contract consists of the performance of several obligations which can be divided up into distinct units, it may be possible for one party to insist on being paid for any of those obligations that have been completed even though outstanding obligations remain unperformed. This is common in the building industry where stage payments are a standard practice and unitary division is provided for under the Sale of Goods Act. In **Richie v Atkinson,**[5] the plaintiff shipowner agreed to carry the defendant's cargo of hemp at a freight of £5 per ton. Only part of the cargo was carried. The court held that the plaintiff was entitled to freight for that quantity of cargo that he had carried. In a subsequent action, the shipowner had to pay damages for breach of contract for failing to carry the rest of the cargo.

1 **Cutter v Powell** (1795). [1775-1802] All.E.R. 159
2 **Metcalfe v Britannia Iron Works** (1877) 2 Q.B.D. 423
3 **Sumpter v Hedges** [1898] 1 Q.B. 673
4 See **Britain v Rossiter [1879]** 11 Q.B.D. 123.
5 **Richie v Atkinson** (1808). See also **Atkinson v Richie**

Where one party prevents the other performing the contract. Sometimes the co-operation of both parties is required before the obligations of the contract can be discharged. It would be unjust for one party to prevent the other completing his obligations and then refuse to pay simply because that other has failed to discharge his obligations.

In **Planche v Colburn,**[6] the plaintiff agreed to write a book in serial form for the defendant for a periodical on costume and armour. When half way through the serial the defendant stopped publishing the periodical. The court held that he had to pay the plaintiff for what he had already done.

An alternative way of dealing with this would be to find a collateral contract that the periodical would be published. Alternatively the court could find that the defendant had warranted publication as an integral part of the contract. In this version, the defendant by breaching a guaranteed duty under the contract excuses the claimant from further performance of the agreement whilst being entitled to full payment. [7]

Acceptance of partial performance. If one party accepts partial performance there may be an inference that they have agreed to scrap the original contract and substitute a new agreement that the defendant will pay a reasonable remuneration (that is to say a quantum meruit) for that work which the plaintiff has already performed, that is to say there is "Accord and Satisfaction". In **Christy v Row,**[8] the plaintiff contracted to carry coal from Shields to Hamburg. Due to adverse political conditions the defendant asked the plaintiff to deliver to Gluckstadt, a town on the Elbe some ways short of Hamburg. The court held that the plaintiff could successfully sue for freight.

Contrast this with **Sumpter v Hedges** where the plaintiff agreed to build a house for £565. After doing work worth £333 he ran out of money. The defendant, using material left on site by the plaintiff, finished the job. The plaintiff sued for the £333 and for the cost of the materials used by the defendant to finish the job. The court held that the plaintiff had not accepted the partial performance. There was no element of choice in the matter. However, the plaintiff had to pay for the materials used to complete the building. The defendant could have counter-claimed for damages for non-completion but since the builder had no money there may have been no point in so doing. The damages would have been assessed on the basis of additional costs incurred, if any, in completing the work himself.

The Northern Progress No2,[9] provides a classic example of all these principles in action. A cargo was sold cif out of the US to a Yugoslavian port. The seller made a contract of carriage which gave the carrier the right to discharge the cargo "at any port" in the event of a war premium being imposed by Lloyds of London. When the troubles started in Yugoslavia a war premium was declared and the carrier promptly discharged the cargo at Hamburg. The buyer/consignee/endorsee was subject to the contract of carriage in the bill of lading which incorporated the alternative discharge clause and may not therefore have bothered to sue the carrier. Instead the buyer successfully sued the seller for concluding a contract of carriage which did not ensure delivery.

Variation / force majeure clauses requiring delivery "as near to as possible" in a contract of sale would be acceptable. However, a clause to discharge anywhere at the option of the carrier would very likely be held to be unfair under both The Unfair Contract Terms Act 1977 and under Photo-Productions. Clearly Hamburg was not even close to the final port of destination.

Substantial performance of the contractual obligations. This applies where the contract has been performed but part of the obligation has been carried out defectively, that is to say there has been the equivalent of a breach of warranty rather than a breach of condition. It will be recalled that where a condition is breached the innocent party can elect to repudiate the contract and sue for damages. Alternatively the innocent party may waive the breach and reserve the right to damages. A failure to elect may induce the wrong doer to conclude the contract is still ongoing and incur further costs giving rise to a

6 **Planche v Colburn** (1831) 5 Car & P 58

7 See **Staunton v Richardson** [1872] LR 7CP & [1874] LR 9 CP 390.

8 **Christy v Row** [1808] 1 Taunt 300

9 **The Northern Progress No2** [1995] Lloyds Rep

right to estoppel preventing the innocent party from repudiating the contract and may even result in the loss of the right to claim damages. Breach of warranty gives rise a mere claim for damages.

If there has been a substantial though not perhaps an exact and literal performance by the promisor the promisee cannot regard himself as discharged and use it as an excuse to avoid payment.

In **Hoenig v Isaacs,**[10] the plaintiff contracted to furnish and decorate a flat for £750. Some of the furniture supplied was blemished. The cost of rectifying the blemishes was a mere £55 but the defendant withheld £560 claiming that was a sufficient quantum meruit for the amount of work carried out. The court held that the defendant must pay the whole sum less £55.

Similarly in **Dakin v Lee,**[11] **t**he plaintiff builders agreed to repair the defendant's premises for £1,500. They performed the contract apart from 3 relatively unimportant aspects which could be put right for £80. The court held that the contract had been substantially, if not precisely performed. The fact that the work was done badly did not mean it had not been performed at all. The plaintiff could recover the price subject to a deduction for the defective work.

Contrast this with **Bolton v Mahadeva,**[12] where the plaintiff, a plumber contracted to install a central heating system in the defendant's house for £580. The system delivered 10% less heat than it was supposed to do and gave off noxious fumes. The defendant had to spend £174 having the faults rectified by another contractor. The court held that the defendant did not have to pay the plaintiff a penny since there was not what could be construed as substantial performance by the plaintiff. The breach went to the root of the contract rather like the way the court evaluates innominate terms as in Hong Kong Fir v Kawasaki Kissen Kaisha. The defendant did not have to pay a penny but since the system had become a fixture by virtue of installation it could not be removed either.

If in **Cutter v Powell** the plaintiff had completed the voyage but had failed in his duties on one or two occasions he could recover payment (but not if he had almost completed the voyage but died a day or two before docking).

In **Eshelby v Federal European Bank**[13] a builder contracted to convert a pickle factory into a night club for £1,300 payable in four instalments 'subject to the work being duly executed in accordance with the contract. The work was done defectively but could be put right for £80. The court held that the builder was entitled to nothing because of the express stipulation in the contract.

Tender of performance. If one party (A) offers to perform his obligations under a contract and the other party (B) refuses to accept that performance then provided what is offered complies exactly with what was contracted for that party making the offer A is discharged from all further obligations under the contract. If B has not yet carried out his obligations this will entitle him A to sue for damages as well. If the obligation is to pay money care must be made to ensure it is legal tender. The money must still be paid, usually by A paying the sum into court, in which case if B sues B will have to pay the court costs.

2) DISCHARGE BY AGREEMENT

An agreement to discharge a contract is a fresh contract. As with any other contract consideration is required for the agreement to be enforceable unless the agreement is under seal (Release under Seal).

Waiver. If obligations are outstanding on both sides then consideration may be furnished by both parties agreeing to accept what the other party has already done and agreeing to forego the remaining benefits in consideration of not performing the duties that they would each otherwise be liable to perform.

Accord and satisfaction. This is where a contract is varied so that one party agrees to accept performance of something else as performance of the original contract. **Pinnel's Case,**[14]. 'The gift of a horse, hawk or robe' would be sufficient performance or satisfaction to satisfy the subsequent agreement, the accord, made as an

10 **Hoenig v Isaacs** [1952] 2 All.E.R. 176
11 **Dakin v Lee** [1916]
12 **Bolton v Mahadeva** [1972]
13 **Eshelby v Federal European Bank**
14 **Pinnel's Case** [1602] 5 Co Rep 117a.

alternative method of fulfilling the defendant's debt to the plaintiff. Cole owed Pinnel £8.50 payable on 11th November 1600 but paid him £5.12 on 1st October, at Pinnel's request, in full discharge. Because of an incorrect pleading the defence failed but otherwise the court accepted the defence was valid.

In **D & C Builders v Rees,**[15] the plaintiff, a builder did £482 worth of work for the defendant. The plaintiff was on the point of bankruptcy and desperately needed to be paid to save the firm. Knowing this the defendant tendered a cheque for £300 saying take this in full discharge of the debt or you get nothing. The plaintiff had no option but to accept or go bust. The court held that the defendant had to pay the balance. The defendant had not furnished consideration for the plaintiff's unwilling agreement to forego the balance.

Contrast this with **High Trees House,**[16] where an agreement to accept a half rent on property which was difficult to sublet in central London during the war may according to Denning J, have been enforced under the doctrine of equitable estoppel, since the other party had relied on the promise which the promisor had intended him to rely on since the promisee had altered his position, and to repay the full amount would have been to his detriment. Some cross referencing here should be made to the fact that realignments of agreements may involve an element of duress. If this is the case then the new agreement will not be enforced. [17] However, it is a matter of degree to be judged on the circumstances of each case.

3) DISCHARGE BY BREACH

A breach of contract is the failure to perform one of the terms of the contract by one of the parties to the contract or the evident inability of one party to perform his obligations resulting in anticipatory breach of contract as in **The Mihalis Angelos**,[18] a breach of condition entitles the innocent party to elect to treat the contract as an end and sue for damages for loss suffered because of the breach, if any, to waive the breach and claim for damages, or in the event of implied waiver there may be a loss of right even to claim for damages. A breach of warranty entitles the innocent party to damages. An innominate term may be either a condition or a warranty.

If a condition of a contract is not performed then the innocent party can refuse to continue with the contract and can treat himself as discharged as in **Staunton v Richardson** and sue for damages as in **Moshi v Lep Air Services**.[19] A guarantor was held liable for non-payment of four outstanding installments of a contract even though the installments were not paid up fully at the time when installment 3 was due when the contract was repudiated.

If one party to a contract is capable of performing his contractual obligations quite independently of the other, he may refuse to accept a breach of contract by that other, perform his obligations and sue for the amount owed to him provided the court thinks that it is reasonable for him to do so and that an action for damages for breach of contract would not be the most suitable course of action.

In **White & Carter v McGregor,**[20] the defendant, a garage owner contracted for a firm supplying lamp-post litter bins to the council to display an advertisement for his garage on the bins. When the time for renewal of the contract arrived the sales manager renewed it for 3 years. The defendant attempted to cancel the contract the next day but the plaintiff refused, displayed the advert and sued for the advertising fee. The court held that the plaintiff was entitled to ignore the defendant's breach of contract, elect to treat the contract as subsisting and then insist on payment

4) DISCHARGE BY FRUSTRATION

The Doctrine of Frustration : If, without the fault of either party, between the time a contract is made and the time it should normally be completed, an unforeseen event occurs which destroys the fundamental purpose of the contract, the contract is said to be frustrated. The mere impossibility of performing the contract in the way envisaged by the parties is not sufficient to satisfy the Doctrine Something more is

15 **D & C Builders V Rees** (1965) 2 Q.B. 617

16 **Central London Property Trust v High Trees House** [1947]

17 See in particular **Williams v Roffey ; The Atlantic Baron - North Ocean S.S.Co. V Hyundai ; Pao On v Lau Yui Long ; CTN Cash & Carry v Gallaher** [1994] 4 A.E.R 714

18 **The Mihalis Angelos** : **Maredelanto Cia naviera S.A. v Bergbau-handel Gmbh** [1971] 1 Q.B. 164.

19 **Moshi v Lep Air Services** [1973] A.C. 331.

20 **White & Carter v McGregor** [1962]

required, namely the destruction of what the court assumes the parties deemed to be the central and irreplaceable feature of the consideration. The Doctrine of Frustration is a rule of law. What amounts to the central feature is a question of fact to be determined by the court.

Where a contract is frustrated the parties are excused from further performance and neither party is liable to the other in damages or otherwise. Neither party can sue on the contract and monies paid cannot be recovered at common law. It has in the past concerned contracts for the hire of rooms for events such as the Coronation of a Monarch, royal fleet reviews and theatre performances.

In international trade and shipping government actions preventing the performance of a contract are the most common form of frustration. There are no actual cases of the Doctrine of Frustration being applied to damaged or lost cargo in international sales contracts. One does not expect such contracts to be 'frustrated' by loss or damage to goods. The frustrating event must be unforeseen by one of the parties and be of such a nature that it is one they would not normally make allowance for. Loss at sea is an inherent risk of carriage by sea. The seller and buyer usually foresee and apportion the risk so the Doctrine of Frustration does not apply to such losses.

The Doctrine of Frustration is yet another example of the law attempting to apportion risk and loss between two innocent parties. To the extent that the Doctrine operates it jeopardises the security of documents in international trade and is unwelcome. It makes insurance matters more complicated and uncertain.

The early view taken by the courts was that the obligations undertaken in a contract were absolute. In **Paradine v Jane**,[21] the defendant owed rent for the lease of property. He had not paid because he was unable to continue to occupy the property or take a benefit from the contract because the property was in enemy occupation. The court held that nonetheless the defendant had to pay. He could have included a term in the contract to provide for an abatement of rent in the event of enemy occupation. Since he had failed to do so he had to pay the rent.

From one perspective the decision appears to be unfair but in another respect it is perfectly reasonable. If a person buys property and is deprived of it by a war he cannot claim the price back from the previous owner. Why should a lease be any different ? The tenant is much more likely to have extensive insurance cover over the property than the landlord. In the broader context, should there be a different rule for executed and executory contracts ? The risk undertaken by both parties to executed and executory contracts is the same, it is merely the timing that is different. The person who acquires an interest by virtue of an executed contract needs to make provision to protect his interest from fortuitous events.

The leaseholder in **Paradine v Jane** had acquired a leasehold interest in the property. In one respect it was an executed contract. The value of the leasehold to him simply proved to be considerably less than he anticipated. The reversionary right of the landlord was also considerably less since once the lease expired he might not be able to reclaim the property whilst it remained in the control of a foreign government. The leaseholder should have insured his leasehold interest and the reversionary landlord should have insured his reversionary interest. A failure to do so by either or both parties meant that they had made a choice to bear any risk of loss personally rather than share it with an underwriter. Both parties are Innocent victims of an unfortunate turn of events. To bring the contract to an end by a rule of law would merely have shifted the loss away from one innocent party and onto the other. When the parties made the lease what was the fundamental purpose of the contract ? What should the court assume the parties deemed to be the central and irreplaceable feature of the consideration and what are the criteria for so assuming ?

A simplistic view is to target the subject matter of the contract, in this case the lease and the enjoyment of land which was the tenant's objective in making the contract. It takes only a moments reflection however to realise that such a view only embraces one party's interest. There is no need for the court to make any assumptions at all as to what the parties had in mind, for by taking one step backwards in the analysis of the agreement process one can reach the central common feature of consideration in all contracts. This is never frustrated and the need for the doctrine is obviated.

[21] **Paradine v Jane** [1647] Aleyn 26

In **Dunlop v Selfridge,**[22] the House of Lords gave judicial approval of Sir Frederick Pollock's definition of consideration namely as being : 'An act or forbearance of one party, or the promise thereof is the price for which the promise of the other is bought, and the promise thus given for value is enforceable.' The central feature is the exchange of promises. What is actually promised is irrelevant. In commercial agreements in particular the ultimate objective is profit and the dealings with the subject matter are the vehicle for achieving it. The common feature of all business is the taking of risk and the successful risk taking within an adventure is what profit rewards. The law should not seek to artificially alter the central risk taking feature of agreements on the grounds of fairness.

If a party is merely unwilling to fulfil his obligations the normal remedy is damages. In exceptional cases the court may award the equitable remedy of specific performance. There are occasions where a party cannot fulfil a promise but specific performance is impossible. The court will then award damages.

Thus, it is desirable that the duties freely undertaken by parties to a contract should be strictly enforced and that a party who fails to fulfil his duties should bear the financial repercussions of that failure. Schmitthoff [23] highlights the words of Sellers J in **Nicolene Ltd v Simmonds**,[24] where the judge observes that "in the ordinary way ... it does not matter whether the failure to fulfil a contract by the seller is because he is indifferent or wilfully negligent or just unfortunate. It does not matter what the reason is. What matters is the fact of performance. Has he performed or not ?"

Clearly, if the failure of one party to fulfil his obligations is due to a default of the other the causative factor is in reality the default of that other party. Liability should lie with the party whose actions defeat the contract. There is very little scope for 'fault' in respect of breach of contract. Such scope that there is, is outlined above in the discussion of contributory negligence.

In all other respects if the duties are regarded as strict then each party is aware of their respective liabilities under the contract and can make provision to guard against the financial repercussions of future events whether foreseen or not. In appropriate circumstances the parties may choose to expressly allocate risk regarding certain types of eventualities and can expressly state at what point in time risk passes from one party to the other. Alternatively, the parties can agree that in certain eventualities the contract may be brought to an end. By doing so, their respective rights, duties and liabilities remain clear. The parties can then insure their interests. Any rule of law which creates uncertainty and detracts from a clear simple scheme of affairs is undesirable especially in international trade relations.

Nonetheless, it would appear that most legal jurisdictions have in one way or another succumbed to the temptation to seek fairness and justice by providing that in certain extraordinary circumstances where unforeseen events have intervened to render it impossible for an agreement to be fulfilled the parties may be discharged from any further performance.[25]. Whilst it is understandable that courts might be tempted to seek some way of according fairness and justice in such circumstances it is submitted that clarity and simplicity should remain the only criteria especially in commercial affairs in such circumstances in that a reasoned ordering of affairs is ultimately fairer to all concerned in any case and in particular since the search for fairness will inevitably prove to be elusive and unobtainable where both parties are innocent victims of capricious circumstance.

This is particularly so, since as an exception to the normal rule that contractual duties are absolute the degree of exceptionalness that is required before an event can be regarded as a frustrating event must always be a question of degree, the achievement of which is in turn a question of fact to be determined by the tribunal and hence introduces an element of uncertainty into business relations as to when that degree of exceptionalness has been achieved. Merely because the contract is more difficult to perform or less profitable is not enough to discharge the parties from their obligations. The nature of outstanding obligations must be significantly changed' according to Lord Simon in **National Carriers v Panalpina.**[26]

22 **Dunlop v Selfridge** [1915] AC 847 at 855

23 at p181 Export Trade 9th Ed

24 **Nicolene Ltd v Simmonds** [1952] 2 Lloyd's Rep 419 at 425

25 See p180 Schmitthoff Export Trade p180

26 **National Carriers Ltd v Panalpina (Northern) Ltd** (1981] A.C 675.

In **Davis Contractors v Fareham U.D.C.**[27] the defendant agreed to build 78 houses in 8 months at a set price. The work took 22 months and cost a lot more due to a severe shortage of skilled labour. He claimed that the contract had been frustrated and that there should be a new contract based on a quantum meruit. The court held that the contract was not frustrated.

At what precise stage mere difficulty in performing the contract or lowering of the profitability level is overtaken by events and becomes so serious that it alters the relationship sufficiently to qualify as a frustrating event is a decision of the fact for the court. Uncertainty enters the arena in respect of events in that grey borderline between the two.

The Nema Pioneer [28] illustrates the uncertainty that arises out of this. A strike at a port prevented a vessel from fulfilling three out of seven voyages contracted for. An arbitrator decided that as a fact the charter party was frustrated by the delay. Since the arbitrator had followed the correct legal principles the CA refused to upset the finding of fact. The problem that arises particularly in instances of delay is as to "*at what point in time does the delay pass from merely diminishing the profitability of the venture to rendering performance fundamentally different from that agreed?*"

Since the result of frustration is automatic and not a choice of the parties this is important. As long as the parties believe the contract is ongoing they will continue to perform their parts of the bargain relying on the contract to continue to make other arrangements on that basis. However Lord Roskill remarks[29] *' ... where the effect of the event is to cause delay in the performance of contractual obligations, it is often necessary to wait on events in order to see whether the delay already suffered and the prospects of further delay from that cause will make the ultimate performance of the relevant contractual obligations radically different, to borrow Lord Radcliffe's phrase (in **Davis Contractors v Fareham**), from that which was undertaken by the contract.*'

It seems unlikely that the Doctrine of Frustration could apply to leases and so the outcome of a similar situation to that in **Paradine v Jane** would not be different. In **Cricklewood Property & Investment Trust Ltd v Leighton's Investment Trust Ltd.,**[30] land leased for 99 years could not be developed because of the war and government restrictions on development. The court held the contract was not frustrated because relative to the length of the lease the period the restrictions were likely to be quite short lived. Lord Wilberforce in **National Carriers v Panalpina**[31] stated however that whilst the doctrine is unlikely to apply to leases in many situations it is not possible to say that it could never apply. Access to a warehouse was blocked for the third of the time a lease had left to run but that was insufficient to frustrate the lease.

Frustration, Rules of Law or Implied Term ? Whether or not one approves of the Doctrine of Frustration it is a rule of law. There may well be cogent reasons for a rule of law that seeks to do justice in relation to certain categories of relationship such as that of employer and employee and consumer and business man, though it is beyond the scope of this work to explore these relationships. To the extent that the rule applies between business parties its scope and application must be analysed and its implications appreciated.

The Common Law Doctrine of Frustration started to emerge in English Law with the case of **Taylor v Caldwell**.[32] The plaintiff contracted to use a Music Hall for four engagements but it burnt down before the concerts could be held. The plaintiff sued for damages for breach of contract. The court held that a term would be implied into the contract that in the event of the property being destroyed the contract would come to an end. It is impossible to classify the circumstances to which the Doctrine of Frustration applies. The Implied term explanation of the origin and basis of the doctrine has become less popular today and many commentators such as Lord Wright, [33]now feel that the court simply imposes a just and reasonable solution.

27 **Davis Contractors v Fareham U.D.C.** [1956] A.C 696
28 **The Nema Pioneer S.S.. Ltd v BTP Tioxide Ltd** [1981] 2 All.E.R. 1030
29 ibid at p1047 that
30 **Cricklewood Property & Investment Trust Ltd v Leighton's Investment Trust Ltd** [1945] A.C 221
31 **National Carriers Ltd v Panalpina (Northern) Ltd** [1981] A.C 675
32 **Taylor v Caldwell** (1863) 3 B & S 826.
33 in Legal Essays and Addresses at p259

Lord Radcliffe in **Tsakiroglou v Noblee** [34] states that " .. *the parties themselves have become so far disembodied spirits that their actual persons should be allowed to rest in peace. In their place there rises the figure of the fair and reasonable man. And the spokesman of the fair and reasonable man ... Is and must be the court itself."*

s7 Sale of Goods Act 1979 imposes a legal rule which brings a contract for the sale of specific goods to an end where after the contract has been made and risk passes to the buyer the goods without any fault on the part of the buyer or the seller perish. There is no pretence of an implied term and a lack of foresight of the event is not relevant. The rule simply avoids the agreement. It may be that in certain circumstances the implied term may be the reason for ending the contract at common law. However, in most situations the implied term is clearly patently fictitious and a poor rationale for the existence of the rule or Doctrine. If the parties had not foreseen the event then to imply that they had a view as to its effect on the contract but had merely omitted to express it is fanciful.

Paul Richards,[35] highlights the view of Lord Simon in **National Carriers v Panalpina** *"Frustration of a contract takes place when there supervenes an event, (without default of either party and for which the contract makes no sufficient provisions) which so significantly changes the nature (not merely the expense or onorousness) of the outstanding contractual rights and / or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances. In such a case the law declares both parties to be discharged from further performance.*'

The Principal Frustrating Events : There are four principal scenario where the Doctrine of Frustration may be invoked, namely

1) **The destruction of the subject matter** as in **Taylor v Caldwell** above.

2) **The death or incapacity of a party** required to provide personal services such as a singer or artist as in **Poussard v Spiers**.[36] This is probably the most justifiable application of the rule should perhaps receive statutory recognition.

   In **Condor v The Barron Knights,**[37] a musician was very ill. It could often be impracticable for people to insure against the risk of not being able to perform service contracts and to hold them liable for the economic consequences of non-performance when sudden illness strikes is not really feasible and would jeopardise the security of the family home.

   In **Poussard v Spiers** an opera singer was engaged to give several performances but fell ill and was not available. The impresario hired another singer. When she had recovered from the illness she wished to fulfil the remaining outstanding performances. The court held that the contract was frustrated by the illness and thus discharged

3) **The non-occurrence of a particular state of things** which frustrates the common venture as in **Krell v Henry**,[38] where the defendant agreed to hire a flat to view Edward VII's coronation procession. The procession was cancelled. The court held that the contract was frustrated. However in **Herne Bay Steamboat Co v Hutton,**[39] the defendant hired a steamship to see the Royal Naval Review and for a day's cruise round the fleet. The Royal Review was cancelled. The court held that since the purpose was not merely to see the Review but also for a trip around the bay, which was still possible the whole purpose of the contract was not destroyed. The Doctrine of Frustration was not applicable.

4) **Government interference such as**
   a) a change in the law making the contract illegal and therefore not legally enforceable by the courts **Denny. Mott & Dickson v Fraser**[40] or

34 **Tsakiroglou & Co Ltd v Noblee and Thorl GmbH** [1962] A.C 93
35 Law of Contract, p242
36 **Poussard v Spiers and Pond** (1876) 1 Q.B.D. 351 & 410
37 **Condor v The Barron Knights Ltd** [1966] 1 W.L.R. 87
38 **Krell v Henry** (1903) 2 K.B 740
39 **Herne Bay Steamboat Co v Hutton** (1903) 2 K.B. 663
40 **Denny. Mott & Dickson Ltd v James B Fraser & Co Ltd** [1944] 1 All.E.R. 678

b) impossible as in **Metropolitan Water Board v Dick. Kerr**,[41] where contractors had to stop constructing a reservoir and make their plant available to the Government for the war effort. The court held that the period of disruption was so great that the contract was frustrated.

c) where a state of war prevents performance, for example where ships get trapped in a port by a war.

Many vessels were stuck in the Suez Canal during the crisis in 1956 and again during the conflict between Israel and Egypt. Many ships were likewise trapped in the Shatt-al-Arab during the Irac / Iran conflict. International sales contracts, charter parties and contracts of carriage of goods were all adversely affected.[42].

Frustration and Fault.

If a party causes the frustrating event by a breach of contract then the Doctrine of Frustration does not apply. Thus in **The Eugenia,**[43] a ship was chartered for a voyage. The charter party expressly forbade the vessel from entering into hostile territory. The vessel got trapped in the Suez Canal during the war. The court held that the defendant had repudiated the contract and was in breach of contract through his own default. Thus frustration did not apply and the plaintiff could receive damages.

Maritime National Fish Ltd v Ocean Trawlers Ltd.[44] The defendant owned three trawlers and he chartered a fourth from the plaintiff. He was granted only 3 government licences for otter trawls which he then used on his own trawlers. Without an otter trawl the chartered vessel was of no use to him and he claimed the contract was therefore frustrated. The court held that te had self induced the breach of contract since he could have allocated one of the trawls to the hired vessel. He was liable in damages.

Similarly in **Lauritzen v Wijsmuller,**[45] one of the defendant's drilling rig transports sank. The defendant had intended to use the one that sank to carry the plaintiff's rig from Japan to Rotterdam. The defendant wanted to avoid the contract and use the other carrier to fulfil other obligations The court held that the contract not frustrated. A contractor can always hire or buy new plant in any case.

The burden of proof is placed on the plaintiff to establish that an alleged frustrating event was wrongfully caused by the defendant. Thus in **The Kingswood,**[46] a chartered ship was destroyed by fire. The court held that a party claiming self induced frustration by the other party must prove actual self inducement. Mere negligence is insufficient.

Avoiding the application of the Doctrine of Frustration

As outlined above, a contract should best be regarded as an absolute commitment. The scope of the commitment is best decided by the parties in advance. This can be done in one of two ways by the parties which will prevent the court later interfering with the agreed provisions of the contract. An event which has been anticipated and provided for in the contract, and a specific course of action agreed upon will not provide the basis for frustration since the contract will not then be rendered substantially different from that envisaged by the parties. Lord Simon acknowledges this in **National Carriers Ltd v Panalpina** in that frustration only applies where 'the contract makes no sufficient provision.' Nor will the event then be unforeseen as required by s57 Sale of Goods Act. Anything that is specifically covered by terms in a contract provides certainty for both parties. The more detailed and well thought out a contract is the better.

A force majeure clause can be employed to exclude liability for events beyond the control of the parties if they so require[47]. Each party can then take out appropriate insurance relative to their respective commitments under the agreement. If the parties bind themselves to an absolute duty to perform the contract then they become liable for breach howsoever caused. The Doctrine of Frustration provides an

41 **Metropolitan Water Board v Dick. Kerr & Co** [1918] A.C 119

42 Amongst others see **The Evia** [1983] 1 A.C 736; **The Agathon** [1982] 2 Lloyd's Rep 211, **The Wenjiang (No2)** [19] 1 Lloyd's Rep 400 and **Finelvet A.G V Vinava S.S. Co Ltd** [1983] 2 All.E.R. 658 On delay in Contracts of Affreightment see p92 et seq Scrutton On Charterparties.

43 **The Eugenia. Ocean Tramp Tankers Corp v V.O Sovfracht** [1964] 2 Q.B. 226

44 **Maritime National Fish Ltd v Ocean Trawlers Ltd** [1935] A.C 524

45 **Lauritzen A.S V Wijsmuller B.V** [1990] 1 Lloyd's Rep 1

46 **The Kingswood : Joseph Constantine S.S. v Imperial Smelting Corpn.** [1942] A.C 154

47 See Schmitthoff's Export Trade p199

exception to absolute nature of an agreement in as much as the courts imply a term into the contract that discharges the obligation.

Alternatively, if the parties do not wish a clause to be implied into the contract that a frustrating event brings the contract to an end an express clause stating that the respective duties of each party are strict needs to be inserted into the contract. Attempts to provide an exhaustive list of terms to cover every type of event foreseeable might prove to be tedious and could still fail to cover every perceivable event. Perhaps the legend 'the Doctrine of Frustration does not apply to this agreement' would be a sufficient catch all phrase and solve the problem.[48]

Hoecheong Products v Cargill Hong Kong,[49] provides a simple example of a force majeure clause in operation. Sellers were contracted to supply a cargo of Henan Province cotton seed expellers f.o.b. Chinese port. A force majeure clause provided that if due to a force majeure, duly certified by the Chinese Authorities, the seller could not deliver the cargo or any part of it, the seller would be excused liability. A severe drought meant that the seller could only procure 11000 tons of the contracted 10,000. Held Seller not in breach of contract.

The term "***Subject to licence***" is a condition precedent to a contract. The seller must use his best endeavours to procure one. [50] The contract is binding according to **Charles H.W. V Alexander P** [51] but a failure to procure after best endeavours is not breach of contract. The contract is merely unenforceable since it is frustrated.[52]

Force majeure clauses are subject to the contra preferentem rule. In the event of ambiguity the court construes the clause against the party seeking to rely on it to evade contractual duties. [53]

In **The Marine Star,**[54] the seller was required to nominate the vessel and nominated The Marine Star. Later that day he cancelled nomination but tailed to renominate a substitute vessel. There was a Force majeure clause in the c.i.f contract which provided that there would be no liability for any breach of contract due to an event beyond the seller's control. The seller could not find a substitute vessel or cargo. The court held that force majeure applied regarding the duty to nominate a vessel. However, substitution was a right not a duty and so was not covered by the clause. The problem resulted from the seller making a commercial choice to use the original vessel and cargo nominated to satisfy another contract and so it would not have been impossible to fulfil the contract if the seller has so wished. The plaintiff was able to receive damages for loss of profit, compensation paid to the next buyer and costs etc. The plaintiff had sold the cargo on to Coastal Aruba. Coastal Aruba had arranged a substitute cargo and claimed compensation for breach of contract from the plaintiff. An Appeal failed.[55]

Fairclouph Dodd & Jones v Vandol.[56] A Force majeure clause provided that there would be no liability if a breach of contract was due to causes beyond the seller's control. The seller could have bought a cargo afloat and so avoided an export ban. Force majeure only applied if goods could not be shipped or purchased afloat within the contract period and not to a situation where a particular profitable source of cargo is not obtainable.

Lewis Emmanuel v Sammutt.[57] There was only one vessel calling at the port and it was fully booked. The court held that this was not a frustrating event. The seller should have arranged shipment himself or bought another cargo afloat during the contract period. Note however, that if the specification of goods in a sales contract required a particular source for the cargo then the contract would be frustrated.

48 See also the discussion by Atiyah as to whether s57 Sale of Goods Act is an excludable rule of construction or a rule of law which the parties cannot evade.

49 **Hoecheong Products v Cargill Hong Kong** [1995] 1 Lloyds Rep 584. Privy Council

50 **Re Anglo-Russian M.T. & J.B** [1917] 2 K.B **679 Provimi Hellas v Warinco** [1978] 1 Lloyds Rep 373.

51 **Charles H.W. V Alexander P** [1950] 84 Lloyds Rep 89

52 **A.V.Pound & Co Ltd v M.W.Hardv & Co Inc** [1965] AC 588

53 See **Jackson v U.M.Insurance** (1874) Law Rep 10 C.P 125.

54 **The Marine Star** [1993] 1 Lloyds Rep 329

55 **The Marine Star** (1994) 2 Lloyds Rep 629..

56 **Fairclouph Dodd & Jones v Vandol** [1957] 1 W.L.R

57 **Lewis Emmanuel v Sammutt** [1959] 2 Lloyds Rep 629

Bangadesh Export Import v Sucden Kerry.[58] C & F sale of sugar free out Chittagong, Bangladesh. The government revoked B.E.I's import licence for sugar after the contract had been made. The inability to secure an import licence was stated categorically not to be grounds for force majeure. B.E.I claimed the contract was frustrated by the loss of the licence. The court held that the contract was not frustrated simply because B.E.I did not have a licence. The contract was to deliver and accept the cargo at the port. There was nothing stopping B.E.I putting the cargo in a bonded warehouse and then reselling it outside Bangladesh. The ability to move the cargo into the interior was not part of the contract as made clear by the express exclusion in the force majeure clause.

The Effect of Frustration

1) The contract is brought to an end forthwith and automatically by the court by operation of law. **Hirji Mulji v Cheong Yue**.[59]

2) At common law both parties are released from any further performance of the contract. In **Appleby v Myers,**[60] machinery which had been installed in a factory was destroyed by fire before completion of the contract. Payment was due on completion. The court held that the fire was a frustrating event and no payment was due.

In **Chandler v Webster,**[61]. a room was hired to watch the Coronation. The client paid £100 down with £41 balance but the procession was cancelled. The court held that he still had to pay the rest because the obligation to pay occurred before frustration. However, **Chandler v Webster** was over-ruled by **Fibrosa v Fairburn**.[62] A £1,000 down payment made for delivery of machinery to Gdynia. The German invasion frustrated the contract. The court held that there was a total failure of consideration. The £1,000 had to be returned. This unfortunately meant that the money and effort spent on the order was not recoverable and is just as unfair as **Chandler V Webster**.

There were problems at common law regarding the repayment of sums of money paid before the frustrating event occurred.

a) If consideration failed both parties could treat the contract as entirely frustrated. Thus nothing had to be paid in **Krell v Henry.**

b) There was no right to any payment for expenses.

c) If the consideration did not entirely fail the other party had to pay everything due prior to frustration.

These problems led to the passing of the Law Reform Frustrated Contracts Act 1943.

The Law Reform Frustrated Contracts Act 1943

1 Adjustment of rights and liabilities of parties to frustrated contract.

1(1) Where a contract governed by English Law has become impossible of performance or been otherwise frustrated, and the parties thereto have for that reason been discharged from the further performance of the contract, the following provisions of this section shall, subject to the provisions of s2 of this Act have effect in relation thereto.

1(2) All sums paid or payable to any party in pursuance of the contract before the time when the parties were do discharged (in this act referred to as 'the time of discharge') shall, in the case of sums so paid, be recoverable from him as money received by him for the use of the party by whom the sums were paid, and, in the case of sums so payable, cease to be so payable;

Provided that, if the party to whom the sums were so paid or payable incurred expenses before the time of discharge in, or for the purpose of, the performance of the contract, the court may, if it considers it just to do so having regard to all the circumstances of the case, allow him to retain it or, as the case may be, recover the whole or any part of the sums so paid or payable, not being an amount in excess of the expenses so incurred.

58 **Bangadesh Export Import v Sucden Kerry S.A.** [1995] 2 Lloyds Rep 1
59 **Hirji Mulji v Cheong Yue S.S. Co**. [1926] A.C 497.
60 **Appleby v Myers** [1867] L.R. 2 CP 851
61 **Chandler v Webster** [1904] 1 K.B 493
62 **Fibrosa v Fairburn** [1943] A.C. 32

1(3) Where any party to the contract has, by reason of anything done by any other party thereto in, or for the purpose of the performance of the contract, obtained a valuable benefit (other than a payment of money to which the last foregoing subsection applies) before the time of discharge, there shall be recoverable from him buy the said other party such sum (if any), not exceeding the value of the said benefit to the party obtaining it, as the court considers just, having regard to all the circumstances of the case and, in particular

(a) the amount of any expenses incurred before the time of discharge by the benefited party in, or for the purpose of, the performance of the contract including any sums paid or payable by him to any other party in pursuance of the contract and retained or recoverable by that party under the last foregoing subsection, and

(b) the effect, in relation to the said benefit, of the circumstances giving rise to the frustration of the contract.

1(4) in estimating, for the purposes of the foregoing provisions of this section, the amount of any expenses incurred by any party to the contract, the court may, without prejudice to the generality of the said provisions, include such sum as appears to be reasonable in respect of overhead expenses and in respect of any work or services performed personally by the said party.

1(5) In considering whether any sum ought to be recovered or retained under the foregoing provisions of this section by any party to the contract, the court shall not take into account any sums which have, by reason of the circumstances giving rise to the frustration of the contract, become payable to that party under any contract of insurance unless there was an obligation to insure imposed by an express term of the frustrated contract or by or under any enactment.

1(6) Where any person has assumed obligations under the contract in consideration of the conferring of a benefit by any other party to the contract upon any other person, whether a party to the contract or not, the court may, if in all the circumstances of the case it considers it just to do so, treat for the purposes of subsection (3) of this section any benefit so conferred as a benefit obtained by the person who has assumed the obligations as aforesaid.

2. Provisions as to application of this Act.

2(1) This Act shall apply to contracts, whether made before or after the commencement of this Act, as respects which the time of discharge is on or after the 1st day of July 1943, but not to contracts as respects which the time of discharge is before this said date.

2(2) This Act shall apply to contracts to which the Crown is a party in like manner as to contracts between subjects.

2(3) Where any contract to which this Act applies contains any provision which upon the true construction of the contract, is intended to have the effect in the event of circumstances arising which operate, or would but for the said provision operate to frustrate the contract, or is intended to have effect whether such circumstances arise or not, the court shall give effect to the said provision and shall only give effect to the foregoing section of this Act to such extent, if any, as appears to the court to be consistent with the said provision.

2(4) Where it appears to the court that a part of any contract to which this Act applies can properly be severed from the remainder of the contract, being a part wholly performed before the time of discharge, or so performed except for the payment in respect of that part of the contract of sums which are or can be ascertained under the contract, the court shall treat that part of the contract as if it were a separate contract and had not been frustrated and shall treat the foregoing section of this Act as only applicable to the remainder of that contract.

2(5) This Act shall not apply

(a) to any charter party, except a time charter party or a charter party by way of demise, or to any contract (other than a charter party) for the carriage of goods by sea; or

(b) to any contract of insurance, save as is provided by subsection (5) of the foregoing section ; or

(c) to any contract to which section 7 of the Sale of Goods Act, 1893 (which avoids contracts for the sale of specific goods which perish before the risk has passed to the buyer) applies, or to any other contract for the sale, or for the sale and delivery, of specific goods, where the contract is frustrated by reason of the fact that the goods have perished.

Analysis of the Law Reform Frustrated Contracts Act 1943

The common law rules as to what amounts to frustration are unaffected by the Act. The Act simply deals with the financial consequences of frustration.

a). Money paid before frustration is prima facie recoverable s1(2) LRFC Act

b). Money payable before frustration prima facie ceases to be payable 1(2) LRFC Act

c). Benefits received before frustration must be paid for s1(3) LRFC Act.

d). A party who has incurred expenses may be awarded his expenses up to the limit of the sums paid or payable to him before the frustrating event sl(3)(a) & (b) LRFC. However, if nothing was paid or payable before the frustrating event, he will not be able to get any expenses at all.

The provisions of the LRFC Act can be excluded by express agreement s2(3). The Act does not apply to completed portions of severable contracts s2(4) in that such portions of these contracts are not frustrated at all in any case and as such the price or other consideration must be paid in the normal manner. A pro-rata price for part delivery of a severable bulk must therefore be paid for.

This reflects the common law in that in time charter parties the courts severed completed portions of the time charter party from the whole. An important aspect of this is that where a contract is not entirely frustrated the time of frustration is an important finding of fact. Thus in **Finelvet v Vinava,**[63] a ship was trapped by the Iran / Irac war on the 22nd September. However, it was not until the 24th November that it became clear that the war would not be a short lived affair and therefore apparent that the contract was frustrated. Therefore hire was payable until the 24th November.

The LRFC Act applies to simple voyage but not to simple time charter parties or to demise charter parties at all. The common law rules continue to apply. The Act does not apply to contracts for the carriage of goods by sea s2(5)(a). This would apply to the contract of carriage, presumably to the contract of carriage within the Bill of Lading under s2 Carriage of Goods By Sea Act 1992 and to time and voyage charter party contracts of carriage to the extent that the charter party performs the secondary role of contract of carriage where there is no other document relating to the carriage of the goods. The Act does not apply to sales of specific goods s2(5)(a) either, nor to s7 SOGA 1979 statutory frustration. Most International Sales contracts are governed by the Common Law Rules.

The scheme for dealing with the financial consequences of frustration within the LRFC Act does not apply to Insurance contracts. The Marine Insurance Act 1906 contains its own provisions.

The aim of the LRFC Act is to spread the loss more fairly and to avoid the common law rule that the loss lies where it falls. The Act does not always achieve this however. Consider the case of **Appleby v Myers**.[64] where the plaintiff agreed to install and maintain machinery in the defendant's factory for 2 years for £459. Just as the machinery was completely installed the factory burnt down. It was held under the common law that the contract was frustrated and the plaintiff could claim nothing. If the same situation occurred today the plaintiff would still receive nothing since the defendant gained no benefit. The moral of the story must be 'insure yourself whenever possible.'

Under **s2(1) LRFC** all sums paid or payable prior to a frustrated contract are repayable or discharged. The court can make an allowance for expenses if it feels that it is just to do so, The total failure of consideration does not have to be shown. In **B.P.Exploration Co (Libya) v Hunt**[65] the plaintiff agreed to supply expertise and finance in consideration of a share in the defendant's oil concession in Libya. Libya nationalised the oil industry and paid Hunt compensation. B.P. sought money to be returned that had been paid to the defendant. The court held that it was frustrated. The money should be returned because Hunt had benefited from the contract but no allowance for inflation would be made since the object of the Act was not to enrich one party at the expense of the other. Under **sl(3) LRFC** where one party has benefited from partial performance the court may make an award of such sum as is reasonable to the other party. Benefit was considered in **B.P. Exploration v Hunt**

1). Benefit means the end value to the defendant of services given and not the provision of the services themselves. Where the service is know how, the benefit is knowledge gained.

2). Valuation is made at the time of frustration.

3). The court can award any amount up to the full value of benefit but not more. Any expenses incurred can be deducted.

4). Appleby v Myers is probably not affected.

5). The Act does not apply to contracts for the sale of goods which perish before the risk passes to the purchaser.

63 **Finelvet A.G V Vinava S.S. Co Ltd** [1983] 2 All.E.R. 858
64 **Appleby v Myers** (1867) L.R. 2 CP 651.
65 **B.P.Exploration Co (Libya) v Hunt** (1982)

CHAPTER TWO

Self Assessment Questions : Discharge of a Contract

1) In what ways may a contract be discharged? Explain the rule in Cutter v Powell and exceptions to it.

2) In what circumstances may a contracting party treat a breach by the other party as a repudiation of the contract? 'A party is not discharged from his contractual obligations merely because performance has become more onerous or impossible owing to some unforeseen event.' Explain the doctrine of frustration as an exception to this rule.

3) Outline the provisions of s2 Law Reform (Frustrated Contracts) Act 1943.

4) The University of Glamorgan contracted to buy 5,000 tins of hot-dog sausages from Small-Mac a firm of American fast food producers to be packed in cases of 50 tins. When the hot-dogs were tendered to the University it was discovered that about a third of the cases contained only *25* tins but the total consignment was 5~000 tins. The University auditor pointed out that Colonel Blandertaste's hot-dogs were much cheaper and that the University should buy Blandertaste's rather than Small-Mac's hot-dogs. The University refuses to take deliver of the hot-dogs. Small-Mac comes to you for advice as to whether or not he can claim against the University for breach of contract.

5) Genius agrees to coach Dunce for his I.C.E. Law paper. Shortly before the date of the first lesson Genius falls seriously ill and is unable to give any lessons at all. Dunce cannot find another tutor and he fails the exam. Does Dunce have a claim against Genius?

6) Widget contracts to make a certain number of machines for Fideho an Illyrian importer. Fideho pays Widget £200.000 by way of deposit. Widget prepares his factory for the manufacture of the machines at a cost of £50,000 but before he can begin production it becomes illegal to export machinery to Illyria. Fideho now seeks to recover his £200,000 deposit. Advise Fideho.

7) The Treforest Auto Club organised a car rally to take place in the Brecon Beacons on the1st May. On the1st of April Morris arranged with Opel that Morris would hire Opel's minibus to take a party of people for the day to watch the rally and that he would pay Opel £15 on 29th April as part payment of the £40 hiring charge. Unfortunately on 22nd April the army decided to hold some exercises lasting two weeks over a part of the rally route and this led to the cancellation of the rally. The next day Morris informed Opel that he would not be going to the Brecon Beacons after all on the 1st May. Opel insists on payment of the *£15.* Advise Morris.

8) In March James contracts to hire his caravan to Henry for a period of5 months commencing on the 1st May. Henry is disabled and James agrees to make certain adaptations to the caravan which cost him £150. Henry pays him half the agreed total rent of £500 in advance. The day before Henry is due to take delivery. The caravan is stolen from James' yard. The police tell Henry that they suspect that James failed to lock the yard overnight. Discuss.

9) Hot Air Ltd agreed to install a central heating system in a hotel which Brown was building the price to be paid on completion of the work. After a great deal of the work had been done and the remainder was nearing completion. The hotel was accidentally destroyed by fire. Can Hot Air Ltd. recover the whole or any part of the contract price?

REMEDIES FOR BREACH OF CONTRACT

A breach of contract occurs when a party fails to perform his contractual obligations, or where he expressly or by implication, repudiates his obligations. There are four main remedies, two at Common Law, namely Damages (liquidated and unliquidated) and Quantum Meruit and two in Equity, namely Specific Performance and Injunction.

Action for Damages at Common Law for Breach of Contract.

This is the primary remedy for breach of contract. 'Damages' is the payment of a sum of money usually aimed at restoring an injured party to the position he would have been in had the contract been carried out properly, so far as a money payment can do this. The Aim of Damages is to compensate the party who has suffered loss, NOT to punish the party causing the loss. 'Damage' is the loss suffered by the plaintiff. An action for 'Damages' is the plaintiff's claim for compensation. Damages are claimable as of right whenever a contract is broken, but if no real damage has been suffered the plaintiff will only obtain 'Nominal Damages' e.g. 1p. If more than 'Nominal Damages' are paid they are called 'Substantial Damages.'

Repudiatory Breach. If one party repudiates all his contractual obligations before the time when performance is due this is referred to as 'Repudiatory Breach' of contract. Repudiatory Breach may be 'Express', where one party tells the other that he does not intend to carry out his contractual obligations, or 'Implied' where one party does something making it impossible for him to complete his contractual obligations, for example, in a contract to supply a specific article, when a seller parts with ownership of the article to a third party. When this occurs the action for damages becomes immediately available to the other party, who does not have to wait until the time of performance arrives before suing for damages.

If one party (X) commits a repudiatory breach of contract because it becomes evident to him that the other party (Y) will not be able to complete his side of the bargain then Y is still able to bring an action for breach of contract, since "Breach of Contract is actionable 'Per Se'.' However, Y will only receive 'Nominal Damages' because when the time to perform the contract would have arrived Y would not have been able to perform his obligations in any case, and so in reality Y has suffered no real loss at all.

In **The Mihalis Angelos,**[66] the plaintiff, a shipowner chartered his vessel to the defendant. A term of the contract provided that the defendant could cancel the contract. If The Mihalis Angelos did not arrive at Haiphong by the 20th July 1965. By the 17th of July it became clear to the defendant that the vessel would not arrive on time and he proclaimed that he was cancelling the contract on the grounds of 'Force Majeure.' The plaintiff then sold the vessel and made a claim for breach of contract. In the event the court found that there was no justification to the claim of Force Majeure, so the defendant was guilty of breach of contract. The right to cancellation for a failure to arrive was not exercisable till the 20th of July. However, if the defendant had waited for the 20th to arrive he could have cancelled the contract in any case, so the court would only award nominal damages. The plaintiff had suffered no real loss at all.

Un-liquidated Damages.

Where no provision for damages is made in the contract then the court assesses the damages that should be paid. Three principal questions need to be answered in order to assess a claim for 'Unliquidated damages'

a). What kind of damage should the claimant be compensated for ? that is to say “Remoteness of damage” plus 'What for ?' assuming the claim is not too remote.

b). How shall the damages be quantified ? What is “The. Measure of damages” or How much ?'

c). Could the loss have been mitigated by the injured party ?

[66] **The Mihalis Angelos** [1970]

CHAPTER TWO

Remoteness of Damage.

It is not just or practicable to award damages for every consequence however unusual which may flow from a breach of contract. Rules are required to show what loss can or cannot be recovered in an action for damages for Breach of Contract. The principle case which sets down the rules regarding how far the courts will travel down the chain of causation, that is to say to determine how remote a consequence a loss can be from the original breach and still award damages is **Hadley v Baxendale,**[67] where Alderson B stated :-

"'Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either' :-
[Rule 1] as loss 'arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or
[Rule 2] as loss 'such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it'"

The plaintiff, a miller hired the defendant, a common carrier, to deliver a broken mill shaft to the makers for repair. The defendant promised to deliver it the next day. Unknown to the defendant, the mill could not operate without the shaft. The plaintiff had not told the defendant that he had no spares. the defendant took his time delivering the shaft and the plaintiff lost several days production. The plaintiff claimed damages for lost production due to the delay in delivering the shaft. The court held that

1). The loss did not arise from the usual course of things since usually a miller would have a spare part.

2). The special circumstance, that the mill could not work until the shaft was redelivered could not reasonably be supposed to have been in the contemplation of both parties.

In **Victoria Laundry v Newman Industries**[68] the plaintiff, a laundry operator, ordered a boiler for immediate use in his business. The defendant delayed delivery for 5 months. The plaintiff sued for loss of profit. The Court of Appeal held that the plaintiff was entitled to damages for lost business. It was held by Asquith L.J. that the plaintiff can only recover :-

a) such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach.

b). Reasonable foreseeability depends on imputed or actual knowledge. Imputed knowledge is that which every reasonable person is taken to have about the 'ordinary course of things.' : Actual knowledge occurs because the plaintiff had told the defendant about it.

c) The plaintiff must show that if a reasonable defendant had thought about what loss would be caused by a breach of the contract he would have foreseen that the loss, which in fact resulted and is now being claimed for$_1$ was likely So to result.

So, the plaintiff could recover for loss of normal operating profit suffered because he did not have an additional boiler, but the loss of a highly lucrative Government Clothes Dying contract could not be specifically compensated for.

Distinguish between 'Reasonable foresight' in contract with the test of 'Reasonable foreseeability' in the Law of Tort. The contract loss must be 'Not very unusual, and very easily foreseeable, or that there must be a real danger or a serious possibility of its occurrence.'

In **The Heron II,**[69]. the plaintiff chartered a vessel to carry sugar from Constanza to Basrah where the sugar would be immediately put on the market. The vessel deviated and arrived 9 days late. The market price for sugar fell. The plaintiff sued for £4,000, the difference between the price received for the sugar and that which he would have received if the ship had not deviated. The court held that whilst it was just as possible that the price of sugar may have risen instead of falling it was foreseeable as a serious possibility that the price would fall. The carrier had to pay the damages.

In a contract for the supply of goods or services (a simple debt) the appropriate remedy for a failure to pay for the goods or service is an action for an agreed sum, that is to say the value of the goods or service. All

67 **Hadley v Baxendale** [1854]
68 **Victoria Laundry v Newman Industries**
69 **The Heron II : Koufos V Czarnikow** [1969

that the plaintiff can claim is the price, nothing more, nor less. S49 Sale of Goods Act 1979 provides for an *'action for the price'* of unpaid goods. Questions regarding remoteness and measure of damages are not applicable.

The Measure of Damages.

The object of an award for damages is to put the plaintiff monetarily as if the contract had been performed and unlike tort he can recover for the loss of gains of which he is deprived by the breach. The plaintiff can recover any expenses he has incurred in preparing to perform, or in performing the contract in part, and which have been rendered futile by the breach.

In **Anglia T.V. V O'Reid,**[70] a television company incurred £2,700 pre-production costs in preparing a play which the leading actor later refused to participate in. The court held that the actor could be held liable for this loss.

The Duty to mitigate one's losses.

The plaintiff is under a duty to mitigate his loss, i.e. to do everything reasonable to reduce the loss which would otherwise occur due to the breach of contract by the other party. If he neglects to do so the courts will reduce the amount of damages that he would otherwise have received by the amount that he could have saved by mitigating his losses.

In **British Westinghouse Electric v Underground Electric,**[71] Viscount Haldane LC said that :- " .... [there is imposed] o*n the plaintiff the duty of taking all reasonable steps to mitigate the lass consequent on the breach and debars him from claiming in respect of any part of the damage which is due to his neglect to take such steps. In the words of James L.J. in Dunkirk Colliery Co v Lever [1878] "The person who has broken the contract is not to be exposed to additional cost by reason of the plaintiffs not having done what they ought to have done as reasonable men, and the plaintiffs not being under any obligation to do anything otherwise than in the ordinary course of business." ... this does not impose on P an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of business..."*

In **Brace v Calder,**[72] the plaintiff was employed as a branch manager by a four man partnership for two years. After five months the partnership dissolved due to the retirement of two of the partners. This meant that the plaintiff's appointment ceased to exist and so he was entitled to damages for breach of his two year contract of employment. However the remaining two partners offered to renew his appointment. By refusing to accept the appointment he had failed to mitigate his loss which would otherwise have been minimal. Thus he received no damages at all.

Liquidated Damages.

Where a contract makes a provision for the amount of damages that a party should pay for a breach of contract the damages are referred to as Liquidated Damages. Care should be taken to distinguish between liquidated damages which are a genuine attempt to provide a pre-estimate of the loss and penalty clauses which aim to deter a party from breaching a contract. Penalties are not recoverable -and in such a case the plaintiff will only be allowed to recover normal damages according with the general principles for recovery of damages.

In **Dunlop Pneumatic Tyres v New Garages Ltd**. [1950] a garage undertook to sell tyres at a fixed price (price maintenance agreement) and to pay £5 for every breach. The court held that the sum was reasonably and not disproportionate to the loss and so would be allowed.

Quantum Meruit

The plaintiff can claim for a quantum meruit (as much as he deserves) where a contract provides no express remuneration - or providing he is entitled to some remuneration, when he has performed part but not all of a contract. In the latter case effectively the original contract is replaced by a new contract which does not specify the remuneration to be paid.

70 **Anglia T.V. V O'Reid** [1972]
71 **British Westinghouse Electric v Underground Electric Co** [1912]
72 **Brace v Calder** [1895]

CHAPTER TWO

Specific Performance.

Specific performance is subject to the discretion of the court as to whether or not it will be awarded. It is awarded where damages are insufficient compensation. It will be granted in relation to land and where the goods are unique, e.g. antiques etc. It will not be granted

a). In a contract for personal services i.e. a contract of employment.

b). If the constant supervision of the courts is needed to secure compliance with the order.

c). If it would be unenforceable against the person asking for it such as a minor. Injunction available.

Injunctions are of two types. Mandatory, where the defendant is ordered to do something in order not to breach a contract. Prohibitory, where the defendant is ordered not to do something which would result in a breach of contract

In **Lumley v Wagner,**[73] an opera singer contracted to sing solely for plaintiff for three months. The defendant then agreed to sing at another theatre. The plaintiff sought an injunction restraining her from breaching her contract.

An injunction will not be granted if it amounts to an order of specific performance of a contract for personal services. **Ehrman v Bartholomew,**[74] **t**he defendant agreed to work for the plaintiff and no one else for 10 years. The court held that this would be unduly hard on the defendant and in order to live he would have to work for the plaintiff. This amounted to the equivalent of seeking and order for the specific performance of a contract of personal service, so the court refused to grant the order.

Rescission.

This is a remedy for inducing a contract by innocent or fraudulent misrepresentation, whereby the contract is abrogated. A party intending to rescind must notify the other party of his intention. The right of rescission is lost

a). If "restitutio in integrum" is impossible.

b). If the injured party takes a benefit under the contract with the knowledge of the misrepresentation.

c). If a third party has acquired for value rights under the contract.

Rescission is also available in cases of inducing contract by undue influence or duress. Rescission may also be available if a contract is the result of a mistake.

A wide variety of issues have to be considered by the courts when assessing damages. Causation must be established before damages are payable. The damage claimed must not be too remote. The plaintiff must mitigate his losses. The claim must be made within the time stipulated in the contract or within the statutory time limit. If the provisions of Law Commission report No 219 are implemented the plaintiff's damages may be reduced in situations where regarding breach of a non-strict duty in a contract, he has failed to exercise care to look after his own interests. The following cases provide some insight into how these provisions have been applied in the courts.

The Zaks Diklo,[75] payment of the price as under s14 Sale of Goods Act. A buyer may deduct money during a set off against defective goods which do not correspond Act with the description.

Western Web Offset Printers Ltd v Independent Media Ltd.[76] Where a contract of works is repudiated damages are assessed on the basis of the actual loss to the plaintiff. This includes the effect of the breach on expenditure by the plaintiff and not just notional loss of profit. Overhead costs incurred when a plaintiff is unable to mitigate loss any further by undertaking other work can be taken into account. A publisher cancelled a contract for 48 issues of a weekly newspaper. Excess capacity in the industry meant the printer could not get new contracts to use his machines and provide staff with work but overheads and wages still had to be paid. Notional profit would have been £38,245 but overall loss including operational cost were assessed at £176,903.

73 **Lumley v Wagner** [1852]

74 **Ehrman v Bartholomew** [1898].

75 **The Zaks Diklo** [1995] I Lloyds Rep 167

76 **Western Web Offset Printers Ltd v Independent Media Ltd** [1995] Times 10.10.95.

In the context of a repudiated charterparty this would cover dock lay up charges and wages for idle crew still required for safety and maintenance. This is already well established regarding charterparties and represents nothing new.

Shell v P & 0 Roadtanks.[77] This was a CMR road transport case. A delivery firm got tankers mixed up and delivered the wrong load to a factory. In consequence a load of detergent was delivered to a factory instead of chemicals. The detergent polluted chemicals in the factory putting the machinery out of order till the equipment was cleaned resulting in loss of profits etc. The case discusses liability under CMR. Note that CMR and HVR etc provide liability for damage to cargo etc but neither discusses liability for consequences of liability to third parties for delivery of the wrong cargo. The cargo was intact and undamaged and could still be delivered to the endorsee. This is a perfect example of tortious liability beyond the scope of liability in contract.

The Fiona.[78] Issues involved include liability for the shipment of dangerous cargo and cargoworthiness The previous cargo in a vessel contained condensate. The tanks were washed but a residue was left behind. The charterer had pointed out the importance of ensuring no residue remained before loading charter cargo of oil. Prior to discharge the engineer took readings of the tank and the heating coil was turned on. The heating coil leaked. An explosion followed and the engineer was killed and the cargo destroyed. The shipowner claimed damages under HVR for the charterers negligence in shipping a dangerous cargo. The charterer cross claimed for uncargoworthiness and loss of cargo. The court held that the shipowner had breached Art III HVR. The vessel was uncargoworthy since the contaminated fuel oil made it dangerous and caused the explosion. The shipper was not liable.

The Mary.[79] This involved a United Nations' cargo of rice to refugees in Somalia. A Somali general tried to sell off the rice for profit claiming it would otherwise fall into enemy hands. The U.N. protested. The ship owner sought a court order to sell off the rice. The court held that the rice should be sold to avoid additional shipping costs and after deduction of costs the balance of sale price should be returned to the U.N.

In **The Stolt Loyalty,**[80] palm oil was shipped from Papua New Guinea to London on board The Stolt Loyalty, bareboat chartered to S.L.Inc from Soframar, via Rotterdam & trans-shipment aboard the Silver Fox. Cargo was contaminated on delivery and £345,000 damages were claimed. The court held that the demise charterer was liable under the claim.

In **The Baleares,**[81] Trammo chartered The Baleares from Geogas to carry a cargo of propane, fob Bethioua from Sonatrach in January 1987 at £103 per tonne (February cargo would be $153 per tonne). Trammo had in turn arranged to sell cargo to 3rd parties & would be liable in damages for breach of contract for non-delivery. The Asbatankvoy charterparty described the vessel as now trading and specified 12th January and to proceed with all reasonable dispatch to Bethioua. Discharge ports to be nominated by Trammo by 20th Jan. The vessel was expected time or arrival was stated as 31st January. Laydays to run from 30th January, cancelling by 5th February. On January 20th Geogas attempted to substitute The Stena Oceanica and proposed loading from 10 - 15 February. Trammo protested and pointed out that late delivery would result in damages. The sellers Sonatrach refused to accept a late loading. On 6th February Trammo cancelled the charterparty without prejudice to damages. Trammo had to pay $2m damages to third party buyers for breach of contract. The price of gas rose by $50 / tonne due to the delay. The court held that the charterer was entitled to $1.5m damages for loss of bargain by not being able to buy the cargo from Sonatrach in January.

In **The Jasmine B.**[82] an Asbatankvoy charterparty gave the charterer the right to nominate up to 3 ports of discharge & right to change nomination at any time. The Charterer nominated Porto Torres. After the vessel had arrived and given notice of readiness the charterer ordered the vessel to sail to Houston awaiting orders. After a number of disputes the charterer ordered the vessel to discharge at Genoa. The court held that the

77 **Shell v P & 0 Roadtanks** [1993] 1 LR 114
78 **The Fiona** [1993] 1 Lloyds Rep 257.
79 **The Mary** [1991] 2 Lloyds Rep 277
80 **The Stolt Loyalty** [1993] 2 Lloyds Rep 281
81 **The Baleares** [1993] 1 Lloyds Rep 215
82 **The Jasmine B** [1992] 1 Lloyds Rep 39

clause did not limit renomination to the period prior to notice of arrival. The renomination was legitimate. The Charterparty provided for the charterer to pay the shipowner any additional costs involved in a renomination so the shipowner had nothing to loose by complying with the order.

The Product Star No2,[83] involved a Beepeetime charterparty. Clause 10. lrac / Iran excluded ports. Clause 40, if master / owner considers a port to be too dangerous a war risk he can refuse to accept the nomination. It is the duty of the charterer to nominate substitute port of loading/discharge. Clause 50, charterer to pay additional war risk premium. Vessel ordered uneventfully to Rewia 4 times. The 5th time the master claimed it was too dangerous. When the ship owner refused to comply the charterer refused to nominate a substitute port and claimed against the ship owner for repudiation of charter party. The court held that Clause 40 required a change of circumstance & an honest belief that Rewia was too dangerous. On evidence the position had changed. Clause 50 covered the ship owner for war risk premium so the ship owner had nothing to loose and he was in breach of contract. Damages awarded for 2 refused voyages and 6 months charter at difference between charter party rate and rate of substitute vessel.

In **The Texaco Melborne,**[84] a shipowner argued with a shipper / charterer and delivered cargo to a different port. The charterer claimed damages for non-delivery under the bill of lading at port of destination. The ship owner offered damages on the sale price at that date in a Ghanian port in Ghanian currency. The charterer claimed damages at repurchase price in Italy in US dollars. The court held that there was no available market in Ghana on which to assess damages. The mere fact that if delivered to Ghana it would have been sold at a price did not represent a market price since there must be an available market not just a one off cargo. Since the exchange rate had changed considerably the ship owner would get a windfall by only paying out in Ghanian currency so damages in US dollars awarded.

In **The Olib,**[85] the endorsee of a bill of lading was forced to pay demurrage & storage costs before a ship owner would release goods subject to a lien for non payment of freight & disbursements. The court held that as a bailee of the goods the ship owner had incurred additional expenses which he was entitled to recover. This was not therefore coercion or duress. (This would apply equally to a debt resulting from a failure by a shipper to pay freight by virtue of the transfer of liabilities under s3 COGSA 1992)

Kaines v Osterreichische[86] involved an anticipatory breach of contract to sell 600,000 tons of Brent Crude Oil - September 1987 on 17th July. The court held that the time for the assessment of damages is at the time of repudiation not when performance was due - by September price of oil had risen - damages were assessed as of 18th July market price.

In **Concordia v Richco,**[87] the court held that the duty of a seller f.o.b & c.i.f. is the same regarding endorsement of documents viz within a reasonable time after shipment. The last possible date of delivery of documents is the day of delivery of goods since documents can no longer be purchased after that date. Damages are to be assessed at market price on last day of delivery. A reasonable time could at the arbitrator's discretion have been at an earlier time.

The Aragon[88] concerned the nomination of vessel. Oil purchased f.o.b Sullom Voe : February shipment - 3 day window to be set 15 days from nomination of Estimated time of arrival of vessel, demurrage payable for delay by endorsee & reclaimable from seller. The vessel arrived 2 days before 3 day loading window. Goods were still not loaded 2 days after expiry of window. The buyer gave notice of revocation. The seller sued for damages for breach of contract. The court held that under **Bunge v Tradax** February shipment is a condition - but the 3 day window is not - the demurrage rate shows it is a warranty with a liquidated damages clause attached. The plaintiff was entitled to loss of profit at contract price for oil which had subsequently halved in value.

83 **The Product Star No2** [1991] 2 Lloyds Rep 468
84 **The Texaco Melborne** [1992] 1 Lloyds Rep 303
85 **The Olib** [1991] 2 Lloyds Rep 108
86 **Kaines v Osterreichische** (1993] 2 Lloyds Rep 1
87 **Concordia v Richco** [1991] 1 Lloyds Rep 475
88 **The Aragon** [1991] 1 Lloyds Rep 61

In **The Maria,**[89] there was a claim by a ship owner against a charterer for non payment of hire. The charterer made a sealed offer of $15k to arbitrator. The ship owner rejected offer. The ship owner was awarded $16.2K but ordered to pay post offer costs. The court held that a sealed offer is the equivalent to a payment into court. If the ship owner had been awarded $15k or less then he would have been liable for all costs but since the ship owner was awarded substantially more costs followed the successful claim and the charterer was liable for all costs.

Damages have until the present time been claimable as of right under contract law. Where the plaintiff makes a claim for breach of contract but has suffered no loss he is entitled to receive damages but the court then awards merely nominal damages. The plaintiff wins his case but has to pay the court costs. In all other respects the plaintiff is entitled to recover fully for his losses. In appropriate circumstances his claim may fail if he fails to establish causation or if his losses are too remote. His claim may be reduced where he fails to mitigate his loss.

If a plaintiff sues in tort as opposed to contract, a distinct possibility now that the courts have accepted concurrent liability in tort and in contract where a tortious duty of care can be established, then the relevant rules regarding assessment of damages in tort apply. The plaintiff is free to choose whichever claim affords him the best procedural advantage and a claim founded in tort will not be treated as an abuse of process. One disadvantage and disincentive to suing in tort has till now been that contributory negligence can result in a plaintiff's damages being reduced in tort to reflect the degree to which the plaintiff has contributed to his own loss. This has not till now been possible in contract and in this respect a contract action is preferable. Tort also requires places the burden of proof of breach and causation on the plaintiff which again highlights the advantage of a contract action.

However, a new level of sophistication may be added to the contract claim process if the Law Commission Report No219 recommendations regarding Contractual Contributory Negligence are enacted. The proposed Contributory Negligence Act will provide that in future where a defendant owed the plaintiff a duty of care, and has breached that duty causing the plaintiff loss, that plaintiff's damages may be reduced to take into account any failure on the part of the plaintiff to look after his interests where that failure has contributed to the loss suffered by the plaintiff.

[89] **The Maria** [1993] 2 Lloyds Rep 168

CHAPTER TWO

Self Assessment Questions : Damages

1) Outline the various remedies available for breach of contract.

2) What are a) Substantial b) nominal and c) exemplary damages?

3) What questions will the court consider in its endeavours to assess the measure of damages? What is the purpose of damages as a contractual remedy?

4) Explain how the Rule in Hadley v Baxendale was refined and restated in Victorian Laundry v Newman. What is meant by remoteness of damage? In contract when are damages too remote?

5) 'Where one party is in breach of contract there is a duty on the other to mitigate the loss occasioned by the breach'. Discuss.

6) What is a penalty clause? How does a penalty differ from liquidated damages?

7) 'In a case of breach by non-payment of a specific sum of money it is advantageous to P to make a liquidated demand rather than to claim unliquidated damages.' Discuss.

8) Distinguish between a quantum meruit claim and a claim for damages. In what circumstances is a quantum meruit claim appropriate?

9) In what circumstances does an unpaid seller bring an action for a reasonable price for goods?

10) Advise Phil who contracts to buy a rare Bolivian Pessata Pink stamp from Unscrupulous for £2,000. Unscrupulous discovers that Avaricious is looking for Bolivian Pessata Pink and is prepared to pay up to *£3,500.* Unscrupulous refuses to sell the stamp to Phil.

11) Rodney's factory presses pop records. Other manufacturers compete with Rodney for this work. which. is subject to abrupt fluctuations in profitability. The processes in Rodney's factory are controlled by a computer which one day breaks down. Rodney engages Roller & Co. a firm of carriers. to take the faulty part to the maker for repairs. In breach of a contract Roller & Co. deliver the part to the wrong destination and the result is that the repairs take 10 days instead of the expected 24 hours. During that time the factory is at a standstill. Rodney is obliged to turn down the chance to tender for a lucrative pressing contract from Ken and for the first time looses a bonus payment which Ken has made for each of the past 5 years for firms producing at least a million pressings for him. Advise Rodney.

12) Bill is employed by a company as its manager. He is summarily and ignominiously dismissed and brings an action for damages for wrongful dismissal. Before the action comes on for trial, the company offers him a job as deputy manager. Advise him whether or not he should accept this offer and on the damages which he is likely to recover if he refuses and continues with the court action.

13) Giles, a raspberry grower. agrees to sell Hartley Yoghurts Co a consignment of raspberries for £2000. Giles sends the raspberries as ordered but Hartley refuses to accept delivery. The carriers return the raspberries to Giles and charge him £95 for their efforts. Giles then sells the raspberries to the Sticky Jam Co for £1950. How much is Giles likely to recover in damages from Hartley in an action for breach of Contract?

Contributory Negligence and Contract

The 1993 Law Commission Report No219 proposes the introduction of the defence of contributory negligence in respect of breach of contract echoing the provisions of the Law Reform Contributory Negligence Act 1945 in respect of the law of tort.

At the time of writing the Report and its model Bill have not been implemented. The track record for the implementation of Commission Reports, particularly in the commercial field, is very impressive so it is quite likely that a version of the bill make it onto the Parliamentary Roll. The proposed Act is very short but it has wide implications for the assessment of damages in contract. In particular, areas of assessment which have been quite straight forward in the past and which encouraged the parties to settle out of court are likely to require judicial consideration at least in the immediate future until case authority provides an indication of how the courts apportion responsibility for breach in various types of situation under the proposed provisions.

Contributory Negligence Bill

Preamble *: A Bill to provide for reducing the damages recoverable for breach of a contractual duty to take reasonable care or exercise reasonable skill in cases where the claimant's failure to take reasonable care has contributed to the damage suffered by him.*

1(1) Where by virtue of an express or implied term of a contract a party is under a duty to take reasonable care or exercise reasonable skill or both in the performance of the contract and the party to whom that duty is owed suffers damage as the result -

(a) partly of a breach of that duty; and

(b) partly of his own failure to take reasonable care for the protection of himself or his interests,

the damages recoverable by that party on a claim in respect of the damage shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

1(2) Subsection (1) above does not apply if the parties have agreed (in whatever terms and whether expressly or by implication) that the damages for breach of the contract are not to be reduces as there mentioned, for example by specifying a sum payable in the event of breach and constituting liquidated damages.

1(3) Where subsection (1) above applies the court, in deciding whether and, if so, to what extent the damages recoverable by the claimant are to be reduced -

(a) shall disregard anything done or omitted by him before the contract was entered into; but

(b) shall have regard to the nature of the contract and the mutual obligations of the parties,

and in other respects shall apply the like principles as those applicable under section 1(1) of the Law Reform Contributory Negligence Act 1945.

1(4) Where the damages recoverable by any person are reduced by virtue of subsection (1) above the court shall find and record what the damage would have been without the reduction.

1(5) In subsection (1) above references to the party by or to whom the duty under the contract is owed include references to any person subject to, or entitled to the performance of, that duty by virtue of assignment or otherwise.

1(6) In this section 'the court' means, in relation to nay claim, the court or arbitrator by whom the claim falls to be determined and 'damage' includes loss of life and personal injury.

Comparison with the Law Reform Contributory Negligence Act 1945

Apportionment of liability in case of contributory negligence.

1(1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage: Provided that

a) this subsection shall not operate to defeat any defence arising under a contract;

b) where any contract or enactment providing for the limitation of liability is applicable to the claim, the amount of damages recoverable by the claimant by virtue of this subsection shall not exceed the maximum limit so applicable.

1(2) Where damages are recoverable by any person by virtue of the foregoing subsection subject to such reduction as is therein mentioned, the court shall find and record the total damages which would have been recoverable if the claimant had not been at fault.

1(5) *Where, in any case to which subsection (1) of this section applies, one of the persons at fault avoids liability to nay other such person or his personal representative by pleading the Limitation Act 19393 or any other enactment limiting the time within which proceedings may be taken, he shall not be entitled to recover any damages ... from that other person or representative by virtue of the said subsection.*

4 *Interpretation. 'fault' means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defences of contributory negligence.*

Summary of Report and Comments

An appreciation of The Contributory Negligence as a Defence in Contract (1990), Working Paper No 114 and the Law Commission Report No219 which provide the background to the proposals is essential in the light of **Pepper v Hart** since the Bill itself is very short and concise. The scope of the provisions is discussed at length by the paper and the report and provides a valuable insight into what the Commission hope the provisions will achieve and why they believe the bill is needed.

Para 2.3 : The Law Reform Contributory Negligence Act 1945 does not apply to any duty of care arising from a contracts other than category 3) below. **Tennant Radiant Heat v Warrington Development**[90] confirms the three categorisations of contractual liability established by Hobhouse J in **Forsikringsaktieselskapet Vesta v Butcher,**[91] viz

1) The defendant's liability arises from a contractual provision which does not depend on negligence on his part

2) The defendant's liability arises from a contractual obligation of care which does not correspond to a tortious duty of care which would exist independently of contract;

3) The defendant's liability in contract is the same as his liability in the tort of negligence independently of the existence of any contract.

The application of the LR.C.N.A. is very limited especially in the light of judicial retreat from **Anns v Merton**[92] and the new restrictions which have been placed on recovery for pure economic loss. At common law contributory negligence is not a defence to an action for breach of contract. A plaintiff's damages will not be reduced where his loss is the result partly of his own failure to take reasonable care for the protection of himself or his interests, unless his conduct breaks the chain of causation, renders the loss too remote or constitutes a failure to mitigate his loss, Para 2.6. Regarding concurrent liability in tort or contract, if the plaintiff sues in contract he can avoid apportionment. Para 2.8.

Is apportionment correct in principle ?

The general conclusion is that an excludable rule of apportionment would be fairer to both parties. Remoteness, causation and mitigation are not satisfactory substitutes for apportionment. Para 3.5.

Arguments against apportionment.

1 **Consensus allows parties to apportion risk**. Apportionment would result in judicial rewriting of contracts. This is rebutted at 3.6 - consensus today is artificial in contract. Where a contract allocates risk apportionment would not apply.

2 **Causation, remoteness & mitigation rules avoid unfairness already**.

3.9. Causation : Contributory negligence may not break the chain of causation so despite the negligence the plaintiff may recover in full under common law[93]. If the plaintiff's negligence is considerable the court may find artificially that the chain of causation is broken. The defendant escapes liability altogether. [94] Compare **Tennant v Warrington** where both parties broke contractual duties and the awards to each parties offset any potential injustice that may have resulted from an inability of the court to apportion loss in contract. Courts are likely to manipulate the rules of causation to protect the most deserving party in a win or lose situation.

90 **Tennant Radiant Heat Ltd v Warrington Development Corpn** [1988] 1 E.G.L.R. 41

91 in **Forsikringsaktieselskapet Vesta v Butcher** [1986] 2 All.E.R. 488 at 508

92 **Anns v London Borough of Merton**

93 see **The Good Luck** [1988] 1 Lloyds Rep 514. & **The Shinjitsu Maru No5** [1985] 1 W.L.R. 1270.

94 **Schering Agrochemicals Ltd v Resibel** 26 Nov 1992 unreported.

3.16. Remoteness is less directly related to contributory negligence than causation but nonetheless to the extent that it is related the result is likewise all or nothing and thus potentially unfair.

3.19. Mitigation requires the plaintiff to take reasonable steps to minimise the losses flowing from the defendant's breach. The standard of reasonable action is not high. The requirement is fairer than in relation to causation and remoteness but is less flexible than apportionment.

3 **Pre 1945 tort law was clearly defective but contract law is not. T**here is less need for reform. However, the all or nothing approach which awards too much or too little highlighted above indicates that there is a defect in the law at present though not the same defect once evident in the law of tort.

4 Fault is irrelevant in contract so there is no room for apportionment of liability relative to the share of fault of each party. Contracts requiring the exercise of reasonable skill and care involve fault in the event of breach. **Raineri v Miles**.[95] 'In relation to claims for damages for breach of contract, it is, in general, immaterial why the defendant failed to fulfil his obligation, and certainly no defence to plead that he had done his best.' This is true of strict contractual duties eg to pay money, deliver generic goods or goods of a certain quality. s6(4) Consumer Protection Act 1987 permits apportionment in cases of strict liability governed by the Act by placing fault on the party subject to strict liability. The defendant's fault is difficult to balance against the plaintiff's fault because neither the quantum or nature of the defendant's fault is specified. Parties assume liability in contract whereas strict liability in tort is imposed so analogies with strict liability in tort are inappropriate. Parties can allocate risk in contract which would then obviate imposition of apportionment.

5 Reform would increase uncertainty not reduce it so it is undesirable. However, the current scope of liability under Hobhouse J's classification is uncertain since classification is often difficult because the scope of tort has fluctuated as judicial attitudes towards economic loss have changed. Concurrent liability exists regarding professionals and clients, carriers and customers, employers and employees, bailor and bailee, occupiers of premises and visitors. Where a strict contractual duty is involved a plaintiff suing in contract would avoid liability at the same time for non-coextensive liability for breach of a tortious duty as in **The Good Luck**.

Reform would produce uncertainty regarding what constitutes contributory negligence and as to the quantum of reduction of damages. In time precedent will provide a guide to what constitutes contributory negligence. Regarding quantum, this is only a problem in relation to breach of strict duties and since this will not be allowed in any case there is no real problem since this type of situation has been dealt with in tort already. The uncertainty introduced would be not greater than currently exists under Hobhouse J's classification system regarding the scope of economic loss.

6 Economically powerful defendants would use the defence of contributory negligence to deter pursuance of deserving claims. The commission felt this would only apply to consumer contracts and whilst it would be critical for strict contractual duties was less of a problem regarding breach of a duty of reasonable care and decided it is not an insurmountable obstacle to reform. (*But no provision to surmount the problem is provided !)*

Should apportionment apply to all contractual obligations or only to those involving reasonable care ?

Para 3.38. The report recommends apportionment of damages for all contractual breaches with the exception of breach of strict contractual obligations. The report analyses the issues in respect of the three categories set out by Hobhouse J above.

1) Where the defendant's liability arises from a contractual provision which does not depend on negligence on his part.

Para 3.39. Is there any reason for distinguishing category 1 from categories 2 & 3 especially since apportionment is allowed for strict liability in tort ? The Commission concludes there is a logical distinction and sets these out in para 3.40. Whilst the detailed allocation of risk in contracts is important a carefully worded provision should deal with this so a statutory apportionment of damages is unjustified.

[95] **Raineri v Miles** [1981] A.C. 1050 per Lord Edmund Davies

Apportionment may create problems regarding inequality of bargaining power in relation to strict liabilities in contract. In particular the strict liabilities imposed by the Sale of Goods Act etc would be undermined. The Commissioners accept that there was no real demand for apportionment in this area in any case. There is a distinction between the 'fault' concept governing Consumer Protection and attempts to apply 'fault' principles to strict liability obligations in a contract and in fact 'fault' is not relevant to such duties.

2) Where the defendant's liability arises from a contractual obligation which is expressed in terms of taking care or its equivalent but does not correspond to a common law duty to take care which would exist in the given case independently of contract.

Para 3.41. If apportionment is permitted in category 3) then it would be illogical not to allow it in category 2). The courts could resort to finding a duty in tort to avoid injustice if category 2) was excluded. A duty of care on the plaintiff is a logical extension on a duty of care being placed on the defendant.

3) Where the defendant's liability in contract is the same as his liability in the tort of negligence independently of the existence of any contract.

Para 3.43. The Commission universally accepts that there should be no distinction between tort and contract rights and duties.

The Commission considers that sl(1)(a) U.C.T.A. 1977 draws a distinction between strict duties under category 1 and care duties under categories 2) & 3) and no difficulty has been encountered by the courts in applying the provisions so there are no practical difficulties in drawing the distinction. Negligence is there defined as 'the breach •.. of any obligation, arising from the express or implied terms of a contract, to take reasonable care or exercise reasonable skill in the performance of the contract.'

Should the scope & nature of contractual obligations broken be taken into account ?

Para 3.45. The Commission concludes that the whole of the contract and not just the obligation broken must be taken into account. The relative expertise of the parties is relevant to the question whether or not it is reasonable for a party to rely on the expertise of the other party in carrying out contractual duties involving reasonable care and the courts can take this into account.

It appears therefore that the law will in future provide greater protection to those who are less knowledgeable than others.

The implications of reform on specific professional *I* business relationships.

Para 3.49. No provisions are to be introduced in respect of specialist subject areas such as banking and construction but the implications of the provision on certain trade relationships is considered.

Para 3.49. Banking. It may be that apportionment will adversely affect clients claims against banks since damages could be reduced where clients have lost money by failing to check bank statements promptly. See also para 5.19-21.

This has implications for the receipt of documents by buyers from banks under the Trust Receipt relationship in documentary credits.

Para 3.50. Construction. Some respondents were worried that apportionment of liability between developer and contractor where the developer employs his own architect would be possible whereas it would not where the developer engages a contractor who subcontracts architectural responsibilities to an architect. The Commission felt that this is nothing to worry about since a developer should be responsible for his own employee's actions and can take out insurance cover to protect himself whereas the independent architect should have his own insurance policy. A defendant contractor who has to pay a developer damages for breach resulting from an architects wrongdoing can seek a contribution from the architect under the Civil Liability Contribution Act 1978. The same considerations would apply to the cargo owner / carrier / stevedore relationship.

Respondents were also concerned that contractors may exercise less care to maximise profit on the basis that if the developer negligently failed to supervise the work the damages awarded for poor work could in future be reduced on that basis. The Commission felt that if the court believes the reason for poor work is to maximise profit the court can take that into account.

The problem is whether or not the objective of maximising profit would be so obvious that the court could spot it and so take it into account. How could the plaintiff prove this to the court ?

Respondents were concerned that where a developer's failure to take care contributed to a breach of contractual duty owed by a subcontractor to the main developer problems would occur for the contractor if his damages were to be reduced on account of the developer's contributory negligence.

If the contractor undertakes remedial work to correct the sub-contractor's default he can recover all costs which are in the reasonable contemplation of the parties flow from the breach by the sub-contractor. Presumably if the developer's negligence take the damage caused beyond that the contractor has to recover the difference from the developer.

If the contractor has to compensate the developer for breach apportionment will occur at that time[3] so that all the damages payable to the developer will then be recoverable from the sub-contractor.

If the industry is still concerned about the provisions of the Act then it must protect itself by introducing terms excluding apportionment.

Para 3.54. Employment. The Statutory distinctions between rights of unfair dismissal under E.P.C.A 1978 which permits apportionment and wrongful dismissal at common law which does not. The common law provision is strict so apportionment will continue not to be available.

Para 3.55. Insurance. Apportionment will not apply to insurance contracts.

Para 3.57. Strict liability under consumer contracts as discussed earlier will not be affected but where customers are also under a duty of care for themselves the provisions will apply.

In Para 1.1. the scenario of a garage which defectively repairs a car's steering and a consumer later sustains injury whilst drivingthe defective car too fast is posed as a reason for introducing the new provisions. Presumably if the consumer sues the garage in contract for failing to repair the steering his damages will be reduced by the extent that his injuries were exacerbated by his excess speed.

Many products contain the legend 'The manufacturer accepts no liability for loss sustained by a consumer through a failure by the consumer to follow the operator's directions for use of this product.' This is not an exclusion clause subject to U.C.T.A. 1977 since it imposes a duty of care on the consumer rather than taking the manufacturer's liability away, see Para 4.24 and so is permitted. Presumably therefore even contracts for the sale of goods have an element of duty and are not always simple strict duty contracts. Is it advisable therefore for all products to be sold complete with operating manuals in future or can a duty not to abuse a product be implied ?

Para 3.58. Standard form contracts will be free to exclude apportionment.

Should there be a new Contract Act or merely reform the 1945 Act ?

Para 4.31.-33 explains why a new Act was preferred to amending the 1945 Act.

Part IV Recommendations

Para 4.1. Apportionment of damages for breach of contract on the grounds of contributory negligence should be introduced in respect of express and implied contractual duties to take reasonable care or exercise reasonable skill or both but not regarding breaches of strict contractual terms. A plaintiff should be free to relay on a defendant to carry out a freely undertaken strict duty. the rules on mitigation will compensate for a lack of apportionment where necessary.

The Commission discusses **Lambert v Lewis.**[96] The plaintiff used a defective coupling supplied by the defendant knowing it was defective and was injured. The court held that the chain of causation was broken and his claim for compensation for the injury failed. Presumably this would continue to apply but the burden of proving knowledge is on the defendant. If he had used it without knowledge of the defect then because the duty is strict he would not have his claim for damage apportioned on account of a failure by him to check that the product was safe. He would be entitled to rely on the defendant to supply a safe product. There is no implied duty to check out the safety of the product.

[96] **Lambert v Lewis** [1982] A.C. 225

What happens where a product carries instructions requiring the user to check it out before or during use ? Cars are sold complete with operating manuals and requirements to carry out regular overhauls, drive at a reduced speed for the first 500 miles to protect the engine etc; fridges should not be turned on for 24 hours after delivery ; certain computer components must be kept away from static.

Para 4.7. discussed breach of duty by a plaintiff to take reasonable care to protect himself. Where a defendant undertakes a contractual duty to exercise care and does not guarantee a certain result it is unfair to deprive him of apportionment where the plaintiff carelessly contributes to his own loss. The classification of the duty as tortious or contractual should not result in a different outcome. The courts have already developed the expertise to deal with these issues in tort so there will be no difficulty in applying the provision. Defendants will be less likely to argue concurrent liability in tort exists in order to benefit from apportionment in future and so will relieve pressure to expand the scope of the law of tort in these areas.

Para 4.10 Is it difficult to classify duties as strict or as a duty requiring the exercise of reasonable care? Will the classification create new uncertainty ? The Commission believes it is unproblematical.

A duty to exercise reasonable care embraces a duty to build in a skilled and workmanlike manner but a duty to use the highest standards of workmanship is a strict duty.

Statutory duties such as those under the Defective Premises Act 1972 that work be done in a workmanlike or professional manner are not affected by the provision but other statutory implied duties of reasonable skill as under s13 Supply of Goods And Services Act 1982 are affected. The implied terms under s14 Sale of Goods Act are not affected. How does one tell which Acts are affected and which are not ?

The carrier's duty under s3 Carriage of Goods By Sea Act 1971 is affected by the provisions, viz Art III Hague Visby Rules and due diligence. This is worrying. The Hague Visby Rules seek to establish a clear simple system for the allocation of risk. If the carrier can maintain a defence of contributory negligence because the shipper fails to take care the aims of the Convention are undermined. The courts would previously have required a very high standard of proof that the shipper had failed to label goods clearly etc to bring the shipper's conduct within the area of loss excluded by the rules under Art IV. The issue of a clean bill of lading would be sufficient to estop the carrier from denying goods are received in good order and condition. s2 & 3 Carriage of Goods By Sea Act 1992 transfer both rights and liabilities under the contract of carriage as evidenced in the bill of lading to the lawful holder of the bill of lading. The endorsee now becomes responsible for the shipper's failure to exercise reasonable care to protect himself. When the lawful holder claims against the carrier for damage to goods the carrier claims that if the goods were labelled better less harm would have come to the cargo. Damage is thus apportioned between the parties and the endorsee receives perhaps on 50% of the damages claimed. The endorsee then has to sue the seller in a foreign jurisdiction perhaps under foreign law for the difference. The Hague Visby Rules were introduced amongst other things to enable the endorsee to sue in his own country.

Cases such as **International Guano v McAndrew,**[97] and the distinctions between causation and remoteness may need to be reassessed in the light of the proposed provision.

Para 4.11 discusses the duties of supervision in particular in construction contracts and the fact that apportionment of damages would apply. The plaintiff developer was also architect in **Barclays Bank v Faircioughh Building**[98] and so would have a duty to supervise. In **Richard Roberts Holdings v Douglas Smith Stimson Partnership,**[99] an architect obtained a suspiciously cheap quote for the lining of a tank. Was the developer contributorily negligent in accepting the quote or could he rely on the architect's skill ? The court held no and the commission presumes the developer would in such circumstances still be entitled to rely on the architect's skill, but since the degree of knowledge of each party is now relevant might not the court's finding vary from case to case and so be uncertain in future ? Most construction contracts give a developer the right to inspect. This in future is likely to be treated as a duty to self help and protect one[1]s interests and so would give rise to apportionment unless the contract specifically excludes apportionment.

97 **International Guano v McAndrew** (1909] 2 K.B. 360

98 **Barclays Bank v Faircioughh Building ltd** [1993] unreported

99 **Richard Roberts Holdings v Douglas Smith Stimson Partnership** [1988] 46 B.L.R. 50

Lay persons would by their lack of expertise be protected so home owners would not have to inspect the progress of improvement works on their properties.

Where a contract involves breach of strict and care duties liability for those losses flowing from the strict breach would be treated as strict and the plaintiff will be able to recover in full whereas apportionment would apply to losses flowing from breach of the duty involving care.

Thus in a **Young & Marten v McManus Childs**[100] type situation where defective tiles were supplied and installed on a roof damages flowing from the supply of faulty tiles would be strict but damages due to faulty installation would be apportioned.

Damages from the strict breach would presumably include reinstatement costs but reinstatement for defective installation could be reduced on account of the developer's negligent failure to supervise installation.

The Commission foresees no problems in this area but what if the defective tiles are also defectively installed? If correctly installed the contractor would have to foot the entire bill for replacement and reinstatement but if defectively installed would a percentage be deducted to take account of the plaintiff's failure to supervise ? In such an instance the contractor would be rewarded for his breach of duty ! A very strange result indeed. The Commission states that the developer should be free to seek his remedy solely under the strict duty. However, there is nothing in the provision to prevent the defendant trying to have the duty split into two parts. The Commission provides the example of **The Good Luck** as a situation where there was a duty of care and a strict duty. However, this is not quite true. In that case there was a breach of a warranty under the Marine Insurance Act. Breach of the Warranty automatically avoided the contract so there was no question of choosing a cause of action. The contract was avoided in any case and so there was no liability at all under the insurance contract. Notification of entry into a war zone coupled with payment of fresh consideration at a price to be agreed results in a held covered provision ie a new contract coming into being. The original contract of insurance does not simply continue in being. There is a duty to act if one wants a new contract. It is not a duty of care in relation to the existing contract.

- A house owner could be affected by the provisions where he fails to exercise care for himself in areas of his own competence such as where he falls into an unfenced trench left behind by a builder whilst videoing the work without watching where he is going.
- Employees checking the installation of equipment in a factory by an outside contractor must exercise the requisite degree of self protection.
- A developer who engages a profession architect or clerk of works to oversee a development would be subject to apportionment for loss due to a low standard of supervision.
- A householder who fails to put dust covers over some furniture contributes to damage to that furniture from negligently splashed paint and his claim for damages is reduced in consequence of the failure to protect his property. A householder without any dust covers is alright presumably because the decorator must then supply them. Why one could not expect the painter in the first example to move the covers around while he is working as part of his duty of skill and care is not clear. The result is absurd. If the householder leaves some old sheets around for the decorator but does not cover anything himself presumably the decorator must now exercise 100% skill and care.

The basis for apportionment Para 4.18.

Causation alone is an insufficient factor for apportionment of damage since by definition causation requires a sine qua non which would result in a 50% reduction at all times. The court should take account of the respective blameworthiness of each party as in **The Marimar,**[101] where responsibility and fault for a collision was judged at 60/40 on the basis of fault whereas from the point of view of causation alone the defendant's action had the greatest potential towards causing damage eg bigger and faster ships cause more damage than smaller slower ones. Returning to the issue of the reckless driver of a car with defectively repaired steering the degree of recklessness must be taken into account in apportioning loss.

100 **Young & Marten v McManus Childs** [1969] 1 A.C. 454

101 **The Marimar** [1968] 2 Lloyd's Rep 165

Contracting out Para 4.23.

Contracting out and the right to allocate risk in commercial contracts is essential. Para 4.2.4. indicates why the UCTA 1977 is not affected by contracting out provisions. Contracting out may however offend the Directive on Unfair Contract Terms in Consumer Contracts to the extent that consumers may have to bear the whole of a loss where apportionment might make the business party share some of the burden and where apportionment is precluded by a standard form non-negotiated term.

In reality most of the time the business would welcome apportionment since it would reduce the liability owed by the business person to the consumer.

In Carriage of Goods the undesirability of apportionment means that contracting out would be welcome. However, the carrier has nothing to gain from contracting out and the potential to gain by complicating the task of claimants and increasing litigation costs and uncertainty and since bills of lading are standard form contracts it is highly unlikely that ship owners and carriers will opt out. At least any increase in litigation work will benefit the lawyers. Times are hard and they need the money so the provision will have some beneficial results. Since the endorsee will have to sue the seller to recoup the losses litigation work is automatically doubled to the benefit of all private international lawyers.

Para 4.27. Liquidated damages clauses are unaffected by the apportionment provisions. The advent of the Act could see a proliferation of such clauses in future in an attempt to secure certainty and predictability.

Assignments para 4.35.

Wherever rights and duties are assigned in a contract either by the parties or by operation of law for example by C.O.G.S.A. 1992 the defence of contributory negligence goes with the assignment. The new owner of the rights adopts the liabilities of the original owner. See later consideration of how unfair this is in relation to pre shipment liabilities and duties of the shipper which are then placed on the endorsee of the bill of lading. The carrier can sue either the shipper or the lawful holder of the bill of lading. The endorsee's liability is exacerbated by the threat of apportionment of damages on account of the shipper's failure to exercise care to protect his interests.

Part V Subsidiary matters.

Repudiation. Para 5.10 : The innocent party does not have to accept repudiation by a wrongdoer and can insist on the contract continuing where the co-operation of the defendant is not required as in **White & Carter v McGregor**[102] and recently exemplified by **The Santa Clara**.[103] An unreasonable insistence on keeping the contract alive may however give rise to contributory negligence under the new provision. The Commissioners believe that this changes little in that such conduct would have been tantamount to a failure to mitigate loss in any case.

Anticipatory breach of contract as in **The Mihalis Angelos**[104] raises an intriguing possibility under the new provisions. The defendant, learning that the plaintiff could not fulfil his contractual obligations made alternative arrangements and repudiated the contracted before the due date of performance. By doing so the defendant lost the opportunity to claim damages for breach but was rewarded by the plaintiff who would in any event have been unable to fulfil his contract suing the defendant for anticipatory breach. Happily the court only awarded the plaintiff nominal damages and the plaintiff had costs awarded against him. If the defendant had waited till the time of performance and then sued he could have received substantial damages for the inevitable breach. The duty to mitigate loss commences when the contract is breached so provided the charterer attempts to procure a vessel at that time he can receive full compensation.

However, since no ship owner can guarantee that his vessel will arrive, the sea being an uncertain factor in any contract to hire a ship presently at sea it may be concluded that such a charter is not a strict duty. The ship owner must make best efforts to deliver the vessel. The new provisions therefore apply. A charterer in the same position today who finds out that a vessel will not be able to arrive in time would be obliged to take steps to protect his interests by making alternative arrangements as did the defendant in **The Mihalis**

102 **White & Carter v McGregor** [1962) A.C. 413
103 **The Santa Clara** [1993) 2 Lloyds Rep 301
104 **The Mihalis Angelos** [1971] 1 Q.B. 164

Angelos. A failure to do so could expose the charterer to a reduction in damages for contributory negligence. However, to make other arrangements to ensure this does not happen is also a risky business as exemplified by the Santa Clara where the arbitrator found as a fact that the other party had not in fact breached the contract thus ruling that the buyer was guilty of unlawful anticipatory breach of contract.