SUISSE ATLANTIQUE : A REJECTION OR A MODERATION OF FUNDAMENTAL BREACH ?

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Possibly one of the most controversial decisions to come from the House of Lords in recent years was the Suisse Atlantique (1), a decision which may have had a significant effect upon the law concerning exception clauses in contracts. The dispute in this case arose through the actions of the charterers of a ship who found that because of the presence of a demurrage clause in the charterparty, it was more profitable for them to reduce the number of voyages sailed by the ship, and to pay the owners the damages agreed upon in that clause. In the House of Lords, the owners put forward the argument that this deliberate conduct amounted to fundamental breach, and that therefore the demurrage clause could not exclude liability for that breach, this argument being based on cases such as Charterhouse Credit Co. v. Tolly (2), and Yeoman Credit Ltd. v. Apps (3), in which the doctrine of fundamental breach had previously been upheld and extended.

The House of Lords rejected this argument, on varying grounds. The owners, by their conduct, had impliedly elected to affirm the contract, and had continued with the charterparty; therefore the whole contract, including the demurrage clause, remained intact. The owners could not repudiate the demurrage clause alone, and affirm the remainder of the contract; selective rescission, upheld in Yeoman Credit Ltd. v. Apps (4), was rejected. Although the Court refused to accept the proposition that the delays amounted to fundamental breach, it was considered that the combined, deliberate delays did amount to repudiatory conduct, and that the owners could have repudiated the whole contract, including the demurrage clause; since however, they had elected to affirm, the contract remained on foot.

A distinction was drawn by the Court between a demurrage clause, which is in the nature of an agreed damages clause, and an exception or exclusion clause, which excludes liability, and does not merely limit damages, for certain types of breach. It was thought that since the clause in question was not an exception clause, it did not deprive the owners of the right to repudiate when the delays became excessive; unfortunately, the owners did not exercise this right.

Their Lordships were prepared to assume, for the purposes of argument, that the delays may have constituted fundamental breach, and the obiter dicta expressed by the learned Lords on this point have since been the subject of much discussion (5). The doctrine of fundamental breach, that is, the rule that no

(1) Suisse Atlantique Societe d'Armement Maritime S.A. v. Rotterdamsche Kolen Centrale [1966] 2 W.L.R. 944 (H.L.); [1966] 2 All E.R. 61.
(2) [1963] 2 W.L.R. 1168; [1963] 2 All E.R. 432
(3) [1962] 2 Q.B. 508; [1961] 2 All E.R. 281.
(4) [1962] 2 Q.B. 508; [1961] 2 All E.R. 281.
(5) For example, Treitel, in (1966) 29 M.L.R. 546; and W.C.S. Leys, "The Validity of the Exclusion Clause in Sales of Goods", a paper presented at the Legal Research Foundation's Second Business Law Symposium at Auckland, February 1967, Symposium handbook p. 35.

exception clause, however general and sweeping it may be, can exclude liability for a fundamental breach of contract, was denied the status of a substantive rule of law. The question involved was considered to be governed by the ordinary rules of contract concerning repudiatory breach, so that the matter was simply one of construction of the demurrage clause; did the clause exclude liability for the breach which had occurred ? Since it was a demurrage or agreed damages clause only, the right to repudiate or to affirm the contract was not excluded. Had the clause plainly and unambiguously excluded liability for repudiatory breach, be it fundamental or otherwise, then the owners would not have had the right to repudiate. So, even if in fact the delays had constituted fundamental breach, the owners, by their affirmation of the contract, would have been barred from recovering any damages other than those agreed upon. This, it is submitted, is a categorical rejection of any special doctrine of fundamental breach, and a return to the orthodox rules of contract and to established canons of construction (6).

What effect will this decision have, in concrete terms, upon like cases in the future. Probably, it will have little effect, for it is submitted that as a matter of construction, extremely clear and unambiguous words will still be needed for an exclusion clause to succeed in excluding liability for fundamental breach. This is surely an obvious conclusion, for the Court stressed the strong, but not irrebuttable presumption that the intention of the parties to a contract is to perform "the contract fundamentally" (7). This presumption will no doubt continue to be utilised, for it gives to the Court a descretion which will guard against a too rigid application of the presumption, in cases where such an application would be inappropriate, having regard to the circumstances of the case.

What were the reasons for the Court's rejection of fundamental breach as a substantive doctrine of law ? Lord Reid's remarks concerning exception clauses and the varying circumstances surrounding them (8) are relevant to this question, for it is highly probable that it was the unsuitability of a rigid doctrine of fundamental breach, as a means of countering the use of unfair or unreasonable exception clauses, which gave rise to this rejection of the doctrine. In every contract, there are underlying factors such as ability to bear risk, insurance costs and relative distribution of bargaining power, so that in many cases, contracts will contain exclusion clauses which in fact do reflect the intentions of the parties. It is important to remind ourselves that the exception clause is not in itself unreasonable or unfair; it is often merely a negative way of describing the obligations a party intends to undertake (9). But in many instances, and especially in the classic example, the manufacturer's or retailer's guarantee, the widespread use of exception clauses can

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(6) See, on this point, U. G. S. Finance Ltd v. National Mortgage Bank of Greece & National Bank of Greece, S. A. [1964] 1 Ll. L. R. 446, 453, per Pearson, L. J.

(7) Suisse Atlantique [1966] 2 All E. R. 61, 89F per Lord Upjohn.

(8) Suisse Atlantique [1966] 2 All E. R. 61, 68 E-F per Lord Reid.

(9) For a brief exposition on this point, see "Exception Clauses in Consumer Sales", by Professor Brian Coote, a paper presented at the Legal Research Foundation's Second Business Law Symposium at Auckland, February 1967, Symposium handbook p. 27.

be an effective method of depriving the weaker party to a contract of bargaining power and of means of redress; in such cases, the exception clause may render the whole contract illusory - the stronger party may exclude all the obligations he has undertaken, by the use of an exception clause. Such a clause reflects the relative bargaining power of the parties, and not their intentions. Similarly, underhand practices such as inserting exception clauses in fine print inevitably lead to a prejudice against the use of exception clauses in general.

The doctrine of fundamental breach was possibly a result of this prejudice, in that it could, if used with caution, have been an effective method of countering the use of unfair or unreasonable exception clauses, but as will be shown, caution was not used in its application. One of the most significant decisions supporting the doctrone is Sze Hai Tong Bank Ltd v. Rambler Cycle Co. Ltd (10), in which it was held that where a shipping company had negligently or wilfully failed to perform one of the primary obligations in the contract, liability for such a fundamental breach could not be excluded by a general exception clause. In Charterhouse Credit Co. v. Tolly (11), a fundamental breach of contract was held to negative the effect of an exclusion clause purporting to protect the vendor of the car concerned, which was sold with a defective rear axle. In Yeoman Credit Ltd v. Apps (12) the doctrine was extended so that though the purchaser could not reject the car and recover the moneys paid, since he had kept the car for some months, he was entitled to recover damages for the fundamental breach, despite a general exception clause. This case, a striking example of selective rescission, was surely the high point of the doctrine, an extension which cut right across the orthodox rules of contract.

Though critical of these decisions, the House of Lords did not actually overrule them in Suisse Atlantique (13), since what was said on this point was obiter dicta. The views expressed in these dicta parallel those expressed in Council of the City of Sydney v. West (14), a bailment case in which the High Court of Australia criticised the extension of fundamental breach in such cases as Yeoman Credit Ltd v. Apps (15), and called for a rejection of fundamental breach and selective rescission as an inappropriate and unreliable method of combating unfair or unreasonable exclusion clauses in contracts. The doctrine originally intended for the purpose of combating such clauses was now capable of affecting clauses which were neither unfair nor unreasonable but which genuinely reflected the intentions of the parties. Protection originally intended for the weaker party to a contract, who needed it, could not, by mistake, be given to those who did not need it.

Will the decision in Suisse Atlantique (16) reduce the protection given to those weaker parties, such as, for example, the consumer purchasing manufactured articles covered by a guarantee containing the usual exclusion clause ? It is submitted that this will not be the result, for the rejection of fundamental breach as a rigid rule of law was intended to protect those contracts in which exclusion clauses do in fact reflect the intentions of the parties. To apply a rigid doctrine of

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(10) [1959] A.C. 576.
(11) [1963] 2 W.L.R. 1168; [1963] 2 All E.R. 432.
(12) [1962] 2 Q.B. 508; [1961] 2 All E.R. 281.
(13) [1966] 2 W.L.R. 944 (H.L.); [1966] 2 All E.R. 61.
(14) (1965-1966) 39 A.L.J.R. 323.
(15) [1962] 2 Q.B. 508; [1961] 2 All E.R. 281
(16) [1966] 2 W.L.R. 944 (H.L.); [1966] 2 All E.R. 61.

fundamental breach to such contracts would inevitably lead to unfortunate results. The presumption that the parties intended to perform their basic contractual obligations will protect the weaker party to a contract in the same or a similar manner as did the now rejected doctrine. Does the consumer need further, or alternative forms of protection, such as a statutory form of standard guarantee ? Though related to the decision in Suisse Atlantique (17), this is a subject beyond the scope of this article, and is one which, as Lord Reid remarked should be left to Parliament (18).

The purpose of this article was to show that the doctrine of fundamental breach was one which need never have been introduced into the law of contract, for the combination of the orthodox rules of contract and the flexible canons of construction was, and still is, sufficient to fulfill the needs of a party afflicted by an unreasonable or unfair exception clause. It was also the intention of this article to suggest that little change, in concrete terms, will be wrought by the House of Lords' rejection of fundamental breach as a substantive doctrine of law. It is submitted, in conclusion, that the doctrine of fundamental breach has been altered in form only, and not in substance, by the decision in Suisse Atlantique (19). Thus it can well be said that this decision has brought about a moderation, rather than a rejection, of fundamental breach.

(17) [1966] 2 W.L.R. 944 (H.L.); [1966] 2 All E.R. 61.
(18) [1966] 2 All E.R. 61, 68G.
(19) [1966] 2 W.L.R. 944 (H.L.); [1966] 2 All E.R. 61.