THE SECOND RISE AND FALL OF FUNDAMENTAL BREACH

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INTRODUCTION.

Soon after the decision of the House of Lords in the Suisse Atlantique case,[1] and of the High Court of Australia in Council of the City of Sydney v West,[2] I wrote a paper for the 1966 AULSA Conference under the title of "The Rise and Fall of Fundamental Breach."[3] In the light of what followed that title came to appear at least a little premature! The Suisse Atlantique did come as an end, but as the end, as it turned out, merely of an episode in a continuing story. The recent decision of the House of Lords in Photo Production Ltd v Securior (Transport) Ltd[4] similarly marks an end, but whether of just another episode or of the story as a whole is still uncertain. Accordingly, the title of this present paper is more a concession to symmetry than an attempt to prophesy.

For me, the Securior case draws its meaning and significance from what has led up to it. That is why the first half of the paper deals with the background to the case, even though this involves some repetition of what I have written before.[5] Then follows a discussion of the main points of the decision, as they relate to fundamental breach. Finally, some thoughts are offered about the significance of the decision for the future.

DISCHARGE FOR BREACH AND DEVIATION DISTINGUISHED.[6]

One of the princial difficulties with the concept of fundamental breach has been a tendency to confuse it with discharge for breach and deviation. As a first step, therefore, it would seem desirable to show briefly how the three differ from each other.

Discharge for Breach

In the sense in which it will be used in this paper, discharge for breach is concerned with the position of one party to a contract where the other has so broken his promises that, in a significant way, the injured party is denied the performance for which he bargained. The concern is not so much with the right of that party to damages, but with whether he must complete his own performance as a condition of suing the party in breach. Two hundred years ago, if the promises were classified as dependent, neither party could sue the other unless he had first performed his own side of the bargain. This meant that a party in significant breach was unable to enforce the contract against the injured party, for the simple reason that he was not qualified to do so. In this sense, therefore, the breach of the one party automatically meant the release of the other from the need to continue performing. The history of discharge for

breach since then has been of a series of explanations for this phenomenon, each of which tended to take on a life of its own. Several of them involved the idea of "condition" in one form or another, doubtless because, originally, the rights of a party to sue were conditioned on his own prior performance.

Thus developed eventually the Sale of Goods Act division of contract terms into so-called conditions and warranties. The idea became current that the release of the injured party involved the 'rescission' of the contract and that the right to 'rescind' arose on the breach of a condition. In Hirji Mulji v Cheong Yue,[7] Lord Sumner, for the Privy Council, likened discharge for breach to frustration and ascribed it to the failure of a condition subsequent. Then, in Hain v Tate & Lyle[8], the House of Lords saw discharge for breach as having the same incidents as deviation. By contrast, a few years after that, in Heyman v Darwins,[9] the House assimilated discharge for breach to anticipatory breach. The breach by the wrongdoer was a repudiation which gave the injured party the option of discharging the contract. But that discharge was not a literal rescission. The contract as a whole remained in being for the purpose of assessing damages.[10]

In recent years, the House of Lords has, in Moschi v LEP Air Services,[11] produced yet another analysis. On a discharge for breach, the contract does terminate, in the sense that primary obligations to perform are replaced by secondary obligations to pay damages. But those obligations are to be measured by reference to the contract as a whole.

Deviation[12]

The characteristic feature of deviation in contracts for the carriage of goods by sea is that, from the moment the ship departs from the contract route, it automatically loses the protection, not only of its exception clauses, but also of the common law exceptions of the act of God and the actions of the Queen's enemies.[13] The ship becomes absolutely liable for any loss of, or damage to the goods carried, the only defence being that that loss or damage would have occurred anyway.[14] Similar incidents occur throughout bailment where they bear the label of "quasi deviation", Lilley v Doubleday[15] being a well-know illustration.

As already mentioned, the House of Lords tried, in Hain v Tate & Lyle[16], to explain these incidents as being the result of a discharge for breach. That meant, they thought, that a discharge for breach automatically rescinded the contract, at least in futuro, unless it were affirmed. That analysis is, of course, quite inconsistent with the version given in Heyman v Darwins. Under that version, there would be no literal rescission, nor would there be any discharge unless the injured party so elected. Even then the contract as a whole would continue to govern the remedies available to him.

Several explanations have been given for the phenomena associated with deviation. One has been that it derived from marine insurance and refers back to the difficulties of communication in the days of sailing ships.[17] Another, given by Lord Wright in Rendall v Arcos,[18] was that the exception clauses have reference only to the risks to be encountered along the contract route and, hence, have no reference to the altered risks of the deviation.[19] The true explanation, it is submitted, lies in the nature of a bailment relationship. Though such relationships tend to be seen as imposing burdens, they are equally a form of protection to the bailee. But the protection lasts only so long as the bailee holds the bailed goods within any limits the bailor has placed on his right to possession. If he steps outside those limits he holds, not as a bailee, but as a mere detainor and as such becomes absolutely liable for loss or damage to the goods so detained.[20] Neither the construction nor the bailment explanation presupposes any termination of the contract.[21]

For present purposes, though, the important point is that if the incidents of deviation and quasi-deviation are taken to be the result of a rescission of the contract, they cannot be explained as flowing from a discharge for breach as it was analysed in Heyman v Darwins. On the other hand, in the light of House of Lords decisions like U.S. Shipping Board v Bunge and Born,[22] and Hain v Tate & Lyle itself, it seems too late to suppose that deviation can be seen by the Courts to turn on anything but a rescission. For practical purposes therefore, deviation and quasi deviation would seem to be best regarded as sui generis.

Fundamental Breach[23]

The doctrine of fundamental breach, as it developed before the Suisse Atlantique, was a substantive rule of law. It asserted that there were categories of breach and types of contractual term so fundamental that no exception clause, however drawn, could exclude liability for them. It originated in a series of three judgments by Devlin J., in Chandris v Isbrandtsen-Moller,[24] Alexander v Railway Executive,[25] and Smeaton Hanscomb v Sassoon I. Setty.[26] The first two of these cases were contracts for the carriage and bailment of goods, respectively, and the breaches involved were of the "deviation" type. Devlin J. referred to such breaches as "fundamental", which was a word used of them by the House of Lords in Hain v Tate & Lyle.[27] So far there was no novelty.[28] The real departure came with the Smeaton Hanscomb case, where timber sold by description did not comply with specification so that there was a breach of the condition implied by Section 13 of the Sale of Goods Act 1893. But the buyer had failed to take action within a contractual fourteen-day time limit on claims. Devlin J. attempted to generalise a new principle of wider application in words well worth repeating for the light they shed on its incidents and purposes.

"It is no doubt a principle of construction that exceptions are to be construed as not being applicable for the protection of those for whose benefit they are inserted if the beneficiary has committed a breach of a fundamental term of the contract, and that a clause requiring the claim to be brought within a specified period is to be regarded as an exception for this purpose: see Atlantic Shipping & Trading Co. v Louis Dreyfus & Co.[29] In that case, the fundamental term was the implied condition of sea worthiness, which is treated, as Lord Sumner said[30] as 'underlying the whole contract of affreightment.' The same principle has been applied in cases of deviation and other fundamental terms. I do not think that what is a fundamental term has ever been clearly defined. It must be something I think, narrower than a condition of the contract, for it would be limiting the exceptions too much to say that they applied only to breaches of warranty. It is I think something which underlies the whole contract so that, if it is not complied with, the performance becomes something totally different from that which the contract contemplates. If, for example, instead of delivering mahogany logs the sellers delivered pine logs and the buyers inadvertently omitted to have them examined for fourteen days, it might well be that the sellers could not rely on the time clause. Roche J., in Pinnock Brothers v Lewis & Peat Ltd.[31] dealt with the same point in relation to another clause in the same contract which sought to exclude the right of rejection, and in relation to that he said ' . . . the delivery in this case could not properly be described as copra cake at all.' "[32]

Devlin J. went on to hold that, since the logs delivered were "round mahogany logs", the limitation clause did apply. The learned judge spoke expressly of the principle as one of "construction." It was Denning L.J. who subsequently restated it as a substantive rule of law, in the course of his judgment in Karsales v Wallis.[33] Again it is well worth quoting the actual words he used.

"Notwithstanding earlier cases which might suggest the contrary it is now settled that exempting clauses of this kind, no matter how widely they are expressed, only avail the party when he is carrying out the contract in its essential respects. He is not allowed to use them as cover for misconduct or indifference or to enable him to turn a blind eye to his obligations. They do not avail him when he is guilty of a breach which goes to the root of the contract. It is necessary to look at the contract apart from the exempting clauses to see what are the terms express or implied which impose an obligation on the party. If he has been guilty of a breach of th se obligations in a respect which goes to the very root of the contract he cannot rely on the exempting clauses . . . . The principle is sometimes said to be that a party cannot rely on an exempting clause when he delivers something 'different in kind' from that contracted for, or has broken a 'fundamental term' or a 'fundamental contractual obligation'. However, I think they are all comprehended by the general principle that a breach which goes to the root of the contract disentitles the party from relying on the exempting clause."

There are two important points to note about these passages. The first is that, since on past authority "conditions" of the contract could be excluded, the breach of a fundamental term had to be something more fundamental than the breach of a condition, as Devlin J. acknowledged and his decision illustrated. The second is that before the Hong Kong Fir[34] case many, if not most, lawyers thought that every discharge for breach was the breach of a condition.[35] In the 1950's, therefore, it followed that a fundamental breach had to be worse than a merely discharging breach. It also meant that for every fundamental breach there ought to be a corresponding fundamental term. That is why commentators in due course subsequently matched the "main objects" of the contract[36] and the condition as to title under the Sale of Goods Act,[37] as fundamental terms, with total failure of consideration[38] as a fundamental breach. Similarly, the "core of the contract"[39] was matched with "difference in kind".[40] After the Hong Kong Fir case had shown that discharge for breach did not have to be the breach of a condition, but could depend on the scale of the breach, a similar change occurred in relation to fundamental terms and fundamental breaches. Instead of being regarded as the two sides to the one coin, they too came to be seen as two different things, depending on the importance of the term and the scale of the breach.[41]

The basic weaknesses of the substantive doctrine of fundamental breach were that as a rule of law it lacked any previous warrant, and that it was conceived as a unified principle, whereas the threads of authority on which it was based were all really quite distinct.[42] Thus, the courts had long been reluctant to construe general words of exception as excluding the warranty of seaworthiness, but the same was true of important terms generally and even of negligence. Moreover, it was clear on earlier authority that, like promisory conditions, the warranty of seaworthiness could be excluded where the words used were apt to do so. The idea that the condition as to title was unexcludable was not only inconsistent with the emptio spei but was hard to reconcile with the fact that the implied condition as to title was itself only a relatively modern development.[43] The very concept of an unexcludable core of obligation was inconsistent with Rose & Frank v Crompton Bros.[44] in which the House of Lords accepted that, even in a commercial agreement, all obligation whatever could be excluded by the use of an "honour clause." And it was difficult to conceive of a term more fundamental than a condition when a condition was a term so vital that any breach justified a discharge of the contract.[45] Again, to apply to a sale of goods contract, on a fundamental breach, the consequences of a deviation would be to deprive a proferens of the protection of his exceptions, even in respect of those breaches which were not fundamental.

What gave the new concepts credibility was the view taken by their proponents of the function of exception clauses.

THE FUNCTION OF EXCEPTION CLAUSES

The fundamental breach principle turned on the idea, expressed by Denning L.J. in Karsales v Wallis,[46] that in construing a contract containing exception clauses it was "necessary to look at the contract apart from the exempting clauses to see what are the terms express or implied which impose an obligation on the party." It was not the condition or fundamental term which was excluded from the contract. It was liability for its breach which was excused, the exception clause operating as a defence, at the point of adjudication, to accrued rights of action. That, incidentally, helps to explain the early emphasis on fundamental breach and the breach of a fundamental term.

In my book[47] and elsewhere I have argued that exception clauses qualify the promises to which they relate and hence take effect at the formation of the contract rather than as mere defences at the point of adjudication. A party to a contract is subject to primary obligations to perform his undertakings and to corresponding sanctioning or secondary obligations to pay compensation if he commits a breach. At common law the two are inseparable, in the sense that no primary obligation arises unless the party concerned has also accepted the sanctioning obligations that go with it. Exception clauses affect the accrual of these obligations, at the time the contract is formed, either by modifying them or by preventing their arising at all. This they can do in three ways. The first involves excluding the primary obligation directly. So, if I sell a horse warranted sound except for hunting, I accept no primary obligation as to its soundness for hunting. Under the second method the primary obligation is excluded because the secondary obligation which would otherwise attach to it has been excluded. Thus, if I say I will not be liable for loss or damage from my servant's negligence, I not only refuse to pay damages. I accept no primary obligation to ensure that my servants are careful. Under the third, sanctioning obligations are limited, without that fact preventing the initial existence of the primary obligations to which they attach. Accordingly, if I limit my potential liability to $2,600.00, I accept a primary obligation to perform but if I commit a breach, no secondary obligation accrues beyond that to pay $2,600.00 in damages.

The significance of this view of exception clauses in relation to fundamental breach is not just that it means that exception clauses take effect at formation of the contract but also that it leaves no need for the concept of fundamental breach itself. This is because, once the exception clauses have taken effect at the formation of the contract, every breach thereafter of the

residual contractual content of the agreement will be actionable.

The first appearance of this kind of analysis, of the relationship of exception clauses to primary and secondary obligations, in a reported case, seems to have been in Hardwick Game Farm v S.A.A.P.A.[48] The Judge was Diplock L.J. He said much the same thing again in the Heron II[49] later the same year. In due course he was to bring the analysis into Moschi v LEP Air Services[50] and ultimately into the Securior case itself.[51]

THE SUISSE ATLANTIQUE CASE

The weaknesses of fundamental breach as a substantive rule of law did not go unnoticed. A series of dicta from 1964 onwards, by Pearson L.J.[52] and Diplock L.J.[53] in England, and Barwick C.J. and Taylor, Kitto and Windeyer J.J. in the High Court of Australia,[54] all tended towards the view that there was no rule of law but at most only a rule of construction, and it was against this background that the question came before the House of Lords in the Suisse Atlantique case.

Fundamental Breach as a Rule of Law

Since the Suisse Atlantique was perhaps the best known and most discussed contract decision of its time, it would be tedious here to subject it to yet another analysis. For present purposes, though, a few points need to be recalled. The first was, of course, that the House unanimously denied the existence of a substantive rule of fundamental breach. Nevertheless, they left the way open to a resurgence of the doctrine in a number of ways.

The first was that none of the earlier cases was expressly overruled. Instead, they were said to be explicable on the basis of construction. That left open the possibility of a continuing "rule of construction". The second was that their Lordships described the incidents of fundamental breach and fundamental terms in words reserved historically for discharge for breach and conditions. At the time, this gave some ground for thinking that the House had accepted that no separate concept of a fundamental breach or a fundamental term could be justified.[55] Nevertheless, their Lordships retained the terminology of fundamental breach. That suggested to readers of the reports that the special concepts not only survived but had continuing relevance to exception clauses. The third respect in which the House left a way open to the resurgence of the doctrine was that they confused and conflated fundamental breach, discharge for breach and deviation. It was this which was to lead before long to Harbutt's "Plasticine."[56] Conversely, it even led to the conclusion that a condition had to have the incidents of a fundamental term. That is what happened in Ashington Piggeries Ltd v Christopher Hill Ltd[57] where the House of Lords concluded that, for there to be a discharging breach of the condition implied by

section 13 of the Sale of Goods Act, the goods had to be "different in kind". One can contrast that case with Smeaton Hanscomb v Sassoon I. Setty.[58] Finally, Lord Wilberforce made several statements which were to be misunderstood and to which it is proposed to return later.[59]

Three Other Aspects of the Suisse Atlantique

Three other aspects of the case were to be important for the future. In the Suisse Atlantique there had been no discharge, the contract having been affirmed. This appeared to leave open the argument that their Lordships' statements about construction were limited to affirmed contracts and had no application on a discharge for breach.[60] Secondly, Lord Wilberforce acknowledged that the effect of an exception clause might be to limit or qualify the promise to which it attached and hence could, in appropriate cases, be to prevent what would otherwise be a breach being a breach at all.[61] It was this idea which was eventually to enable McKenna J. to find for Securicor on the claim against it by Photo Production Ltd. Lastly, in the closing passages of his judgment,[62] Lord Reid, in calling for statutory reform, pointed to the arbitrariness of fundamental breach, in that it failed to differentiate between consumer and commercial contracts, between fair exception clauses and those which were unconscionable, and between negotiated contracts and those in common form. This dictum subsequently influenced courts and judges in England,[63] Australia[64] and New Zealand[65] to take account of such distinctions when construing contracts containing exception clauses.

THE SECOND VERSION OF FUNDAMENTAL BREACH[66]

Harbutt's "Plasticine"

For the reasons already given, it was open to the courts in the years following Suisse Atlantique to continue applying fundamental breach to exception clauses much as before, under the umbrella of "construction." In the case at least of deviation from bailment contracts, "construction" might have been unnecessary even as an umbrella. Even so, there were relatively few reported cases in England on the subject before 1970.[67] In that year, and in a non-bailment case, the Court of Appeal eschewed even the semblance of "construction" when it held in Harbutt's "Plasticine" v Wayne Tank & Pump Co.[68] that, even when the words used did, on a proper construction, cover the events which had occurred, a limitation clause could not protect the proferens once the contract had been discharged for breach. Though the decision came as a surprise, and its reasoning was almost universally condemned by the commentators,[69] it was logical enough, given its premises, both stated and unstated. The first, stated, premise was that on a discharge for breach the contract was rescinded, so that the exception clauses ceased to have effect. This appeared to be

consistent not only with Hain v Tate & Lyle[70] but also with dicta in the Suisse Atlantique case itself.[71] And though it deprived a proferens of his exceptions by a rule of law, it was a different rule of law from that which had been condemned by the House of Lords. Moreover, counsel for the defendant had conceded that, if the contract had been discharged, his clients would have lost the protection of their limitation clauses.[72] The other, unstated, premise was that exception clauses take effect, if at all, only as defences at the point of adjudication. Only if this were so could they be denied effect by a rescission of the contract in futuro. If their true effect were to limit the obligations of the promisor, that would have occurred at the time of formation, and no rescission in futuro could affect them.[73] It follows that, whatever its surface attractions, the reasoning in Harbutt's "Plasticine" was vulnerable on two counts. It would collapse if the effect of discharge for breach were not, after all, a literal rescission of the contract. It would suffer the same fate if exception clauses were recognised as being not mere defences, but qualifications of obligation.

During the decade which followed, the application of Harbutt's "Plasticine" became increasingly extreme. In Wathes v Austins (Menswear) Ltd[74] the Court of Appeal held that the principle applied, not only where the contract had been discharged for breach, but also where it had been affirmed by the injured party. The Court purported to follow Charterhouse Credit Co. Ltd. v Tolly[75] on the basis, which was correct, that it had not been expressly overruled in the Suisse Atlantique case.[76] While reference was made to "construction" in the Wathes case there was no analysis of the words used. It appeared to be assumed that the result of the case would turn, not on the wording of the contract, but on whether a fundamental breach had occurred. The significance of this was not lost on Lord Denning M.R. In Levison v Patent Steam Carpet Cleaning Co.,[77] and in the Securicor case itself,[78] he reverted to the terminology of the pre-Suisse Atlantique period.

Contrary Trends

As against these developments two other streams of authority emerged which pointed in the opposite direction. The premise that discharge for breach involves a literal rescission, depriving the contract of any future effect, became difficult to reconcile with The Mihalis Angelos[79] in which the Court of Appeal held that, for the purposes of assessing damages, regard had to be given to a clause in favour of the "wrongdoer" which would not have been operative until after the contract had been discharged. Again, in Moschi v LEP Air Services Ltd.,[80] the House of Lords appeared to accept the view that, while on a discharge for breach any primary obligations ceased and were replaced by secondary obligations to pay damages, those damages were to be assessed on the

the basis of the contract as a whole and not just of selected parts of it.

The premise that exception clauses were mere defences also came in question. In Kenyon Son & Craven Ltd. v Baxter Hoare & Co. Ltd.[81] Donaldson J. distinguished three kinds of exception clause, depending on whether they excluded obligation, excluded liability, or merely limited liability. In respect of at least the first of these, he denied that the court could discover the obligations of the proferens without taking into account any exceptions of those obligations.[82] Soon afterwards, in The Angelia,[83] Kerr J. expressed the view that an event covered by an exception of "liability" was not and could never be a breach at all, let alone a fundamental breach. The difference between an exclusion of liability and an exclusion of obligation was merely "semantic". This meant that, of Donaldson J's three categories of exception clause, it could be said only of limitation clauses that they operated as mere defences. It was to the category of limitation clause that the exception in "Harbutt's Plasticine" belonged. But even in respect of this class, Barwick C.J[84] and, significantly, Diplock L.J.[85] were already on record as saying that limitation clauses, too, qualified the obligations to which they referred, though this was not a view shared by some of the commentators.[86]

The Revival of the Original Version of Fundamental Breach

The decision in Wathes v Austins (Menswear)[87], though it purported to follow Harbutt's "Plasticine", could be interpreted as a return to the pre-Suisse Atlantique rule of law. But in addition there were two further factors tending in the same direction, the first of them being the dicta of Lord Wilberforce of which mention has already been made and which appeared in his judgment in the Suisse Atlantique.[88] There were three. First, he distinguished two meanings which had been given to the expression "fundamental breach". The one he saw as covering fundamental breach in the meaning given it in this paper. The other covered discharge for breach as it is defined in this paper.[89] His second dictum was to the effect that an exception clause could not be allowed to empty a contract of all content. To this extent, there was rule of law.[90] The point he was making related to the formation of the contract and depended on the idea he had expressed elsewhere in his judgment that exception clauses could have the effect that what would otherwise be a breach would not be a breach at all. Thirdly, he gave deviation, quasi-deviation and "difference in kind" as examples of construction, as being cases where the parties "could hardly have been supposed to contemplate such a mis-performance".[91]

These passages were taken by Fenton Atkinson L.J. in Farnsworth Finance Facilities v Attryde[92] and particularly by Donaldson J. in Kenyon, Son & Craven v Baxter Hoare[93] to mean that fundamental breach in the narrower sense in which it has been defined in this paper, had survived the Suisse Atlantique as a rule of law.

Much more important, though, was the second factor. This was that even where the courts purported to apply a rule of construction, they were in fact using the presence or absence of fundamental breach as the determinant of whether the exception clause applied, and hence were applying it as though it were a rule of law.[94] That was true of Wathes v Austins(Menswear).[95] It was also very vividly illustrated in the unreported case of Prince v Brown Bros. and Merseyside & North Wales Electricity Board[96] which concerned an indemnity given by an employer to the Electricity Board, which failed to turn off the power to a transformer which the employer's workmen were to paint. When one of their number was electrocuted, the remainder not unnaturally refused for a time to continue, though in due course they went back to work. It was held that since work had been resumed and completed, no "fundamental breach" had occurred. Accordingly the Electricity Board were protected by their indemnity. Had the question asked been not "was the breach 'fundamental'?" but "was it serious?" the whole enquiry would have been transformed. The act of the Board in putting the lives of the workmen in jeopardy was not only appallingly serious in its possible consequences. It was also probably a breach of the duty of common humanity as well.[97] To hold that the indemnity protected the Board was to hold, not just that an insurance risk had been allocated between commercial parties, but that an employer had bargained away the legal responsibility of the party whose role it was to ensure that the lives of the workmen were not endangered. Whether that truly was the intention expressed or implied in the contract could not, on the approach followed, be even considered.

Some reaction against these developments seems to have at least begun before the Securicor case. In 1977, Griffiths J. in Green v Cade Bros.[98] showed that he believed something was wrong when he said:

> "Nor do I find much help in approaching the question of construction by applying the label 'fundamental' to the breach or to the term breached. The Court has to look at the facts that constitute the breach and the circumstances surrounding it and ask itself whether the clause could have been intended by the parties to apply to such a situation and the nature of the breach must loom large in such consideration."[99]

However, while it was a step forward that the seriousness of the breach, or the importance of the term, should have been seen as more relevant than its belonging to a particular technical category, it has to be noted that the facts and surrounding circumstances to which the learned judge referred were those of the breach instead of, as construction would normally require, those attending the formation of the contract.[1]

Outside England and Wales, the revival of the substantive doctrine of fundamental breach seems to have been more than matched in Canada. But from the reported cases, it appears to have had much less impact in Scotland, Australia and New Zealand.[2]

THE SECURICOR CASE

The Case at First Instance

Photo Production Ltd. v Securicor (Transport) Ltd.[3] involved a 1968 agreement under which Securicor was to provide a patrol service to Photo Productions' premises at a charge which worked out at about 26 pence per visit.[4] The agreement included Standard Conditions of which 1 provided that "under no circumstances [should] the Company be responsible for any injurious act or default by any employee of the Company unless such act or default could have been foreseen and avoided by the exercise of due diligence on the part of the Company as his employer. . . ." Condition 2 allowed for limitations of liability should any liability on the part of the Company arise "notwithstanding the foregoing provision." Whilst on an inspection of the premises, one of Securicor's employees deliberately started a fire which resulted in loss totalling £615,000. The employee in due course was convicted of arson and sentenced to three years' imprisonment. In the meantime Photo Production Ltd. re-engaged Securicor under a new contract.[5]

Photo Productions' claim in the High Court was for damages in contract or tort, or both. They alleged that the contract contained two implied terms, one that the patrolmen would exercise all reasonable diligence, skill and care, and the other that Securicor would itself exercise all proper care in the selection, training, supervision, employment and use of their patrolmen. The trial judge, McKenna J., rejected the first of these implied terms as being inconsistent with Condition 1 of the Standard Conditions. As to the second, he held that there had been no want of care or diligence on the part of Securicor as employers. But for Condition 1, Securicor would also have been vicariously liable in tort for their servant's criminal act,[6] but since that act was not one Securicor could have foreseen and avoided, their responsibility for this too had been excluded. The provision was a reasonable one and there was no cause for the Court to put a strained meaning on its language. Photo Productions had also argued that Securicor had committed a fundamental breach which prevented their relying on Condition 1. As to this, McKenna J. held that if a contract provided that one of the parties to it should not be "responsible" if a particular event occurred, the occurrence of that event could not be treated as being a breach of contract by that party. If it could not be treated as a breach, it could not be treated as a fundamental breach, however serious its consequences. He referred to the judgment of Kerr J. in The Angelia.[7]

Of the two grounds upon which the reasoning in Harbutt's "Plasticine" could be challenged, from the nature of discharge for breach and from the

function of exception clauses, McKenna J. had chosen the latter. Though his decision apparently caused "astonishment" in some quarters,[8] he had in large measure foreshadowed it in the earlier case of Mayfair Photographic Suppliers v Baxter Hoare & Co. Ltd.[9]

The Case in the Court of Appeal

But if the judgment at first instance came as a surprise, that could hardly be said of the reaction of the Court of Appeal (Lord Denning M.R., Shaw and Waller L.J.J.) in unanimously allowing the appeal.[10] In his judgment, Lord Denning accepted that, taken in their natural and ordinary meaning, Conditions 1 and 2 either exempted or limited Securicor's liability but held, nevertheless, that on three grounds the Company were not entitled to rely upon those clauses. His first ground was based on Harbutt's "Plasticine", but restated in terms reminiscent of the pre-Suisse Atlantique substantive doctrine. "The Court itself" he said "deprives the party of the benefit of an exemption or limitation clause if he has been guilty of a breach of a fundamental term or of a fundamental breach of one of the terms of the contract."[11] His second ground was that the courts were entitled to construe a contract in the light of the presumed intentions of the parties as reasonable persons, and could say in the present case that they would not have intended the Conditions to apply in the events which had occurred. His final ground was that the courts would not allow a party to rely on an exemption or limitation clause where it would not be fair or reasonable for the party to do so. The other members of the court both held that, by reason of their fundamental breach, Securicor had lost the protection of their exception clauses but that, in any event, on their proper construction, the Conditions did not apply in the events which had occurred.

The Case in the House of Lords

Before the House of Lords, the two basic issues were whether, on their proper construction, Conditions 1 and 2 could apply and, if so, whether Securicor were prevented from relying upon them because of fundamental breach or on any other ground. As to the construction point, their Lordships were unanimous that the words used in Condition 1 were apt to protect Securicor. On the second issue, they unanimously denied the existence of any substantive doctrine of fundamental breach, with the reservation, in the case of Lord Diplock, that the agreement must still exhibit "the legal characteristics of a contract".[12] Harbutt's "Plasticine" and Wathes v Austins (Menswear) Ltd.[13] were both overruled, as was Charterhouse Credit v Tolly,[14] the decision relied on in the Wathes case. Nor did Lord Denning's alternative grounds of "presumed intention" and his test of reasonableness find favour. The House reaffirmed that, within the limits of legality, the parties were free to contract on terms of their own choice, and to agree beforehand what the consequences of breach should be.

The Rejection of Harbutt's "Plasticine"

The reaffirmation of what had been decided in Suisse Atlantique no doubt disposed of the more recent developments, so far as they were a direct revival of the former substantive doctrine, and also of the Harbutt's "Plasticine" principle in the form in which it had recently been expressed. But it did not necessarily dispose of the reasoning on which Harbutt's "Plasticine" itself was based. As we have seen, there were two grounds on which that could be attacked. Of their Lordships, all except Lord Diplock chose the route of discharge for breach. This made it necessary to distinguish the deviation cases and to hold that discharge for breach did not mean a rescission of the contract. In his leading judgment, Lord Wilberforce accepted the Heyman v Darwins[15] analysis. Upon a discharge for breach the contract remained in being for the purposes of assessing damages, and this included any provisions of the contract which dealt with damages, whether they liquidated, limited or excluded them.[16] In a sense, the choice of the Heyman v Darwins analysis was an arbitrary one. It was put forward in my book and two earlier articles because it was at that time the most recent. But since then the House of Lords has produced a new analysis in the LEP Air Services case.[17] Since it is the more recent analysis it ought arguably to have been the one to follow. A possible reason why this did not happen will be suggested in due course.[18] As to the deviation cases, Lord Wilberforce recalled that in the Suisse Atlantique he had said it was a matter of the parties' intentions whether, and to what extent, clauses in shipping contracts could be applied after a deviation. He allowed that it might be preferable to consider them "as a body of authority sui generis with special rules derived from historical and commercial reasons."[19] But on either view, what they could not do was to lay down different rules, as to contracts generally, from those stated by the House in Heyman v Darwins.

Because of his part in formulating the rather different analysis in Moschi v LEP Air Services,[20] it was not so easy for Lord Diplock to dispose of Harbutt's "Plasticine" by a simple reliance on Heyman v Darwins. Under the LEP Air Services case, the contract determined on a discharge for breach, in that primary obligations were replaced by secondary ones. That would suggest that clauses irrelevant until adjudication would come too late to take effect. Lord Diplock was able to overrule Harbutt's "Plasticine" by following the second route, that of the function of exception clauses. Both primary and secondary obligations were the product of the contract as a whole, including any exception or limitation clause, and came into existence as modified by them.[21] This also meant that he was able to conclude, with McKenna J. below, that Securicor's primary obligation to procure visits by persons who would exercise skill and care was not absolute but had been modified by Condition 1.

It was limited to the exercise of due diligence by Securicor in their capacity as employer, to procure that those persons would exercise reasonable skill and care.[22]

Construction of the Exception Clause

The other major issue discussed by their Lordships was that of construction. None had any doubt that in its natural and ordinary meaning Condition 1 covered the events which had occurred. The question was, rather, whether there was any reason why the natural and ordinary meaning should not be applied. Though regard had to be had to the contra proferentem rule,[23] this was a commercial contract[24] "negotiated between businessmen capable of looking after their own interests and of deciding how risks inherent in performance . . . [could] be most economically borne (generally by insurance) . . . ."[25] The risk concerned was a "misfortune risk" of the kind that the reasonable diligence of neither party could prevent.[26] The fee charged by Securicor was modest[27] and would probably have been less than the reduction in premiums Photo Productions might have enjoyed as a result of obtaining their services.[28] The allocation of risk in the contract was fair,[29] reasonable[30] and probably the most economical.[31] A businessman entering the contract could have had no doubt as to the real meaning of Condition 1 and would have made his insurance arrangements accordingly.[32] In these circumstances it would be wrong to place a strained construction upon the words used when they were clear, and fairly susceptible of only one meaning.[33]

In treating these factors as relevant to the question of construction their Lordships were applying established principles. As we have seen, it has been settled since the judgment of Lord Reid in the Suisse Atlantique that the construction of a contract can vary depending on whether it is a commercial or a consumer one or negotiated as distinct from being a contract of adhesion.[34] While the reasonableness or otherwise of a provision is not at common law a ground for modifying it once a true construction has been arrived at,[35] such considerations are certainly relevant to the process of arriving at a true construction in the first place, provided the words used are properly capable of more than one meaning.[36] It is also an established test that the words used should be clear to the class of persons to whom they are addressed.[37]

THE SIGNIFICANCE OF SECURICOR FOR THE FUTURE

Fundamental Breach

In the course of his judgment in Securicor, Lord Wilberforce gave some prominence to his view that the passing of the Unfair Contract Terms Act 1977 had made the doctrine of fundamental breach superfluous.[38] That was true,

he thought, not only of contracts falling within the Act but also of those outside it. The very fact that the Act had not been made to apply to commercial contracts otherwise than on one party's standard form confirmed that the parties to such contracts were intended by the legislature to be left free to make their own arrangements.

Moreover, while he acknowledged that, despite its imperfections and doubtful parentage, fundamental breach had served a useful purpose, Lord Wilberforce was otherwise dismissive of it. His references to "a legal complex so uncertain as the doctrine of fundamental breach must be" and to "analysis, which becomes progressively more refined, of decisions in other cases leading to inevitable appeals" suggest that he would be content to see it disappear altogether.[39] It is far from certain, however, that that is what will happen.

A first point is that not all the contracts excluded from the Unfair Contract Terms Act are commercial. Contracts not on one party's standard terms, where neither deals in the course of business, also fall outside it.[40] Even in respect of contracts within it, the Act says nothing about the initial construction and interpretation of the clauses concerned and, since fundamental breach has until now been seen as relevant to those questions, it would require a major change in attitudes to make it irrelevant hereafter.[44] For similar reasons fundamental breach is likely to be seen as relevant to the statutory requirement of reasonableness and, possibly, to the reasonable expectation postulated by section 3(2)(b)(i). As for common law countries with no equivalent to the Unfair Contract Terms Act, the pressures to retain a fundamental breach principle will remain unchanged.

Conceivably, in countries without equivalent legislation, and in England itself in respect of non-business contracts outside the Act, there might be a temptation to distinguish Securicor, so far as it denies the existence of a rule of law, on the ground that it applies only to contracts in respect of which the new Act has made fundamental breach unnecessary.[42] But that would be a travesty of legal reasoning, since the contract in Securicor antedated the Act and had therefore to be decided on ordinary common law principles, as Lords Diplock and Salmon were careful to emphasise.[43] Almost as bad would be an attempt to distinguish the case on the grounds that it was confined to reasonable, negotiated, arrangements for the allocation of insurance risks between commercial parties. Of course those factors were relevant, but only to the issue of construction. On the substantive points covered in the judgments, the reasoning of the House of Lords applies just as strongly to all types of contract.

When it comes to questions of construction there would, despite Lord Wilberforce's strictures, seem to be sufficient material available to enable

any country to retain fundamental breach should it wish to do so. Initially the concept would be retained as a guide to construction. But the pressures towards treating it once more as a rule of law could be expected to build quite rapidly. The point is that, apart from negativing the Harbutt's "Plasticine" version of fundamental breach, the Securicor decision has left things fairly much as they were after the Suisse Atlantique. In the first place, no pre-Suisse Atlantique case other than Charterhouse Credit & Tolly[44] has actually been overruled. Secondly, the terminology of fundamental breach has in substance been retained, in all its ambiguity.[45] Accordingly, and this is the third factor, there is little in Securicor to prevent lawyers, so-minded, concluding that a rule of "construction" remains, to the effect that exception clauses do not apply to fundamental breaches. On past experience, that will almost certainly mean that the enquiry will be directed, not to the words used, but to the presence or absence of fundamental breach as the determinant. In consequence the test will in reality be applied as one of law. Fourthly, the fact that Hain v Tate & Lyle[46] has been distinguished in no way affects its application to deviation and quasi-deviation. Those breaches will continue to deny the proferens the protection of his exception clauses. The temptation to generalise from these breaches to others outside bailment will remain, if only because the concept of deviation is not very clearly understood. Finally, there remain those dicta of Lord Wilberforce in the Suisse Atlantique case which misled Fenton Atkinson L.J. and Donaldson J.[47] His Lordship was prepared neither to qualify nor to explain them in Securicor. Moreover, his dictum about there being a rule of law which would not allow an exception clause to empty a contract of all content has now been echoed by Lord Diplock. Of course the reference of both dicta was to the formation of the contract, and pre-supposed that exception clauses define obligation. But in a world of lawyers who see exception clauses as mere defences, that qualification seems no more likely now to be accepted than it was after Suisse Atlantique.

If construction was what Suisse Atlantique and Securicor were really about, two changes in approach ought to occur. The enquiry of the courts ought in the first place to be directed to finding the meaning of the words used, in the light of the contract as a whole, and of the surrounding circumstances at the time the contract was formed. Of course it would be relevant to that enquiry that the acts or events claimed to be covered by the exceptions were of a serious nature. The more serious they were, the clearer the words used should be. But it would be the degree of seriousness which would count, not whether they were "fundamental" in any technical sense. Secondly, a return might be expected to the principles which have heretofore governed the construction of exception clauses. I have attempted to list some of these elsewhere[48]. Nevertheless, so much water has passed under the bridge since 1953 that it may be asking too much to expect either change to occur, at least in England and Canada where fundamental breach has had its greatest influence.

The Function of Exception Clauses

Since Lord Diplock concurred in overruling Harbutt's "Plasticine", he can be taken to have affirmed his earlier-expressed view that even limitation clauses qualify the (secondary) obligations to which they relate. To that extent, the gap left after The Angelia[49] has been closed.

On the other hand, Lord Wilberforce did not advert to the function of exception clauses at all. More than that, he chose to overrule Harbutt's "Plasticine" by applying the Heyman v Darwins analysis of discharge for breach rather than by adopting the more recent analysis in the LEP Air Services case. To adopt the latter could have involved his accepting Lord Diplock's approach to the function of exception clauses. This may tend to suggest that he has changed his mind since his dictum in Suisse Atlantique. What is perhaps at least as likely is that, in a case which he could decide without having to advert to the point, Lord Wilberforce simply preferred to "leave well alone". That, certainly, is what he did earlier when he was in a similar position in the Eurymedon.[50] The difficulty is that if the House of Lords were to decide, definitively, that exception clauses are more than mere defences, the repercussions would not be confined to discharge for breach, or to exception clauses intended to benefit third parties,[51] but would extend across the whole spectrum. In particular such a finding could have radical consequences for the Unfair Contract Terms Act which was drafted throughout on the premise that exceptions are mere defences. It could be rendered in some respects largely ineffective if a different approach were to be followed.[52]

The fact that Lord Diplock has now based a judgment on the "qualification" view of exception clauses at House of Lords level adds that much force to what he has said previously on the topic.[53] But it is scarcely likely that, on that account, an idea which has been mooted now for 43 years will overnight win general acceptance.[54]

Rescission

One other point that might be made concerns rescision ab initio. Before the recent case of Johnson v Agnew[55] English Chancery lawyers appeared to believe that the only remedy for a party to a sale of land who had suffered a serious breach and wished to terminate his obligations was to rescind ab initio, with a restitutio in integrum, but without damages. Now that the House of Lords have, in Johnson v Agnew,[56] agreed with the courts of Australia and New Zealand in holding that the common law remedy of discharge for breach with damages is available, the pendulum seems to be swinging to the opposite extreme and it is being said that rescision ab initio without damages is not an option open to the injured party.[57]

Past authority has supported the existence of both remedies as well as of a third remedy of rescission followed by a claim for a quantum meruit.[58] At the least, it is submitted that neither Securicor nor Heyman v Darwins is inconsistent with there being such a choice, where the appropriate conditions of the remedy can be met. That in turn would depend inter alia on the terms of the contract, including any exception clauses. But if the three remedies do co-exist, it is possible to forsee the emergence of yet another substantive version of fundamental breach amongst those who see exception clauses as mere defences. It would involve rescission of the contract ab initio followed by a claim in tort or quasi contract.

The Contractual Remedies Act

For New Zealand lawyers, the most pressing problem arising from the concept of fundamental breach is to assess the impact on it of the Contractual Remedies Act 1979. One of the principle objects of that Act was, of course, to unify the law relating to discharge for breach. That aspect was dealt with at length in the N.Z. Law Society seminars earlier this year. The aspect calling for treatment here is the effect of the Act on fundamental breach in the narrow sense in which it has been defined in this paper.

Section 8 of the new Act, while not identical with either the Heyman v. Darwins or the LEP Air Services analyses, is certainly inconsistent with Harbutt's Plasticine. That case would therefore have ceased to apply in New Zealand even without the Securicor case. But other questions remain.

The first is the effect of section 5 of the Act which states:

> "If a contract expressly provides for a remedy in respect of misrepresentation or repudiation or breach of contract or makes express provision for any of the other matters to which sections 6 to 10 of this Act relate, those sections shall have effect subject to that provision."

It would seem clear enough that under this section limitation clauses like that in Harbutt's "Plasticine" will be able to take full force and effect. The consequences for clauses which exclude obligations or liability altogether are less obvious. The answer will almost certainly depend on what the New Zealand courts see as the function of exception clauses. If they opt for the view exemplified by Lord Diplock, Barwick C.J., and Kerr and McKenna J.J. they will hold that exceptions of obligation or liability prevent the act complained of being a breach. In that case neither section 5 nor any other part of the act relating to breach will apply. On the other hand if they opt for the view exemplified in the judgments of Lord Denning M.R. and treat

the exception clauses as mere defences, section 5 and the Act itself will, so far as relevant, govern the case. One has only to think of excepted perils in contracts for the carriage of goods by sea, where the provision of a "remedy" would defeat the purpose of the exceptions, to appreciate how important the answer given by the Courts will be.

The second problem is the extent to which fundamentalbreach has any continuing relevance to the interpretation and construction of exception clauses. The Act of course does not purport to deal with questions of interpretation and construction so that, prima facie, fundamental breach could remain relevant as a "rule of construction". The extent to which this is so may depend on how "fundamental breach" is perceived in this country. In a situation where the expression "fundamental breach" has been used as synonymous with "discharge for breach" and where the distinctive nature and function of fundamental breach itself may have been lost sight of, it is conceivable that the words "fundamental breach" will disappear from the New Zealand legal vocabulary and be substituted by the new concept of "cancellation". If that happened any "rule of construction" would no doubt be applied to acts which (the exception clause apart) would fall within section 7(4)(a) and (b). If that became so, the new rule of construction would in effect apply to discharging breaches generally and in consequence would be considerably more wide-ranging than the original fundamental breach rule as Devlin J. conceived it. That effect would be compounded if the new rule of construction came to be applied as the determinent of the result. Much the more flexible solution for the courts to adopt would be to make construction turn not on the technical categorisation of the breach, but on the seriousness of the term broken or the consequences of the breach, following the approach that the more serious they were, the clearer the words used must be.

A final point concerns deviation. Under the Act, deviation will no longer bring about a rescission of the contract and Hain v. Tate & Lyle will therefore cease to apply. However, that does not in itself mean that the exception clauses will protect the deviating party. Both on the construction theory, that the exceptions cover only the risks of the contract voyage, and on the bailment theory I have put forward, the non-application of the exceptions to the altered risks does not depend on any supposed "rescission". And a positive gain from the new Act is that, unless the cargo owner should actively cancel the contract, the shipowner will once more be entitled to his freight should he deliver the cargo to its destination without defeating the purpose of the contract. This was almost certainly the law in the first half of the 19th century, and remained the understanding in commercial circles at least into the 1930's.

CONCLUSION

By reaffirming Suisse Atlantique and overruling Harbutt's "Plasticine", the House of Lords has done what it can to remove two obvious distortions from the law. But neither action, by itself, can solve the continuing problem of unacceptable contractual terms generally. Neither "construction" nor a third revival of fundamental breach can provide a fully satisfactory answer. The better approach, it is submitted, would be the development of an overall control based on reasonableness or, less radically, on unconscionability. Nor, in logic, should such a control be restricted to only one form of contract term.

It may be that in a country like Canada, where the approach to law appears to be rather more functional than it is in, say, England, Australia or New Zealand, such a control could be evolved by the courts themselves. But in countries where attitudes are more analytical, it would seem far too late, now, to expect any such development to be possible. For such countries, the need is surely for statutory intervention, as Lord Reid indicated 14 years ago in the Suisse Atlantique.

Footnotes

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1. Suisse Atlantique Societe d'Armement Maritime S.A. v N.V. Rotterdamsche Kolen Centrale [1967] 1 A.C. 361 (hereafter "the Suisse Atlantique").
2. (1965) 114 C.L.R. 481.
3. Published subsequently at (1967) 40 A.L.J. 336.
4. [1980] 2 W.L.R. 283.
5. Exception Clauses, Sweet & Maxwell, London (1964), esp. chapters 5 ("Breach of conditions"), 6 ("Deviation") and 8 ("Fundamental Terms and Fundamental Breaches"); "The Rise and Fall of Fundamental Breach," (1967) 40 A.L.J. 336; "The Effect of Discharge by Breach on Exception Clauses" [1970] C.L.J. 221; "Discharge for Breach and Exception Clauses Since Harbutt's 'Plasticine'," (1977) 40 M.L.R.31.
6. A fuller treatment appears in [1970] C.L.J. 221.
7. [1926] A.C. 947 (J.C.).
8. [1936] 2 All E.R. 597.
9. [1942] A.C. 356.
10. There is further discussion in Exception Clauses, Chapter 5, and in [1970] C.L.J. 221.
11. [1973] A.C. 331; Hyundai Heavy Industries Co.Ltd. v. Papadopoulos [1980] 2 All E.R. 29 (H.L.)
12. Discussed in Exception Clauses, Chapter 6, and [1970] C.L.J. 221, 234 et seq.
13. Ellis v. Turner (1800) 8 T.R. 531; Davis v. Garrett (1830) 6 Bing. 716; Lilley v. Doubleday (1881) 7 Q.B.D. 510 (quasi-deviation).
14. Loss from inherent vice would seem to be about the only possibility.
15. (1881) 7 Q.B.D. 510.
16. [1936] 2 All E.R. 597.
17. Cheshire and Fifoot's Law of Contract, 9th ed. (1976), p.165; Yates, Exclusion Clauses in Contracts, (1978), p.135. The incidents of deviation were applied to bailment generally at least as early as Coggs v. Bernard (1703) 2 Ld.Raym.909. Knauth, Ocean Bills of Lading, 4th ed. (1953), places their appearance in charterparty disputes at about 1795.
18. (1937) 43 Com. Cas. 1, 15.
19. Accordingly, affirmation would not by itself make the exceptions re-apply. The contract would need to be varied to make the exceptions cover the risks of the new route.

20. This explanation is discussed more fully in Exception Clauses, pp. 89-93. It accounts for the fact that the liability of the deviator is absolute, and not that of a bailee.

21. Thus, even the deviating shipowners' right to freight on a timeous delivery, long recognised by the commercial community, can be explained as arising under the contract, either as on a substantial performance, or under the equivalent of a "warranty ex post facto".

22. (1925) 42 T.L.R. 174; Exception Clauses, pp. 82, n.15 and 93 n.86.

23. For a fuller treatment see (1967) 40 A.L.J. 336.

24. [1951] 1 K.B. 240.

25. [1951] 2 K.B. 882.

26. [1953] 1 W.L.R. 1468.

27. [1936] 2 All E.R. 597.

28. In The Albion [1953] 1 W.L.R. 1026, the Court of Appeal confirmed that the expressions "fundamental term" and "fundamental breach" had no special significance outside "deviation".

29. [1922] 2 A.C. 250 (H.L.).

30. Ibid., 260.

31. [1923] 1 K.B. 690.

32. [1953] 1 W.L.R. 1468, 1470.

33. [1956] 1 W.L.R. 936, 940. See also his judgment in Spurling v. Bradshaw [1956] 1 W.L.R. 461, 469.

34. Hong Kong Fir Shipping Co. v. Kawasaki Kisen Kaisha [1962] 2 Q.B. 26 (C.A.) (hereafter "the Hong Kong Fir").

35. This was, incidentally, reflected in the title of chapter 5 of Exception Clauses. The book was based on a dissertation written in the 1950's.

36. Wedderburn, [1957] C.L.J. 17; Atiyah, Sale of Goods, (1957), pp.81-84.

37. Cheshire and Fifoot, The Law of Contract, 4th ed. (1956), pp. 133, 136.

38. Cheshire and Fifoot, op. cit. supra, p. 133; Sutton and Shannon on Contracts, 5th ed. (1956), pp. 306-307.

39. Melville, "The Core of a Contract", (1956) 19 M.L.R. 26.

40. As to "difference in kind" see Exception Clauses, chapter 3 ("Exception Clauses and a Physical Subject-Matter"); "Correspondence with Description in the Law of Sale of Goods", (1976) 50 A.L.J. 17.

41. A.C. Guest, (1963) 26 M.L.R. 301; J.L. Montrose, [1964] C.L.J. 60; G.H. Treitel, The Law of Contract (1962) p.148.

42. These matters are discussed in greater detail in (1967) 40 A.L.J. 336, 337-341.

43. As late as Morely v. Attenborough (1849) 3 Ex.500 there was held to be no implied warranty of title on sales of goods.

44. [1925] A.C. 445.

45. See e.g. Wallis v. Pratt [1911] A.C. 394 where the House of Lords adopted the dissenting judgment of Fletcher Moulton L.J. in [1910] 2 K.B. 1003.

46. [1956] 1 W.L.R. 936, 940.

47. Exception Clauses, Chapter 1.

48. Hardwick Game Farm v. Suffolk Agricultural and Poultry Producers Association Ltd. [1966] 1 W.L.R. 287, 341-343.

49. C. Czarnikow Ltd. v. Koufos [1966] 2 Q.B. 695, 730-731.

50. [1973] A.C. 331.

51. The idea that exception clauses could have a substantive effect seems to have originated with Professor J. C. Montrose who applied it to the sale of goods by description in (1937) 15 C.B.R. 760, as did Professor Unger subsequently in [1957] Bus. L.R. 30. Exception Clauses applies the idea to exception clauses generally.

Dicta or decisions since 1964 accepting the idea in whole or in part include:

In England: Hardwick Game Farm v. S.A.P.P.A. Ltd. [1966] 1 W.L.R. 287. 309, per Sellers L.J., 339 et seq. per Diplock L.J.: Gillette Industries Ltd. v. W.H. Martin Ltd. [1966] 1 Lloyd's Rep. 57, 68, per Winn L.J.; C. Czanikow Ltd. v. Koufos [1966] 2 Q.B. 695, 730-731, per Diplock L.J. Suisse Atlantique v. V.N. Rotterdamsche Kolen Centrale [1967] 1 A.C. 361, 431, per Lord Wilberforce; Kenyon Son & Craven Ltd. v. Baxter Hoare & Co. Ltd. [1971] 1 W.L.R. 519, 522; The Angelia [1973] 2 All 144, 161-163, per Kerr J; and now, of course, those of McKenna J. and Lord Diplock in Photo Production v. Securicor (supra). Cf. also Torquay Hotel Co. Ltd. v. Cousins [1969] 2 Ch. 106, 137, per Lord Denning M.R. ("prepared to assume").

In Australia: The Council of the City of Sydney v. West (1965) 114 C.L.R. 481, 495-496, per Kitto J., 500, per Windeyer J.; T.N.T. (Melbourne) Pty. Ltd. v. May & Baker (Australia) Pty. Ltd. (1966) 115 C.L.R. 353, 385-386, per Windeyer J. State Government Insurance Office, Queensland v. Brisbane Stevedoring (1969) 43 A.L.J.R. 456, 461, per Barwick C.J.; George Whimpey v. Territory Enterprises (1970) 45 A.L.J.R. 38; McRobertson Miller Airline Services v. Commissioner of State Taxation, W.A. (1975) 133 C.L.R. 125, 113, per Barwick C.J., 148, per Jacobs J.

In Canada: Arron Transfer v. Royal Bank of Canada (1971) 19 D.L.R. (3d) 420, 432 aff'd (1972) 27 D.L.R. (3d) 81 (rather ambiguously);

Bata v. City Parking Canada Ltd. (1974) D.L.R. (3d) 190; B.G. Linton Construction Ltd. v. C.N. Railway Co. (1974) 49 D.L.R. (3d) 548, 552, per Laskin C.J.C.

52. U.G.S. Finance v. National Mortgage Bank of Greece [1964] 1 Lloyd's Rep. 446, 543.

53. Hardwick Game Farm v. Suffolk Agricultural and Poultry Producers' Association Ltd. [1966] 1 W.L.R. 287, 341-343.

54. Council of the City of Sydney v. West (1965) 114 C.L.R. 481, 488, 495-496.

55. I thought so in 1966. But by 1970, it had become apparent that the concept had survived. Hence the return, in [1970] C.L.J. 221, to a plea that "fundamental breach" and discharge for breach be recognised as different things. On the other hand, it was already clear in 1966 that discharge for breach and deviation had been confused.

56. Harbutts "Plasticine" Ltd. v. Wayne Tank and Pump Co. Ltd. [1970] 1 Q.B. 447.

57. [1972] A.C. 441. I discussed the point in (1976) 50 A.L.J.17.

58. [1953] 1 W.L.R. 1468.

59. At p. 10 infra.

60. Cf. Treitel, The Law of Contract 2nd ed. 1970 p.196; Cheshire & Fifoot's Law of Contract 9th ed. 1976, p. 165.

61. [1967] 1 A.C. 361, 431.

62. Ibid., 405-406.

63. Kenyon, Son & Craven Ltd. v. Baxter Hoare & Co. Ltd. [1971] 1 W.L.R. 519; Gallagher Ltd. v. B.R.S. Ltd [1974] 2 Lloyd's Rep. 440, 419-A.M. Satterthwaite & Co. Ltd. v. N.Z. Shipping Co. Ltd. [1975] A.C. 154; cf. Green Ltd. v. Cade Bros. [1978] 1 Lloyd's Rep. 602; British Crane Hire v. Ipswich Plant Hire [1975] 1 Q.B. 303, 313; Arthur White (Contractor) Ltd. v. Tarmac Civil Engineering Ltd. [1967] 3 All E.R.586.

64. H & B Van Der Sterren v. Cibonetics (Holdings) Pty. Ltd. (1970) 44 A.L.J.R. 157, 158; T.N.T.(Melbourne) Pty Ltd. v. May & Baker (1966) 115 C.L.R. 353, 373; cf. Davis v. Commissioner for Main Roads (1968) 41 A.L.J.R. 322.

65. Hawkes Bay and East Coast Aero Club Inc. v. McLeod [1972] N.Z.L.R. 289, 295, 300.

66. Discussed in greater detail in [1970] C.L.J. 221 and especially in (1977) 40 M.L.R. 31.

67. Garnham, Harris & Elton v. Ellis(Transport) Ltd. [1967] 1 W.L.R. 940; Anglo-Continental Holdings Ltd. v. Typaldos Lines(London)Ltd. [1967] 2 Lloyd's Rep. 61; B.G. Transport Service Ltd. v. Marston Motor Co.Ltd.

[1970] 1 Lloyd's Rep. 371, 379; Mendelssohn v Normand Ltd [1970] 1 Q.B. 177.

68. [1970] 1 Q.B. 447 (hereafter Harbutt's "Plasticine")

69. E.g. Coote, [1970] C.L.J. 221; Weir, [1970] C.L.J. 189; Baker (1970) 33 M.L.R. 441; Leigh-Jones and Pickering, (1970) 86 L.Q.R. 513; (1971) 87 L.Q.R. 515; J.F. Wilson, (1971) N.Z.U.L.R. 254; A.M. Shea, (1979) 42 M.L.R. 623. The leading contract text books also all expressed reservations about it. For an attempt to support it see Dawson, (1975) 91 L.Q.R. 380.

70. [1936] 2 All E.R. 597.

71. [1967] 1 A.C. 361, 398 per Lord Reid, 419, per Lord Upjohn.

72. [1970] 1 Q.B. 447, 455, 470.

73. At (1971) 87 L.Q.R. 515, 520, Leigh-Jones and Pickering, while characterising such an approach as "unrealistic", acknowledged that if it were accepted the result in Harbutt's "Plasticine" would be "altogether short-circuited."

74. [1976] 1 Lloyd's Rep. 14.

75. [1963] 2 Q.B. 683.

76. At (1966) 29 M.L.R. 546, 550, Professor Treitel argued the need for it to be overruled by the House of Lords. On the other hand, the actual result could easily have been reached as a matter of construction: Exception Clauses p. 116, n.89.

77. [1978] Q.B. 68, 81.

78. [1978] 1 W.L.R. 856, 863.

79. [1971] 1 Q.B. 164.

80. [1973] A.C. 331.

81. [1971] 1 W.L.R. 519, 522.

82. Ibid., 532.

83. Trade and Transport Inc. v. Iino Kaiun Kaisha Ltd. (The Angelia) [1973] 1 W.L.R. 210, 228-231. For a contrary reading of this passage see Barendt, [1973] A.S.C.L. 293-294.

84. State Government Insurance Office, Queensland v. Brisbane Stevedoring (1969) 43 A.L.J.R. 456, 461.

85. C. Czarnikow v. Koufos (The Heron II) [1966] 2 Q.B. 695, 730-731; cf. Hardwick Game Farm v. S.A.P.P.A. Ltd. [1966] 1 W.L.R. 287, 341-343.

86. Cheshire and Fifoot's Law of Contract 9th ed. (1976), pp. 146-147; Leigh-Jones and Pickering (1971) 87 L.Q.R. 515, 520; Dawson, (1975) 91 L.Q.R. 380, 396, 402; Treitel, The Law of Contract, 5th ed. (1979), p. 171-172.

87. [1976] 1 Lloyd's Rep. 14.

88. [1967] 1 A.C. 361.

89. Ibid., 431.

90. Ibid., 432. See also Laskin C.J.C. in B.G. Linton Construction Ltd. v. C.N. Railway Co. (1974) 49 D.L.R. (3d) 548, 552; Aita v. Silverstone Towers Ltd. (1978) 86 D.L.R. (3d) 439 (whether a right arbitrarily to withdraw from agreement); Metrotex Pty. Ltd. v. Freight Investments Pty.Ltd. [1969] V.R. 9, 19. Conversely, if the agreement were not intended to be a contract, or were intended as a unilateral rather than a bilateral contract, this constraint would not apply: Rose & Frank v Compton & Bros. [1924] A.C. 445; MacRobertson Miller Airline Services v. Commissioner of State Taxation, (W.A.) (1975) 133 C.L.R. 125.

91. Ibid, 433.

92. [1970] 1 W.L.R. R. 1053, 1060.

93. [1971] 1 W.L.R. 519, 531-532. Cf. Heffron v. Imperial Parking Co. (1974) 46 D.L.R. (3d) 642, 650-651; Chomedy Aluminium Co. v. Belcourt Construction (1979) 97 D.L.R. (3d) 170; Cheshire and Fifoot's Law of Contract, 9th ed. (1976), p. 165.

94. Cf. Capper, [1976] A.S.C.L. 526; Waddams, (1976) 39 M.L.R. 369, 378.

95. [1976] 1 Lloyd's Rep. 14.

96. Unreported, but noted at (1977) 40 M.L.R. 31, 45-46.

97. I have argued in (1975) 125 N.L.J. 752, not only that this duty is not confined to occupier's liability, but also that it would be open to the courts to hold it unexcludable on grounds of public policy.

98. [1978] 1 Lloyd's Rep. 607, 609.

99. From the date of his judgment (October 1977) it may be that Griffiths J. had in mind Prince v. Brown Brothers and Merseyside & North Wales Electricity Board.

1. Other English cases on fundamental breach during this period include Guarantee Trust of Jersey v. Gardner (1973) 117 S.J. 564; United Fresh Meat Co. v. Charterhouse Cold Storage [1974] 2 Lloyd's Rep. 286; Gallagher v. B.R.S. [1974] 2 Lloyd's Rep. 440; Evans v. Andrea Merzario [1976] 1 W.L.R. 1078, 1084; Rasbora v. J.C.L. Marine Ltd. [1977] 1 Lloyd's Rep. 645.

2. Scottish cases include Alexander Stephen (Forth) v. J.J. Riley (U.K.) 1976 S.C.T. 269 (where Harbutt's"Plasticine" was not agreed with); W.L. Tinney & Co. v. John C. Dougall 1977 S.L.T. (Notes) 58. In Australia, the High Court accepted the Suisse Atlantique approach in T.N.T. (Melbourne) Pty. Ltd. v. May and Baker (Australia) Pty. Ltd.

(1967) 115 C.L.R. 353, as might have been expected in view of their decision in Council of the City of Sydney v. West (1965) 114 C.L.R. 481. Thereafter, the doctrine seems to have retained very little impact: V.L. Boots Pty. Ltd. v. Booth (E.R.F.)Pty Ltd. [1968] 3 N.S.W.R. 519; Hall v. Queensland Truck Centre [1970] Qd. R. 231. In New Zealand, the doctrine was applied in one unreported case, Auckland Gas Co. v. Farnsworth Galvanisers (1970) noted in [1972] N.Z.L.J. 32.

In Canada, the Supreme Court accepted the Suisse Atlantique approach in B.G. Linton Construction v. C.N.R. Co. (1974) 49 D.L.R. (3d) 543. But that did nothing to stem what had become a profusion of cases in which the doctrine was applied, effectively as a rule of law. These were collected in Waddams, The Law of Contracts, Toronto, (1977), pp. 285-286, nn.80 and 85. The more recent decisions include Davidson v. Three Spruces Realty Ltd. (1977) 79 D.L.T. (3d) 481; McKinnon v. Acadian Lines Ltd. (1977) 81 D.L.R. (3d) 480; Evans Products Ltd. v. Crest Warehousing Ltd. (1979) 95 D.L.R. (3d) 631; Murray v. Sperry Rand Corp. (1979) 96 D.L.R. (3d) 113; Captain v. Far Eastern S.S.Co. (1978) 97 D.L.R. (3d) 250; Noollatt Fuel & Lumber v. Matthews Group (1978) 83 D.L.R.(3d) 137. Two recent cases illustrate the confusions attendant on a failure to distinguish between discharge for breach, deviation and fundamental breach: Van Darne v. North American Van Lines(Canada)Ltd. (1979) 95 D.L.R. (3d) 358; Whittaker v. Ford Motor Co. of Canada (1979) 98 D.L.R. (3d)

3. [1980] 2 W.L.R. 283.

4. The amount of the defendant's charge was not stated in the reports of the case in the Court of Appeal ([1978] 1 W.L R. 856; [1978] 3 All E.R. 146).

5. This interesting, though strictly irrelevant, fact appears in the Case for the Appellant, for a copy of which I am indebted to Professor David Yates. I have used the same source to fill out the accounts of the case at first instance given in the Weekly and All England reports.

6. Morris v. C.W. Martin & Sons [1966] 1 Q.B. 716. Contrast Keppel Bus Co. Ltd. v. Ahmad [1974] 1 W.L.R. 1082 (J.C.). See G. Samuel, (1979) 95 L.Q.R. 25, 26.

7. Trade and Transport Inc. v. Lino Kaiun Kaisha Ltd. (The Angelia) [1973] 1 W.L.R. 210, 230-231.

8. G. Samuel, (1979) 95 L.Q.R. 25, who is critical of the approach followed by McKenna J.

9. [1972] 1 Lloyd's Rep. 410.
10. [1978] 1 W.L.R. 856.
11. Ibid., 863.
12. The fact that the point presupposes that exception clauses can prevent the accrual of obligation may explain why it was taken by Lord Wilberforce in the Suisse Atlantique, and by Lord Diplock but not by Lord Wilberforce in Securicor. See post, p.
13. [1976] 1 Lloyd's Rep. 14.
14. [1963] 2 Q.B. 683.
15. [1942] A.C. 356.
16. [1980] 2 W.L.R. 283, 290.
17. [1973] A.C. 331.
18. Post, p. 18
19. [1980] 2 W.L.R. 283, 291. Cf. Cheshire and Fifoot's Law of Contract, 9th ed. (1976), p. 165; Yates, Exclusion Clauses in Contracts, p. 155.
20. [1973] A.C. 331.
21. [1980] 2 W.L.R. 283, 295. See also his earlier dicta on the subject in Harwick Game Farm v. S.A.P.P.A.Ltd. [1966]1 W.L.R. 287, 341-343; C. Czarnikow v. Koufos (The Heron II) [1966]; Ward v. Bignall [1967] 1 Q.B. 534, 548.
22. [1980] 2 W.L.R. 283, 296.
23. Ibid., 292, 296.
24. Ibid., 289, 296, 297, 298.
25. Ibid., 296, 297.
26. Ibid., 297.
27. Ibid., 291, 298.
28. Ibid., 298.
29. Ibid., 298.
30. Ibid., 291.
31. Ibid., 296-297.
32. Ibid., 297-298.
33. Ibid., 296, 297.
34. See cases at notes 63-65 ante.
35. Anson's Law of Contract, 25th ed (1979), pp. 185-186; Treitel, The Law of Contract, 5th ed. (1979), p. 179.
36. E.g. Wickman Tools v. Schuler A.G. [1974] A.C. 235, 251-252, 255-256, 272: In re Gulbenkian's Settlements [1970] A.C. 508, 517, 524; Bremer v. Vanden Avenne - Izegem [1978] 2 Lloyd's Rep. 109, 113.

37. Hollier v. Rambler Motors (A.M.C.) Ltd. [1972] 2 Q.B. 71; Gallagher v. B.R.S. Ltd. [1974] 1 Lloyd's Rep. 440, 448; Green Ltd. v. Cade Bros. [1978] 1 Lloyd's Rep. 602, 608 ("any farmer who read it"). The earlier cases were cited in [1970] C.L.J. 221, 240.

38. 1980 2 W.L.R. 283, 289, 291.

39. Ibid., 289.

40. Sections 11(3) and 3(1).

41. Discussed in (1978) 41 M.L.R. 312, 323. Howard Marine v. Ogden & Sons [1978] 1 Q.B. 574 illustrates the point.

42. Cf. Levison v. Patent Steam Carpet Cleaning Co. Ltd. [1978] 1 Q.B. 69, 81, per Lord Denning M.R.

43. [1980] 2 W.L.R. 283, 293, 297.

44. [1963] 2 Q.B. 683.

45. Lord Diplock would reserve the word "fundamental" for a discharge for breach based on the scale of the breach, or of its consequences, as in the Hong Kong Fir: [1980] 2 W.L.R. 283, 294.

46. [1936] 2 All E.R. 597.

47. Ante, p.10.

48. [1970] C.L.J. 221.

49. [1973] 1 W.L.R. 210.

50. A.M. Satterthwaite & Co. Ltd. v. N.Z. Shipping Co. (The Eurymedon) [1975] A.C. 154, 168.

51. In The Eurymedon, supra, 182, Lord Simon (dissenting) made the point that to accept the argument based on the "qualification" view would mean that Midland Silicones Ltd. v. Scruttons Ltd. [1962] A.C. 446 "should have been decided the other way".

52. (1978) 41 M.L.R. 312; Adams, (1978) 41 M.L.R. 703; Sealy, (1978) 37 C.L.J. 15.

53. See cases cited at p.10 fn.85 ante.

54. See p7, fn 51 ante.

55. [1979] 1 All E.R. 883.

56. Supra.

57. Albery, (1975) 91 L.Q.R. 337; Woodman (1979) 42 M.L.R. 701; Oakley, [1980] C.L.J. 58.

58. Dawson, [1976] 39 M.L.R. 214, 215, 216, 219; Shea (1979) 42 MLR 623.