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CASES ON DISCHARGE OF CONTRACT

1. PERFORMANCE

THE GENERAL RULE

***Re Moore and Landauer* [1921] 2 KB 519**

There was an agreement for the sale of 3,000 tins of canned fruit packed in cases of 30 tins. When delivered it was discovered that half the cases contained only 24 tins although the total number of tins was still 3,000. The market value was not affected. The Court of Appeal held that notwithstanding that there was no loss to the buyer, he could reject the whole consignment because of the breach of s13 of the Sale of Goods Act (goods must correspond with the description).

***Cutter v Powell* (1795) 6 Term Rep 320**

A seaman who was to be paid his wages after the end of a voyage died just a few days away from port. His widow was not able to recover any of his wages because he had not completed performance of his contractual obligation. However, this situation is now provided for by the Merchant Shipping Act 1970.

MODIFICATION OF THE GENERAL RULE

***Sumpter v Hedges* [1898] 1 QB 673**

The plaintiff agreed to erect upon the defendant's land two house and stables for £565. He did part of the work to the value of about £333 and then abandoned the contract. The defendant completed the buildings. The Court held that the plaintiff could not recover the value of the work done, as he had abandoned the contract.

***Roberts v Havelock* (1832) 3 B. & Ad. 404**

A shipwright agreed to repair a ship. The contract did not expressly state when payment was to be made. He chose not to go on with the work. It was held that the shipwright was not bound to complete the repairs before claiming some payment.

Note: GH Treitel, *The Law of Contract*, states (at p702): In such cases the question whether a particular obligation is entire or severable is one of construction; and where a party agrees to do work under a contract, the courts are reluctant to construe the contract so as to require complete performance before any payment becomes due. "Contracts may be so made; but they require plain words to shew that such a bargain was really intended": *Button v Thompson* (1869) LR 4 CP.

***Christy v Row* (1808) 1 Taunt 300**

A ship freighted to Hamburg was prevented 'by restraint of princes' from arriving. Consignees accepted the cargo at another port to which they had directed it to be delivered. The consignees were held liable upon an implied contract to pay freight pro rata itineris (ie, for freight at the contract rate for the proportion of the voyage originally undertaken which was actually accomplished). A contract was implied from their directions re alternative port of delivery.

***Planche v Colburn* (1831) 8 Bing 14**

The plaintiff was to write a book on 'Costume and Ancient Armour' for a series, and was to receive £100 on completion of the book. After he had done the necessary research but before the book had been written, the publishers abandoned the series. He claimed alternatively on the original contract and on a quantum meruit.

The court held that: (a) the original contract had been discharged by the defendants' breach; (b) no new contract had been substituted; and (c) the plaintiff could obtain 50 guineas as reasonable remuneration on a quantum meruit. This claim was independent of the original contract and was based on quasi-contract.

***Dakin v Lee* [1916] 1 KB 566**

The defendants promised to build a house according to specification and failed to carry out exactly all the specifications, for example, concrete not four feet deep as specified, wrong joining of certain rolled steel joists and concrete not properly mixed. The Court of Appeal held that the builders were entitled to recover the contract price, less so much as ought to be allowed in respect of the items found to be defective.

***Bolton v Mahadeva* [1972] 2 All ER 1322**

The plaintiff agreed with the defendant that he would install central heating in the defendant's house for a lump sum of £560. When the work was completed, the defendant complained that it was defective and refused to pay. The judge found that the flue was defective so that it gave off fumes making the rooms uncomfortable, and the system was inefficient in that the amount of heat varied from one room to another. The cost of rectifying these defects was £174. The Court of Appeal held that the plaintiff was not entitled to recover as there had been no substantial performance.

***Startup v M'Donald* (1843) 6 M&G 593**

The plaintiffs agreed to sell 10 tons of oil to the defendant and to deliver it to him 'within the last 14 days of March', payment to be in cash at the end of that period. Delivery was tendered at 8.30pm on 31 March. The defendant refused to accept or pay for the goods because of the late hour. The court held that the tender was equivalent to performance and the plaintiffs were entitled to recover damages for non-acceptance. Today note s29(5) SGA 1979: Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour; and what is a reasonable hour is a question of fact.

2. AGREEMENT

No cases.

3. BREACH

***Vitol SA v Norelf Ltd* [1996] 3 All ER 193**

The repudiating party notified the other that they considered the contract at an end. However, no action was taken by the innocent party, either to act on the repudiation or to affirm the contract, on receipt of this information. The Court of Appeal stated that inactivity did not show the party's intentions one way or another and did not amount to acceptance of repudiation or serve as affirmation either. This decision was reversed by the House of Lords, who held that silence or inaction can amount to acceptance of a wrongful repudiation of a contract.

***Hochster v De La Tour* (1853) 2 E&B 678**

An employer told is employee (a travelling courier) before the time for performance arrived that he would not require his services. The courier sued for damages at once. The court held that he was entitled to do so.

***Avery v Bowden* (1855) 5 E&B 714**

A charterparty provided that a ship should proceed to Odessa and there take a cargo from the charterer's agent. The ship arrived at Odessa and the master demaned a cargo, but the agent could not provide one. The ship's master continued to ask for one. A war broke out. The charterer sued. The court held, inter alia, that if the agent's conduct amounted to an anticipatory repudiation of the contract, the master had elected to keep the contract alive until it was discharged by frustration on the outbreak of war.

***White & Carter v McGregor* [1962] AC 413**

The plaintiff advertising contractors agreed with the defendant garage proprietor to display advertisements for his garage for three years. The defendant repudiated the agreement and cancelled on the same day. The plaintiffs refused to cancel and performed their obligations. They sued for the contract price. The House of Lords held, by a majority of 3:2 that they were entitled to the full contract price.

See the law report: [1961] 3 All ER 1178.

***Panchaud Freres SA v Establissments General Grain Co* [1970] 1 Lloyd's Rep 53**

Buyers of maize rejected it on a ground which was subsequently found to be inadequate. Three years later, they discovered that the grain had not been shipped within the period stipulated for in the contract. They, therefore, sought to justify their rejection on this ground. The Court of Appeal held that they were not entitled to do so. Lord Denning MR stated that the buyers were estopped by their conduct from setting up late delivery as a ground for rejection because they had led the sellers to believe they would not do so.

***Fercometal Sarl v Mediterranean Shipping Co* [1988] 2 All ER 742**

Charterers entered into a charterparty with the shipowners. The charterers cancelled the charterparty and engaged a different vessel. The owners did not accept the repudiation which was premature because it was given in advance of the cancellation date. When the vessel arrived the owners gave notice of readiness even though they were not in fact ready to load the charterers' cargo. The charterers rejected the notice and proceeded to load their cargo onto the other vessel. The shipowners brought an action for damages.

The House of Lords held that where a party to a contract wrongfully repudiated his contractual obligations before he was required to perform those obligations, the innocent party could either affirm the contract, treating it as still in force, or treat it as being discharged. If he elected to affirm the contract he was not absolved from tendering his own performance under the contract. Thus if a repudiation by the anticipatory breach was followed by affirmation of the contract, the repudiating party could escape liability if the affirming party was subsequently in breach of his obligations under the contract.

On the facts of the case the owners, having affirmed the contract when they refused to accept the charterers premature repudiation, could avoid the cancellation clause in the charterparty only by tendering the vessel ready to load on time, which they had failed to do, or by establishing, which they could

not do, that their failure was due to their acting on a representation by the charterers that they had given up their option to cancel.

Federal Commerce & Navigation v Molena Alpha **[1979] AC 757**

Clause 9 of a charter provided that the charterers were to sign bills of lading stating the freight had been correctly paid. After a dispute arose concerning deductions made by the charterers, the shipowners withdrew this authority contrary to the terms of the charter. The master was instructed not to sign bills of lading with the indorsement 'freight pre paid' or which did not contain an indorsement giving the shipowners a lien over the cargo for freight. This meant that the charterers were put in an impossible position commercially. The charterers treated the owner's actions as a repudiation of the charter.

The House of Lords held that although the term broken was not a condition, the breach went to the root of the contract by depriving the charterers of virtually the whole benefit of the contract because the issue of such bills was essential to the charterers' trade. Therefore, the owner's conduct constituted a wrongful repudiation of the contract.

Woodar Investment v Wimpey Construction **[1980] 1 WLR 277**

Wimpey contracted to buy land for £850,000 and agreed to pay £150,000 on completion to a third party, Transworld Trade Ltd. The contract allowed the purchaser to rescind the contract if before completion a statutory authority 'shall have commenced' to acquire the property by compulsory purchase. At the date of the contract both parties knew that a draft compulsory purchase order had been made. Wimpey purported to terminate relying on this provision, and Woodar sought damages alleging that this amounted to a wrongful repudiation. Their damages claim included the loss suffered by the third party (as to which, see Privity of Contract).

The House of Lords held, by a majority of 3:2, that in order to constitute a renunciation of the contract there had to be an intention to abandon the contract and instead of abandoning the contract Wimpey were relying on its terms as justifying their right to terminate.

4. FRUSTRATION

TESTS FOR FRUSTRATION

Taylor v Caldwell **(1863) 3 B&S 826**

For facts, see below, p4. Blackburn J stated: "The principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance."

Davis Contractors v Fareham UDC **[1956] AC 696**

For facts, see below, p6. Lords Reid and Radcliffe stated that the 'radical change in the obligation' test required the court to:

1. Construe the contractual terms in the light of the contract and surrounding circumstances at the time of its creation.
2. Examine the new circumstances and decide what would happen if the existing terms are applied to it.
3. Compare the two contractual obligations and see if there is a radical or fundamental change.

EXAMPLES OF FRUSTRATION

***Taylor v Caldwell* (1863) 3 B&S 826**

Caldwell agreed to let a music hall to Taylor so that four concerts could be held there. Before the date of the first concert, the hall was destroyed by fire. Taylor claimed damages for Caldwell's failure to make the premises available. The court held that the claim for breach of contract must fail since it had become impossible to fulfil. The contractual obligation was dependent upon the continued existence of a particular object. See above for the quote of Blackburn J.

***Condor v The Baron Knights* [1966] 1 WLR 87**

A drummer engaged to play in a pop group was contractually bound to work on seven nights a week when work was available. After an illness, Condor's doctor advised that it was only safe to employ him on four nights a week, although Condor himself was willing to work every night. It was necessary to engage another drummer who could safely work on seven nights each week. The court held that Condor's contract of employment had been frustrated in a commercial sense. It was impracticable to engage a stand-in for the three nights a week when Condor could not work, since this involved double rehearsals of the group's music and comedy routines.

***Phillips v Alhambra Palace Co* [1901] 1 QB 59**

One partner in a firm of music hall proprietors died after a troupe of performers had been engaged. The contract with the performers was held not to be frustrated because the contract was not of a personal nature, and could be enforced against the surviving partners.

***Graves v Cohen* (1929) 46 TLR 121**

The court held that the death of a racehorse owner frustrated the contract with his employee, a jockey, because the contract created a relationship of mutual confidence.

***FC Shepherd v Jeromm* [1986] 3 All ER 589**

The Court of Appeal held that a sentence of imprisonment imposed on an employee was capable of frustrating the employee's contract of employment if the sentence was such that it rendered the performance of the contract radically different from that which the parties contemplated when they entered into the contract.

***Krell v Henry* [1903] 2 KB 740**

Henry hired a room from Krell for two days, to be used as a position from which to view the coronation procession of Edward VII, but the contract itself made no reference to that intended use. The King's illness caused a postponement of the procession. It was held that Henry was excused from paying the rent for the room. The holding of the procession on the dates planned was regarded by both parties as basic to enforcement of the contract.

***Herne Bay Steamboat Co v Hutton* [1903] 2 KB 683**

Herne Bay agreed to hire a steamboat to Hutton for a period of two days for the purpose of taking passengers to Spithead to cruise round the fleet and see the naval review on the occasion of Edward VII's coronation. The review was cancelled, but the boat could have been used to cruise round the assembled fleet. It was held that the contract was not frustrated. The holding

of the naval review was not the only event upon which the intended use of the boat was dependent. The other object of the contract was to cruise round the fleet, and this remained capable of fulfilment.

Metropolitan Water Board v Dick Kerr **[1918] AC 119**

Kerr agreed to build a reservoir for the Water Board within six years. After two years, Kerr were required by a wartime statute to cease work on the contract and to sell their plant. The contract was held to be frustrated because the interruption was of such a nature as to make the contract, if resumed, a different contract.

Denny, Mott & Dickinson v James Fraser **[1944] AC 265**

A contract for the sale and purchase of timber contained an option to purchase a timber yard. By a wartime control order, trading under the agreement became illegal. One party wanted to exercise the option. It was held that the order had frustrated the contract so the option could not be exercised.

Re Shipton, Anderson and Harrison Brothers **[1915] 3 KB 676**

A contract was concluded for the sale of wheat lying in a warehouse. The Government requisitioned the wheat, in pursuance of wartime emergency regulations for the control of food supplies, before it had been delivered, and also before ownership in the goods had passed to the buyer under the terms of the contract. It was held that the seller was excused from further performance of the contract as it was now impossible to deliver the goods due to the Government's lawful requisition.

Jackson v Union Marine Insurance **(1873) LR 10 CP 125**

A ship was chartered in November 1871 to proceed with all possible despatch, danger and accidents of navigation excepted, from Liverpool to Newport where it was to load a cargo of iron rails for carriage to San Francisco. She sailed on 2 January, but the next day ran aground in Caernarvon Bay. She was refloated by 18 February and taken to Liverpool, where she underwent extensive repairs, which lasted till August. On 15 February, the charterers repudiated the contract.

The court held that such time was so long as to put an end in a commercial sense to the commercial speculation entered upon by the shipowner and the charterers. The express exceptions were not intended to cover an accident causing such extensive damage. The contract was to be considered frustrated.

LIMITATIONS OF THE DOCTRINE

Davis Contractors v Fareham UDC **[1956] AC 696**

The plaintiff agreed to build 78 houses in eight months at a fixed price. Due to bad weather, and labour shortages, the work took 22 months and cost £17,000 more than anticipated. The builders said that the weather and labour shortages, which were unforeseen, had frustrated the contract, and that they were entitled to recover £17,000 by way of a quantum meruit. The House of Lords held that the fact that unforeseen events made a contract more onerous than was anticipated did not frustrate it.

***Tsakiroglou v Noblee Thorl* [1961] 2 All ER 179**

T agreed to sell Sudanese groundnuts to NT, the nuts to be shipped from Port Sudan to Hamburg, November/December 1956. As a result of the 'Suez crisis', the Suez Canal was closed from 2 November 1956 until April 1957. T failed to deliver, arguing that shipment round the Cape of Africa was commercially and fundamentally different. The court held that the contract was not frustrated. T were, therefore, liable for breach – the change in circumstances was not fundamental.

***Maritime National Fish v Ocean Trawlers* [1935] AC 524**

Maritime chartered from Ocean a vessel which could only operate with an otter trawl. Both parties realised that it was an offence to use such a trawl without a government licence. Maritime was granted three such licences, but chose to use them in respect of three other vessels, with the result that Ocean's vessels could not be used. It was held that the charterparty had not been frustrated. Consequently Maritime was liable to pay the charter fee. Maritime freely elected not to licence Ocean's vessel, consequently their inability to use it was a direct result of their own deliberate act.

***Walton Harvey Ltd v Walker & Homfrays Ltd* [1931] 1 Ch 274**

The defendant's granted the plaintiffs the right to display an advertising sign on the defendant's hotel for seven years. Within this period the hotel was compulsorily acquired, and demolished, by a local authority acting under statutory powers. The defendants were held liable in damages. The contract was not frustrated because the defendant's knew, and the plaintiffs did not, of the risk of compulsory acquisition. They could have provided against that risk, but they did not.

EFFECTS OF FRUSTRATION

***Gamerco v ICM/Fair Warning (Agency) Ltd* [1995] 1 WLR 1226**

The plaintiffs, pop concert promoters, agreed to promote a concert to be held by the defendant group at a stadium in Spain. However, the stadium was found by engineers to be unsafe and the authorities banned its use and revoked the plaintiffs' permit to hold the concert. No alternative site was at that time available and the concert was cancelled. Both parties had incurred expenses in preparation for the concert; in particular the plaintiffs had paid the defendants $412,500 on account. The plaintiffs sought to recover the advance payment under s1(2) Law reform (Frustrated Contracts) Act 1943, and the defendants counterclaimed for breach of contract by the plaintiffs in failing to secure the permit for the concert.

It was an implied term of the contract that the plaintiffs would use all reasonable endeavours to obtain a permit, yet once the permit was granted they could not be required to guarantee that it would not be withdrawn. The contract was frustrated essentially because the stadium was found to be unsafe, a circumstance beyond the control of the plaintiffs. The revocation of the permit, subsequent to its being obtained by the plaintiffs, was not the frustrating event; the ban on the use of the stadium was. Under s1 of the 1943 Act, the plaintiffs were entitled to recover advance payments made to the defendants. The court did have a discretion to allow the defendants to offset their losses against this, but in all the circumstances of the present case the court felt that no deduction should be made in favour of the defendants and their counterclaim should be dismissed.

***BP Exploration v Hunt* [1982] 1 All ER 925**

See law report at p939C-p940C.