CONDITIONS AND WARRANTIES: FOREBEARS AND DESCENDANTS †

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I. INTRODUCTION

For many years the orthodox approach to the classification of contractual terms has been to treat them as being either "conditions" or "warranties" on the basis of the proper construction of the contract. This approach we shall call the *construction approach.* The importance of the distinction between conditions and warranties is that the breach of a "condition" entitles the innocent party to claim damages and rescind the contract; whereas the breach of a "warranty" entitles the innocent party only to claim damages.[1] This orthodoxy was questioned by the English Court of Appeal in *Hongkong Fir Shipping Co. Ltd.* v. *Kawasaki Kisen Kaisha Ltd.*[2] (hereafter referred to as the *Hongkong Fir Case*). In that case it was noted that many contractual undertakings are too complex to be categorised as being either "conditions" or "warranties". Of these complex contractual undertakings all that can be said is that some breaches will give rise to a right to rescind the contract and some breaches will sound only in damages.[3] This approach, requiring an analysis of the breach of contract, can be called the *breach approach.* This decision has been seen by some as creating a third category of contractual

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† *The common law evolves not merely by breeding new principles but also, when they are fully grown, by burying their progenitors: Hongkong Fir Shipping Co. Ltd.* v. *Kawasaki Kisen Kaisha Ltd.* [1962] 2 Q.B. 26 at 71 *per* Diplock, L.J. Note that in [1962] 1 All E.R. 474 at 488 the word "ancestors" was used instead of "progenitors".

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1 As is pointed out in *Halsbury's Laws of England,* Vol. 9 (4th ed. 1974), para. 542 and in *United Dominions Trust (Commercial) Ltd.* v. *Eagle Aircraft Services Ltd.* [1968] 1 W.L.R. 74 at 82-84 *per* Diplock, L.J., the above analysis is applicable only to bilateral or synallagmatic contracts. *Cf.* S. J. Stoljar, "The False Distinction Between Bilateral and Unilateral Contracts" (1955) 64 *Yale L.J.* 515.

2 [1962] 2 Q.B. 26; [1962] 2 W.L.R. 474; [1962] 1 All E.R. 474; discussed *infra* at 47-50.

3 [1962] 2 Q.B. 26 at 70 *per* Diplock, L.J.

terms: "innominate terms"[4] or "intermediate stipulations".[5] Later English cases have accepted[6] this questioning of the orthodox construction approach. Recently, the English Court of Appeal has taken the matter further: it has applied the breach approach to contracts for the sale of goods, where the construction approach to breach of contract is most familiar: *Cehave N.V.* v. *Bremer Handelsgesellschaft m.b.H. The Hansa Nord*[7] (hereafter referred to as *Cehave N.V.* v. *Bremer*).

The purpose of this article is to examine whether the Sale of Goods Act 1893 (U.K.)[8] allows the breach approach to be applied to the law relating to the sale of goods. For three reasons it is considered necessary to examine some of the history of express contractual terms. First, the effect of the Sale of Goods Act must be seen by examining its historical context. Secondly, the *Hongkong Fir Case* (and the decisions commenting on it) can only be understood in the light of historical principles. Thirdly, the question of reform in this area of the law must be examined against the background of the case law developed by the courts over the centuries.

II. THE HISTORICAL PERSPECTIVE[9]

Dependent and Independent Promises

To a certain extent the terminology used in the early cases was a result of rules of pleading and not of rules of substantive law, though the terminology continued to be used even when the strict rules of pleading ceased to be applied. Of fundamental importance was the distinction between dependent and independent promises. If promises were held by the court to be dependent then a party suing for breach could not maintain his action without averring performance of (or the willingness to perform) his own promise. However, if the court held that the promises were independent then it was not necessary to aver performance. The difficulty presented to the courts was how to decide when a promise was dependent and when it was independent.

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[4] J. C. Smith and J. A. C. Thomas, *A Casebook on Contracts* (3rd ed. 1966) p. 231. *Anson's Law of Contract* (A. G. Guest ed., 24th ed. 1975) p. 130. *Halsbury's Laws of England, op. cit.* Vol. 9, para. 544. *L. Schuler A.G.* v. *Wickman Machine Tool Sales Ltd.* [1974] A.C. 235 at 264 *per* Lord Simon.

[5] *Cehave N.V.* v. *Bremer Handelsgesellschaft m.b.H.* [1976] 1 Q.B. 44 at 60 *per* Lord Denning, M.R.

[6] For example: *The Mihalis Angelos* [1971] 1 Q.B. 164 at 193 *per* Lord Denning, M.R.; *L. Schuler A.G.* v. *Wickman Machine Tool Sales Ltd.* [1974] A.C. 235 at 264 *per* Lord Simon. Both decisions are discussed *infra* at 50-54.

[7] [1976] 1 Q.B. 44; [1975] 3 W.L.R. 447; [1975] 3 All E.R. 739. Discusssed *infra* at 54-63.

[8] The New South Wales statute is the Sale of Goods Act 1923-1975. Reference in the text to this Act will be by way of parenthesis after the corresponding English provisions.

[9] For various historical analyses see S. J. Stoljar, "Dependent and Independent Promises: A Study in the History of Contract" (1957) 2 *Syd. L.R.* 217; S. J. Stoljar, *A History of Contract at Common Law* (1975) pp. 147-163; Anthony Beck, "The Doctrine of Substantial Performance: Conditions and Conditions Precedent" (1975) 38 *M.L.R.* 413.

In the early actions on covenants (i.e. promises under seal) the presumption was that covenants "were treated as independent except where linked by a verbal formula making one covenant expressly dependent upon the other".[10] This presumption was easily rebutted. In a case decided in 1500 Fineux, C.J. distinguished two situations: If A covenanted to serve B for a year and B covenanted to give him twenty pounds, and did not use the words "for said cause"[11] then the presumption applied and A would have an action for twenty pounds irrespective of whether he had served B or not. If, however, the words "for said cause" were used, then the covenants became dependent and A could not maintain his action without averring that he had served B for a year. It can be seen that this was a very technical and arbitrary distinction.[12]

In the late sixteenth century the same ideas were transferred from covenants to mutual promises and where the parties exchanged promises these were presumed to be independent. However, much of the sterile learning was swept away by the decision in *Pordage* v. *Cole*.[13] The defendant covenanted with the plaintiff that he would give him the sum of £775 *for* all the plaintiff's lands and a house, the money to be paid "before Midsummer". In an action by the plaintiff for the price, the defendant argued that the plaintiff had to aver performance because of the use of the word "for". From the terms of the agreement there seemed to be a clear case of express dependency, i.e., the defendant's promise to pay was dependent upon the plaintiff's prior (or contemporaneous) conveyance. However, the court held that the action was well brought even without an averment of the conveyance of the land. The old rule that the word "for" removed the presumption of independence did not apply because it was the intention of the parties that each should have a mutual remedy; the promises were therefore independent.[14] Similarly in *Hunlocke* v. *Blacklowe*[15] the court held that the promises would not be construed as dependent because to do so would defeat the intentions of the parties. This became the dominant test: what construction would best serve the intention of the parties?[16]

The eighteenth century saw Lord Mansfield play an important rôle.

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[10] S. J. Stoljar, *op. cit* (1957) 2 *Syd. L.R.* 217 at 219.

[11] (1500) Y.B. 15 Hen. VII fo. 10b pl. 7; S. J. Stoljar, *op. cit.* (1957) 2 *Syd. L.R.* 217 at 219-220.

[12] However, as Professor Stoljar (*id.* at 220-21) has noted, the initial test for distinguishing between independent and dependent covenants seemed at the time, to be a "just" solution.

[13] (1669) 1 Wms. Saunders 319. S. J. Stoljar, *op. cit.* (1957) 2 *Syd. L.R.* 217 at 223 has noted that the transfer of rules (developed in the context of covenants) to mutual promises, created "incredible confusion". For two early cases see *Nichols* v. *Raynbred* (1615) Hob. 88 and *Spanish Ambassador* v. *Gifford* (1615) 1 Rolle's Rep. 336; 3 Bulst. 159.

[14] (1669) 1 Wms. Saunders 319 at 320.

[15] (1670) 2 Wms. Saunders 156.

[16] This is not to say that there was no confusion. The courts, on occasions still found the words of the parties more important than intent: See S. J. Stoljar, *op. cit.* (1957) 2 *Syd. L.R.* 217 at 232-37.

The case of *Jones* v. *Barkley*[17] has a twofold significance. First, the argument of counsel for the plaintiff contains the report of *Kingston* v. *Preston*[18] where Lord Mansfield had previously distinguished three types of covenants "to be collected from the evident sense and meaning of the parties".[19]

(1) Those that were independent. Here it was no excuse for the defendant to allege breach by the plaintiff.
(2) Those that were conditions and dependent. Here the complete performance by one party was necessary to make the other party liable.
(3) Those that were mutual conditions to be performed at the same time. Here it was only necessary, to maintain an action, for a party to offer to perform his side of the bargain.[20]

Secondly, the case provided the basis for the modern doctrine of concurrent performance in the sale of goods. In defining his third form of covenants, Lord Mansfield had not (in *Kingston* v. *Preston*) made clear which party was obliged to do the first act; *Jones* v. *Barkley* established that a party need only show he was ready and willing to perform. In the words of Lord Mansfield "it is not necessary . . . to go farther, and do a nugatory act".[21]

So far the courts had been dealing with the problems posed by the proper order of performance. Where the covenants were independent the order was immaterial. Where the covenants were dependent there were two possibilities: either performance by one was a condition precedent to performance by the other; or performance was to be at the same time. This left the problem posed by defective performance by a party of his obligations under a contract. This was also analysed in terms of dependent and independent promises and conditions precedent. In *Boone* v. *Eyre*[22] the plaintiff had conveyed to the defendant the equity of redemption of a West Indies plantation, together with its stock of negroes in consideration of £500 and an annuity for life. The plaintiff further covenanted that he had a good title both to the plantation and to the negroes. The defendant failed to pay the annuity and in an action by the plaintiff, the defendant pleaded that at the time of his covenant the plaintiff had not been legally possessed of the negroes and so never had full title. On demurrer, the Court of King's Bench gave judgment for the plaintiff. In the course of his judgment Lord Mansfield said:

> The distinction is very clear, where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions the one precedent to the other. But where they go only to a part,

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[17] (1781) 2 Doug. 684.
[18] (1773) 2 Doug. 689.
[19] *Id.* at 691.
[20] *Id.* at 690-91.
[21] (1781) 2 Doug. 684 at 694.
[22] (1777) 1 H. Bl. 273n. The report here is a note to *Duke of St. Albans* v. *Shore* (1789) 1 H. Bl. 270. Subsequent proceedings can be found in (1779) 2 Wm. Black. 1312. See also 1 H. Bl. 254. See n. 29, *infra* at 36.

> where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent. If this plea were to be allowed, any one negro not being the property of the plaintiff would bar the action.[23]

The first thing to notice is that the words of Lord Mansfield are by no means clear. He could not have meant that mutual covenants could both be conditions precedent because this would result in a stalemate. Obviously he was trying to distinguish situations where complete performance was necessary from situations where a minor deviation would not bar recovery. There are two possibilities. First, he could be arguing that if, on a *construction of the contract* the consideration was divisible into parts, then failure to perform a minor part would be no bar to recovery. Secondly, he could be arguing that if the *breach of contract* was minor it would be unreasonable to allow this to be a bar to recovery.[24] Whichever is the "correct" interpretation, it is clear that Lord Mansfield was looking for a "just" solution.

In *Boone* v. *Eyre* the contract was partially executed, one party having taken a benefit under it. However, in *Duke of St. Albans* v. *Shore*[25] the court considered the decision in *Boone* v. *Eyre* relevant to a purely executory contract. By an agreement between the Duke and Shore, Shore was to purchase certain land from the Duke together with certain timber to be valued. The Duke was to accept a conveyance of certain other premises from Shore, the price of which was to be deducted from the purchase price. The Duke was to make a good title to the property and on execution of the conveyance was to be entitled to the balance of the purchase price. Shore repudiated the agreement. Against an action by the Duke, Shore maintained that the Duke had cut much of the growing timber and had thus made performance of the agreement impossible. In his declaration the Duke stated that at all times he was ready to make a good title and to execute the conveyance. The Court of Common Pleas held that the case came within the principle of *Boone* v. *Eyre*. Judgment was given for the defendant on the basis that the question to be asked was "whether the covenant of the plaintiff goes to the whole consideration"[26] and that the cutting of the timber did alter the estate so as to make what Shore was to receive significantly different from that for which he had bargained. The court analysed the actual breach to show that, whereas in *Boone* v. *Eyre* the covenants were independent, here they were dependent.

Two more decisions in the eighteenth century are relevant. The first is *Campbell* v. *Jones*[27] where Lord Kenyon, C.J. stated that

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[23] (1777) 1 H. Bl. 273n.

[24] See Anthony Beck, *supra* n. 9 at 416. Some of the problems undoubtedly stem from the fact that the words quoted are probably not those of Lord Mansfield at all, but only a reporter's interpretation: *Corbin on Contracts* Vol. 3A (1960) s. 659 n. 26.

[25] (1789) 1 H. Bl. 270.

[26] *Id.* at 279, Lord Loughborough delivering the judgment of the court.

[27] (1796) 6 T.R. 570.

"whether . . . covenants be or not be independent . . . must depend on the good sense of the case".[28] Hence if it had been shown that one party had promised to do an act before the other, that promise would have been dependent. But here the defendant had received part of the consideration and the breach by the plaintiff had not been a breach of the "most material part of the consideration".[29] Therefore, following the second interpretation of *Boone* v. *Eyre*, the covenants were held to be independent. The second case is *Glazebrook* v. *Woodrow*[30] which interpreted *Boone* v. *Eyre* as a case of construction. In the words of Lord Kenyon, C.J.: "every man's agreement is to be performed according to his intent, as far as that is to be collected from the particular instrument".[31] Similarly, Lawrence, J. thought the question of dependency or independency should be determined "entirely"[32] by the words and nature of the agreement. The case should not be interpreted too strongly against the breach approach because the covenants were concurrent and therefore clearly dependent. The decisions, taken together, show that the courts could reach different results, depending on the situation and the justice of the case.

The Emergence of Conditions and Warranties

The nineteenth century produced a multitude of decisions and saw the addition of further confusion to the analysis of contractual terms. At times the courts preferred a strict construction approach; on other occasions a more functional attitude (which involved an analysis of the breach) was adopted. Two decisions of Lord Ellenborough, C.J. illustrate this. In *Ritchie* v. *Atkinson*[33] the court had to decide whether the delivery of a complete cargo was a condition precedent to the recovery of *any* freight. Lord Ellenborough, C.J. said the answer to that question depended "not on any formal arrangement of the words, but on the reason and sense of the thing, as it is to be collected from the whole contract".[34] The delivery of the cargo was "divisible" and the plaintiff could therefore recover freight in proportion to the goods delivered. On the other hand, in *Davidson* v. *Gwynne*,[35] Lord Ellenborough affirmed

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[28] *Id.* at 571-72. See also *Morton* v. *Lamb* (1797) 7 T.R. 125.

[29] (1796) 6 T.R. 570 at 573. S. J. Stoljar, *op. cit.* (1957) 2 *Syd. L.R.* 217 at 243, in discussing *Boone* v. *Eyre* notes that: "Its very success also falsified its true place in the historical picture; however important the decision, it was part and parcel of a continuing development, it was not (as seems sometimes thought) a suddenly inspired creation".

[30] (1798) 8 T.R. 366.

[31] *Id.* at 370. Grose, J. was not sure how far *Boone* v. *Eyre* was contrary to this principle: *Id.* at 372.

[32] *Id.* at 373. Lawrence, J. thought partial execution relevant to intent but what he intends by this is not clear. Le Blanc, J. also thought partial execution of the contract relevant where one party received an advantage: *Id.* at 374-75.

[33] (1808) 10 East 295.

[34] *Id.* at 306. It must be admitted that Lord Ellenborough's constructional approach to the contract in *Ritchie* v. *Atkinson* was quite wide. See also *Stavers* v. *Curling* (1836) 3 Bing. (N.C.) 355.

[35] (1810) 12 East 381.

that "unless the non-performance alleged . . . goes to the whole root and consideration . . . the covenant broken is to be considered not as a condition precedent".[36]

It will be noted that the term "condition precedent" was beginning to be used when considering whether a promise was dependent or independent. It was largely the use of this term which prevented a proper resolution of the ambiguity present in the formulation of Lord Mansfield in *Boone* v. *Eyre*. Pollock, C.B. encountered the difficulties inherent in the use of the term in delivering the judgment of the Court of Exchequer in *Ellen* v. *Topp*.[37] After stating the breach test approach to *Boone* v. *Eyre*, Pollock, C.B. said that he found the rule "remarkable" because by it the construction of the contract could be varied *ex post facto* and that "subsequent conduct" could result in what was originally a condition precedent ceasing to be so.[38] Nevertheless he did not doubt the soundness of the rule, although it was inapplicable in the case before the court.

The literal, construction approach can be further illustrated by *Graves* v. *Legg*[39] where Parke, B., delivering the judgment of the court said:

> . . . the general rule is, to construe covenants and agreements to be dependent or independent according to the intent and meaning of the parties to be collected from the instrument . . . . [O]ne particular rule well acknowledged is, that where a covenant or agreement goes to part of the consideration on both sides, and may be compensated in damages, it is an independent covenant, . . . and an action might be brought for the breach of it without averring performance . . . . *Campbell* v. *Jones* and *Boone* v. *Eyre* are instances of the application of the rule . . . . [W]here a person has received part of the consideration for which he entered into the agreement, it would be unjust that, because he had not the whole, he should therefore be permitted to enjoy that part without either payment or doing anything for it.[40]

Because the defendants had taken no benefit under the contract they could plead the condition precedent. Moreover, the court accepted that the proper interpretation of *Boone* v. *Eyre* was to confine the decision to partially executed contracts. This was true of *Boone* v. *Eyre* itself but it is hard to reconcile the case with decisions such as *Duke of St. Albans* v. *Shore* where the breach approach was applied to an executory agreement. Nevertheless it was recognized that a "condition precedent" always remained a condition precedent but that in some circumstances it would

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[36] *Id.* at 389. See also *Glaholm* v. *Hays* (1841) 2 Man. & G. 257, and *Tarrabochia* v. *Hickie* (1856) 1 H. & N. 183 at 187 *per* Pollock, C.B.

[37] (1851) 6 Exch. 424. The court consisted of Pollock, C.B., Parke, B., Alderson, B. and Platt, B.

[38] *Id.* at 441.

[39] (1854) 9 Exch. 709.

[40] *Id.* at 716. Parke, B. probably did not mean to imply that the person receiving part of the consideration could never rescind.

be "no longer competent for the defendent to insist upon the non-performance of that which was originally a condition precedent".[41]

A further influential decision was that of the Exchequer Chamber in *Behn* v. *Burness*.[42] The question posed by the court was whether a statement in a charterparty that the ship was "now in the port of Amsterdam" was a "condition". To decide whether the term was a condition the court thought it necessary to construe the instrument "with reference to the intention of the parties at the time is was made, irrespective of events which may afterwards occur".[43] The word condition was here being used as synonymous with "condition precedent"; but this represents a crucial misunderstanding, since in effect the court here confused two distinct situations. First, where parties bargained promise for promise. In this situation (the promises being independent of each other) performance by one party could not be dependent (conditional) on performance by the other. Secondly, where parties bargained for performance. Here performance by one party would be conditional to the other party's liability. The important point to realize is that the term itself could not be a condition: only performance could be conditional. Indeed, to ask whether a term is a condition is thus to fuse the two situations. Moreover, even if parties did bargain for performance, acceptance by one party of part performance by the other could result in the promises ceasing to be dependent. It would be artificial to construe a contract to find what terms were conditions when the question is really what performance each party would accept. That is, events later than the formation of the contract could show that (as was said in *Graves* v. *Legg*) the parties had not bargained for strict performance and that liability was not conditional on such performance. Unfortunately the court in *Behn* v. *Burness* did not take this point and fostered a confusion between terms and conditions from which the English law of contract has never extricated itself. The reason for the court in *Behn* v. *Burness* focussing its inquiry on whether the term in question was a "condition" was that it was in the nineteenth century that another development took place in the history of contractual terms. From the above historical account it is obvious that the terms "condition" and "warranty" had not by the end of the eighteenth century acquired their present legal meaning and significance. According to *Benjamin's Sale of Goods* it was only a nineteenth century development to use the word "condition" to mean a term of a contract, any breach of which entitled the innocent

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[41] *Id.* at 717. See *Chanter* v. *Leese* (1838) 4 M. & W. 295 at 311; *Behn* v. *Burness* (1863) 3 B. & S. 751 at 755; *Carter* v. *Scargill* (1875) 10 Q.B. 564 at 567-68.

[42] (1863) 3 B. & S. 751.

[43] *Id.* at 758 *per* Williams, J. delivering the judgment of the court. See *Oppenheim* v. *Fraser* (1876) 34 L.T.N.S. 524; *Heyworth* v. *Hutchinson* (1867) L.R. 2 Q.B. 447. But *cf. MacAndrew* v. *Chapple* (1866) L.R. 1 C.P. 643 where, although counsel for the defendant asserted that *Behn* v. *Burness* precluded any reference being made to the breach, the court affirmed the breach approach interpretation of *Boone* v. *Eyre*: (1866) L.R. 1 C.P. 643 at 648.

party to rescind and sue for damages. It seems that the word "condition" had been used in this sense in *Glaholm* v. *Hays*[44] but that this special usage was not settled until 1876 when it was adopted by Sir Frederick Pollock in his *Principles of the Law of Contract*.[45]

Anthony Beck in a recent article, "The Doctrine of Substantial Performance: Conditions and Conditions Precedent", has criticized decisions such as *Ellen* v. *Topp* as being based on a "heresy"[46] derived from Serjeant Williams' note to *Pordage* v. *Cole*.[47] The heresy is supposed to result from the interpretation of *Boone* v. *Eyre* which allows the breach of contract to be examined in determining whether covenants were dependent or independent. Specifically, Mr. Beck points to *Ellen* v. *Topp* as being authority for the proposition that subsequent conduct can convert what was originally a condition precedent into something else. It is undoubtedly a rule of contractual interpretation that a condition precedent (properly so called) remains a condition precedent irrespective of subsequent events: *Wallis, Son & Wells* v. *Pratt & Haynes*[48] is clear House of Lords authority for this proposition. It is important to realize, however, that the courts have not been consistent in their use of the term "condition precedent". The case of *Pym* v. *Campbell*[49] can be cited as an example of a "true" condition precedent. The parties there agreed that *there would be no binding contract* unless a third party did a particular act. The failure of the third party to do this act, i.e., the failure of the condition precedent, would result in there being no binding contract. The courts were also using the term "condition precedent" to mean something completely different, viz., where the parties had bargained for the entire performance of a promise or promises. It is correct to describe the first situation as being governed by a condition precedent. But, in relation to the second situation, it would be artificial to try to label any particular term a condition precedent. The confusion between the two distinct meanings is evident in the use of the term "condition" in *Behn* v. *Burness*.

Mr. Beck goes on to argue that the cases interpreting *Boone* v. *Eyre* in the heretical way are to be explained on the basis of waiver.[50] However, there cannot be a waiver of a true condition precedent and

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[44] (1841) 2 Man. & G. 257; *Benjamin's Sale of Goods* (A. G. Guest ed. 1974) para. 755.

[45] (1875) pp. 445-49 as cited by Lord Denning, M.R. in *Wickman Machine Tool Sales Ltd.* v. *L. Schuler A.G.* [1972] 1 W.L.R. 840 at 851.

[46] Anthony Beck, *supra* n. 9 at 417.

[47] (1669) 1 Wms. Saunders 319 at 320n. There is no doubt that the rules promoted confusion. See the discussion in S. J. Stoljar, *op. cit.* (1957) 2 *Syd. L.R.* 217 at 245ff. noting particularly Professor Stoljar's discussion of rules three and four.

[48] [1911] A.C. 394 at 400 *per* Lord Shaw.

[49] (1856) 6 E. & B. 370. See S. J. Stoljar, "The Contractual Concept of Condition" (1953) 69 *L.Q.R.* 485 esp. at 492ff.

[50] Mr. Beck defines the term "condition precedent" as synonymous with "entire obligation"; Anthony Beck, *supra* n. 9 at 413 but cases applying *Boone* v. *Eyre* did not concern entire contracts, since the promises in those cases were held to be independent except where the contract was executory.

this is explained by Davidson, J. in *Attorney-General* v. *Australian Iron and Steel Ltd.*[51]

> The true condition precedent seems to be restricted to the case where the existence of the contract itself or of the initial operation of one or both parties' obligations under it are made to depend on the happening of a certain or uncertain event without personal default of a party. In such circumstances, if the event does not happen, there is no obligation and no right of action for damages . . . . Probably in such cases there could be no question of waiver which could not operate to revive a contract which had ceased to exist or never existed.[52]

When the second type of condition precedent is examined it is clear that a failure to perform exactly did not always preclude the party at fault from relying on the contract. Usually the courts would look to see what the person endeavouring to rely on the "condition precedent" had received under the contract. If he had taken something of value then the courts, following the "breach approach" interpretation of *Boone* v. *Eyre* refused to allow the party to rely on the condition precedent. It remained a condition precedent but ceased to be available as such. There is nothing in these cases to show that the courts were construing a contract *ex post facto*. Despite Mr. Beck's argument, it is suggested that the courts have not been guilty of heresy here.

The courts did not always require a strict *à priori* classification of terms. In *Bettini* v. *Gye*[53] for example, the plaintiff promised to be in London "without fail at least six days before the commencement of his engagement". Owing to an illness the plaintiff broke this promise and the defendant purported to terminate the contract. The court posed the question: "Whether this part of the contract is a condition precedent to the defendant's liability, or only an independent agreement, a breach of which will not justify a repudiation".[54] The court stated that the answer depended on the construction of the contract but they found that there were no express words giving a right to repudiate. It was therefore necessary to see whether the stipulation went "to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract . . . a thing different in substance".[55] For this proposition the court cited that part of Parke, B.'s judgment in *Graves* v. *Legg* in which he referred to *Boone* v. *Eyre* as only being applicable to partially executed contracts. We may note, however, that Mr. Gye had received no benefit under the contract, it was purely

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[51] (1936) 36 S.R. (N.S.W.) 172.

[52] *Id.* at 182. Mr. Beck's analysis is marred by his attribution of a statement in *Graves* v. *Legg* (1854) 9 Exch. 709 to Pollock, C.B. when, in fact, Parke, B. spoke the words in question. Thus Pollock, C.B. did not expressly (as Anthony Beck, *supra* n. 9 at 418 says) recant the position he had taken in *Ellen* v. *Topp*.

[53] (1876) 1 Q.B.D. 183.

[54] *Id.* at 187 *per* Blackburn, J. delivering the judgment of the court.

[55] *Id.* at 188.

executory.[56] Nevertheless, the court held that the breach was not grave enough to go to the root of the contract. Judgment was therefore given for the plaintiff. Hence, under the guise of a purely constructional approach, the court succeeded in applying principles applicable to the gravity of the breach. Probably the most significant case is *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.*[57] which involved a partially executed contract for the delivery of steel in instalments. The question for the House of Lords was whether each payment was a condition precedent to each future delivery. The court did not even purport to apply the construction approach but concentrated on the breach which had occurred. Lord Blackburn stated:

> The rule of law, . . . is that where there is a contract in which there are two parties, each side having to do something . . . if you see that the failure to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a good defence to say, "I am not going on to perform my part of it when that which is the root of the whole and the substantial consideration for my performance is defeated by your conduct".[58]

The phrase "rule of law" is clear evidence that the decision was not based on the construction of the contract. The courts could look beyond the construction of the contract and examine the actual breach. Thus the decisions in the nineteenth century show that both in the general law of contract and in the sale of goods the ambiguity of Lord Mansfield in *Boone* v. *Eyre* was never finally resolved in favour of either the breach approach or the construction approach. The only exception was where the question was whether there existed a condition precedent in the *Pym* v. *Campbell* sense, which always depended on a construction test.

The nineteenth century also saw the development of the term "warranty" to mean a term of a contract, the breach of which entitled the innocent party only to a claim to damages and not to a right to rescind. The word "warranty" was used in this sense in *Chanter* v. *Hopkins*.[59] Originally an action on a warranty was an action on the case in the nature of deceit and entirely unconnected with contract. However, later, a practice arose of declaring an assumpsit when a warranty was sued upon. The substitution of assumpsit as the form of action for breach of warranty in place of the action on the case for deceit led to

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[56] *Ibid.* See S. J. Stoljar, *op. cit.* (1957) 2 *Syd. L.R.* 217 at 251; S. J. Stoljar, *A History of Contract at Common Law, op. cit. supra* n. 9, pp. 176-77. But *cf.* Anthony Beck, *supra* n. 9 at 421 n. 30.

[57] (1884) 9 App. Cas. 434. Section 31 of the Sale of Goods Act (U.K.) 1893 (N.S.W.: s. 34) is based on this decision; see *Maple Flock Co. Ltd.* v. *Universal Furniture Products (Wembley) Ltd.* [1934] 1 K.B. 148 at 154-55.

[58] (1884) 9 App. Cas. 434 at 443-44. The significance of the phrase "rule of law" can be illustrated by the discussion of fundamental breach in *Suisse Atlantique Société d'Armement Maritime S.A.* v. *N.V. Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361.

[59] (1838) 4 M. & W. 399.

the belief that only where there was an intention to contract could there be a warranty. That view received the approval of the House of Lords in *Heilbut Symons & Co.* v. *Buckleton*.[60]

Conclusion

By way of summary, it can be said that the courts treated promises as being either dependent or independent. *Promises were independent* where: (1) the contract was executed; or (2) the parties exchanged promise for promise. *Promises were dependent* where: (1) the contract was executory and the promises were to be performed at the same time; (2) the parties bargained for the performance by the other of the entire promise, i.e., where the performance was a condition precedent.[61] Towards the end of the nineteenth century the terms "dependent" and "independent" were often replaced by the terms "condition" and "warranty" respectively. The use of the term condition as synonymous with "condition precedent" resulted in greater importance being attached to an *à priori* construction of the contract than to a consideration of the gravity of the breach. The law was thus in a state of confusion and flux when Sir MacKenzie Chalmers came to draft the Sale of Goods Act.

III. THE ENACTMENT OF THE SALE OF GOODS ACT (U.K.)

The Sale of Goods Act 1893 (U.K.) came into operation on 1 January, 1894. The Act's full title was "An Act codifying the law relating to the Sale of Goods".[62] A warranty was defined by the Act: s. 62(1) (N.S.W.: s. 5(1)) as "an agreement with reference to goods which are the subject of a contract of sale but collateral to the main purpose of such contract the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated". The term condition was not specifically defined but s. 11(1)(b) (N.S.W.: s. 16(2)) defines it by inference as a term "the

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[60] [1913] A.C. 30. As *Benjamin's Sale of Goods, op. cit supra* n. 44, para. 744, points out: "The course of development of the law of warranty was different in the United States from England, for there the tortious background of warranty received greater prominence, and this led to more ready inference of warranties from statements of fact inducing the contract. In England however the idea of warranty has been closely associated with that of contract, and it is clear that liability is only to be imposed where the person giving the warranty can firmly be regarded as having made a contractual promise . . . ."

[61] The parties could also make performance a condition subsequent, thus terminating the contract. For a very clear exposition of the basic concepts see the American case *K. & G. Construction Co.* v. *Harris* (1960) 164 A. 2d. 451 at 454-55 *per* Prescott, J. See also S. J. Stoljar, *op. cit.* (1957) 2 *Syd. L.R.* 217 at 244. For a further discussion, see *Williston on Contracts* Vol. 5 (W. H. E. Jaeger ed., 3rd ed. 1961) ss. 665, 670; S. J. Stoljar, *A History of Contract at Common Law, op. cit. supra* n. 9, Chapter 12; *Corbin on Contracts* Vol. 3A (1960) s. 659, n. 26 and s. 660, n. 31; and *cf. Jacob and Youngs, Inc.* v. *Kent* (1921) 129 N.E. 889 at 890 *per* Cardozo, J.

[62] Although the Act received the Royal Assent on 20 February 1894, s. 63 provided for its commencement on 1 January 1894. Section 63 was repealed in 1908. The Sale of Goods Act 1923 (N.S.W.) is entitled "An Act to codify and amend the Law relating to the Sale of Goods".

breach of which may give rise to a right to treat the contract as repudiated".

To some extent the definition of warranty in the Sale of Goods Act was contrary to history. As noted above, the term "warranty" was originally part of the law of deceit and was only later associated with the law of contract.[63] Also, in contracts such as insurance the term "warranty" came to have the same effect which Chalmers gave the word "condition" in the Sale of Goods Act. Moreover, as Lord Denning, M.R. pointed out in *Oscar Chess* v. *Williams*[63] the use of the word "warranty", in the Sales of Goods Act, to mean a subsidiary term, has to be distinguished from the word's ordinary (and broader) meaning, denoting merely a binding promise. The usage chosen by Chalmers was of recent origin but was enshrined in the Act.

The crucial section for the classification of express contractual terms, is s. 11(1)(b) (N.S.W.: s. 16(2)) which provides that:

> Whether a stipulation in a contract is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract.

The important question to be determined is the precise meaning of this section in the context of the historical analysis of the case law given above. Chalmers stated that: "As used in the Act, 'condition' is the equivalent of the old term 'dependent covenant', while 'warranty' is equivalent to the old term 'independent convenant' ".[64] But this amounts to a distortion of what was being said in the cases decided before the middle of the nineteenth century. Chalmers' use of the term "condition" was a misuse of the term "condition precedent". The terms "condition" and "warranty" developed independently of each other and had historical origins distinct from independent and dependent promises. The terms were "equivalent" only to the extent that the remedy for breach of condition was the same as that for breach of a dependent promise; and the remedy for breach of warranty (as the term is used by Chalmers) was the same as that for breach of an independent promise. Chalmers' inaccurate view of the historical perspective is further illustrated by his discussion of promissory conditions.

> [Where there are] promissory conditions . . . the non-performance of the condition by the promisor . . . gives a right to the promissee to treat the contract as repudiated . . . . In the older case promissory conditions were referred to as "dependent covenants or promises"

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[63] [1957] 1 W.L.R. 370 at 374-75. See also *Goldsborough Mort & Co. Ltd.* v. *Carter* (1914) 19 C.L.R. 429 and *Ballard* v. *Sperry Rand Aust. Ltd.* (1975) 6 A.L.R. 696.

[64] *Chalmers' Sale of Goods*, Clowes & Son, London (6th ed. 1905) p. 29.

> and were contrasted with independent covenants or promises, namely, stipulations the breach of which gives rise to a claim for damages, but not to a right to treat the contract as repudiated. Now the term "dependent promise" appears to be merged in the wider term "condition precedent".[65]

Professor Stoljar has argued that this statement is both "wrong" and "misleading".[66] Fundamentally, Chalmers has failed to distinguish promises from conditions. A promise could not itself be a condition; only the *performance* of a promise could be a condition precedent. The abbreviation of condition precedent into "condition" led to the conclusion that conditions had to be designated in the same way as "true conditions precedent". Thus the term "dependent promise" could only "become merged" in the term "condition precedent" if the parties were required to designate promises as either conditions or warranties at the time of the *formation of the contract.* A promise could then only become independent, i.e., available as a warranty, in situations where, for example, the property in the goods had passed to the buyer.

That this is the burden of s. 11(1)(b) can clearly be shown by the decision in *Bentsen* v. *Taylor, Sons & Co.*,[67] a case decided in the very year the Sale of Goods Act was passed. There Bowen, L.J. said there was *no other way* to decide the question whether a stipulation was a condition or a warranty, "except by looking at the contract in the light of the surrounding circumstances, and then making up one's mind whether the intention of the parties, as gathered from the instrument itself, will best be carried out by treating the promise as a warranty sounding only in damages, or as a condition precedent by the failure to perform which the other party is relieved of his liability".[68] Thus, Chalmers (at least in the context of sale of goods) effectively resolved the ambiguity of Lord Mansfield's statement in *Boone* v. *Eyre*[69] in favour of the construction approach. The breach test, which had been used to distinguish dependent and independent promises was thus given a premature interment by the legislature in 1893.[70] The Sale of Goods Act, on its face, disclosed only two types of express contractual terms; conditions and warranties to be classified at the time of contractual formation and not at the time of breach.

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[65] *Id.* p. 179.

[66] S. J. Stoljar, "Conditions, Warranties and Descriptions of Quality in Sale of Goods" (1952) 15 *M.L.R.* 425; (1953) 16 *M.L.R.* 174 at 189. There is no shortage of criticism; see for example, J. L. Montrose, "Some Problems About Fundamental Terms" [1964] *Camb. L.J.* 60, 254 at 69, 75, 76; Anthony Beck, *supra* n. 9 at 421 and see *infra* at 60ff.

[67] [1893] 2 Q.B. 274.

[68] *Id.* at 281. See *per* Lord Esher, M.R. *id.* at 279.

[69] (1777) 1 H. Bl. 273n. See *supra* at 34-35.

[70] If the interment of the breach test occurred in 1893, the resurrection took place in 1961 in *Hongkong Fir Shipping Co. Ltd.* v. *Kawasaki Kisen Kaisha Ltd.* [1962] 2 Q.B. 26. Discussed *infra* at 47-50.

IV. CASES AFTER THE SALE OF GOODS ACT

The twentieth century cases show a confusion similar to that evident in the nineteenth century decisions, except that the Sale of Goods Act gave impetus to the construction approach to the classification of contractual terms. An important case was *Wallis, Son & Wells* v. *Pratt & Haynes.*[71] In that case the House of Lords deprecated any approach not confined to the contract itself. Lord Shaw viewed with "repugnance" the idea of construing a contract *"ex post facto"*. He felt that it was safer to construe the document "as it was originally meant to be construed . . . according to the evident intention of the parties at the time the bargain was made".[72] Lord Alverstone, C.J. pointed to the "clear distinction" between conditions and warranties which was "recognized by the statute".[73] Similarly in *Attorney-General* v. *Australian Iron & Steel Ltd.*[74] Davidson, J. stated that the first question was whether the parties had made a term a "condition precedent or a vital and essential term going to the root of the contract".[75] Since that had not been done it became necessary for the court to construe the contract "in order to gather from the language . . . and having regard to the surrounding circumstances what was the intention of the parties".[76]

It seems that the cases in the twentieth century were concerned with enunciating the construction test as the device to be used to distinguish conditions and warranties. The courts appear to have suffered from a myopic concentration on the Sale of Goods Act and this approach has manifested itself in a tendency to generalize from an apparent condition/warranty dichotomy in the Sale of Goods Act to the general law of contract. Indeed, in the twentieth century cases applying a breach test become much harder to find.

In *Francis* v. *Lyon*[77] Griffith, C.J. quoted with approval a statement by Lord Blackburn in *Mersey Steel and Iron Co.* v. *Naylor Benzon & Co.*[78] and said that the question to be asked was whether the breach of the stipulation affected the "substance and foundation of the adventure".[79] However, the weight of this statement in the construction test/breach test balance is equivocal since earlier in his judgment[80] Griffith, C.J. had cited with approval the construction test propounded in *Bentsen* v. *Taylor Sons & Co.* by Bowen, L.J. Another ambiguous decision was *Bowes* v. *Chaleyer.*[81] In that case Starke, J. adopted a construction test

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[71] [1911] A.C. 394.
[72] *Id.* at 400.
[73] *Id.* at 396.
[74] (1936) 36 S.R. (N.S.W.) 172.
[75] *Id.* at 178.
[76] *Ibid.*
[77] (1907) 4 C.L.R. 1023.
[78] The passage from Lord Blackburn was (1884) 9 App. Cas. 434 at 443.
[79] (1907) 4 C.L.R. 1023 at 1035; *cf. Bowes* v. *Chaleyer* (1923) 32 C.L.R. 159 at 182.
[80] (1907) 4 C.L.R. 1023 at 1034-35.
[81] (1923) 32 C.L.R. 159.

to determine whether a stipulation in a contract "was of the essence of the contract . . . or whether it was a collateral or subsidiary promise".[82] In their joint judgment Isaacs and Rich, JJ.[83] cited with approval Bowen, L.J.'s enunciation of a construction test for distinguishing conditions and warranties in *Bentsen* v. *Taylor, Sons & Co.* But the emphasis in the judgment then appears to change:

> Apart from statutory provision or expressed intention as to whether a stipulation shall or shall not be a condition, the one final test is this: Does its breach go to the root of the contract so that it either frustrates the main object of the contract or makes further performance substantially performance of a different contract? Any other rule establishes the tyranny of mere words over substance.[84]

In *Associated Newspapers Ltd. v. Bancks*[85] the High Court of Australia had to decide whether three successive breaches by the newspaper of a contract with Bancks requiring them to publish his cartoon on page one of the comic section entitled Bancks to treat the contract as repudiated. It was held that the failure to perform (i.e., breach) "went to the root of the contract and gave the defendant . . . the right immediately to treat the contract as at an end".[86] Although the above quotation may suggest that the High Court had adopted a breach analysis, certain passages[87] suggest that the court was in reality adopting a construction test to distinguish conditions and warranties. However, a clear application of the breach test can be found in *Mathieson* v. *Sunshine*

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[82] *Id.* at 194.

[83] *Id.* at 179-180. In this case Isaacs and Rich, JJ. dissented, but their judgment contains interesting observations on the principles applicable to distinguishing between conditions and warranties. Apart from Starke, J., the other judges who formed the majority (Knox, C.J. and Higgins, J.) had little to say on this matter.

[84] *Id.* at 181. This passage could be interpreted in either of two ways. First, it could literally mean that a *breach test* is applicable in determining whether a term is a condition or a warranty. This is unlikely since this view is against the weight of English authority which sees the relevant test as one of construction; and secondly, it could be that Isaacs and Rich, JJ. were referring to the *likely effect of the breach.* This interpretation is strengthened because it is consistent with a previous reference (*id.* at 179-180) by Isaacs and Rich, JJ. to certain passages in Bowen, L.J.'s judgment in *Bentsen* v. *Taylor, Sons & Co.* which refer to the probable *or* likely effect of a breach.

[85] (1951) 83 C.L.R. 322.

[86] *Id.* at 339. See *White* v. *Australian and New Zealand Theatres Ltd.* (1943) 67 C.L.R. 266 at 271-72 *per* Latham, C.J. and *Tramways Advertising Pty. Ltd.* v. *Luna Park (N.S.W.) Ltd.* (1938) 38 S.R. (N.S.W.) 632 at 641-47. In the *Tramways Advertising Case* in the Court of Appeal in N.S.W., Jordan, C.J. adopted a construction test for distinguishing conditions and warranties: "The question whether a term in a contract is a condition or a warranty, i.e., an essential or a non-essential promise, depends upon the intention of the parties as appearing in or from the contract . . . ." (1938) 38 S.R. (N.S.W.) 632 at 641-42.

[87] (1951) 83 C.L.R. 322 at 336-37. E.g., "Perhaps the test is better formulated by C. B. Morison in his *Principles of Rescission of Contracts* (1916) at p. 86. 'You look at the stipulation broken from the point of view of its probable effect or importance as an inducement to enter into the contract' ". This suggests that one is looking to classify a term at the formation of the contract, and that one is not looking to the breach.

Wrappings Pty. Ltd.[88] The court had to deal with a clause requiring the plaintiff to devote his time and attention to promote the success of the defendant company. It was held that there had been a breach of this clause; and Walsh, J. in discussing the effect of the breach, noted the distinction made by Jordan, C.J. in the *Tramways Advertising Case,*[89] that in some circumstances a contract required a strict performance while in others substantial performance was enough. To decide what sort of performance was required in the contract in question, Walsh, J. went beyond the mere construction of the contract, and said:

> In a case like the present one, I think an enquiry is required not merely into the nature of the promise but also into the nature and circumstances of the breach, in order to determine whether it relieved the other party of its obligations under the contract.[90]

This is a very clear indication that the breach test could still be relevant, when the formal and literal words of the Sale of Goods Act were not in point.[91]

V. THE HONGKONG FIR DECISION

In 1961 the English Court of Appeal decided the *Hongkong Fir Case,*[92] a decision of fundamental importance in the classification of contractual terms. By a time charter of 26 December, 1956, the plaintiff shipowners hired to the defendant charterers the M.V. *Hongkong Fir* for a period of 24 months, the vessel being "in every way fitted for ordinary cargo service". Clause 3 of the charterparty provided that the owners should "maintain her in a thoroughly efficient state in hull and machinery during service". The vessel was delivered to the charterers on 13 February, 1957 and sailed from Liverpool to Virginia to pick up coal and carry it to Osaka. Although the vessel's machinery was in reasonably good condition when delivered, the age of the machinery necessitated an experienced and competent engine room staff. However, the staff provided did not meet these requirements and there were many serious breakdowns. On the voyage from Liverpool to Osaka (about eight and a half weeks) about five weeks were spent off hire. A further fifteen weeks were spent at Osaka. In an action by the owners for damages for wrongful repudiation of the charterparty, the charterers contended that they were entitled

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[88] (1962) 80 W.N. (N.S.W.) 1412.

[89] (1938) 38 S.R. (N.S.W.) 632 at 641.

[90] (1962) 80 W.N. (N.S.W.) 1412 at 1416. An analysis of the relevant High Court and N.S.W. decisions (as at August 1976) reveals that the courts have mainly focused on the construction test for disinguishing between conditions and warranties. However, one may wonder whether the judgment of Walsh, J. in *Mathieson* v. *Sunshine Wrappings Pty. Ltd.* marked an almost imperceptible Australian movement towards the approach adopted by the English Court of Appeal in the *Hongkong Fir Case.*

[91] An equally clear statement can be found in *Huntoon Co.* v. *Kolynos (Incorp.)* [1930] 1 Ch. 528 at 558 *per* Lawrence, L.J.

[92] [1962] 2 Q.B. 26. Noted by M.P. Furmston, "The Classification of Contractual Terms" (1962) 25 *M.L.R.* 584.

to repudiate by reason of the owners' breach of their obligations to deliver (and maintain) a seaworthy vessel. Alternatively it was argued that the charterparty was frustrated by delays and breakdowns.

At first instance, Salmon, J.[93] held that the shipowners had been in breach of their obligations, but that seaworthiness was not a condition precedent to their rights under the charterparty and that the charterparty had not been frustrated. The charterers were therefore only entitled to damages. The charterers then appealed to the Court of Appeal[94] which unanimously dismissed the appeal and held: (1) That the shipowners were in breach of the seaworthiness clause, but that the clause was not a condition of the charterparty, the breach of which would entitle the charterer to repudiate; (2) That the delays were not so great as to frustrate the commerical purpose of the charterparty.

In his judgment, Sellers, L.J. held that the obligation of seaworthiness amounted to a warranty, the breach of which sounded in damages.[95] The importance of the case, however, lies in the judgments of Upjohn and Diplock, L.JJ. Upjohn, L.J. put forward the proposition that the remedies open to an innocent party for the breach of a stipulation, not classifiable as a condition, depended upon the nature of the breach of contract and its foreseeable consequences. He noted that, when considering the remedies available to an innocent party "the decision whether the stipulation is a condition or warranty may not provide a complete answer".[96] Even if a term was not a condition, a breach which went to the root of the contract would give a right to repudiate.

Diplock, L.J. delivered perhaps the most significant judgment. What he said can be stated in two propositions.

(1) The test for deciding whether a party can repudiate depends on a positive answer to the question:

> . . . does the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?[97]

The same test is to be applied whether (a) the event complained of occurs as a result of a breach of contract by one of the parties; or (b) the event occurs through the fault of neither party. Thus the test is independent of fault, although different consequences will, of course, attach depending upon the cause of the event.

(2) The classification of contractual terms into "conditions" and "warranties" is not a comprehensive classification. Thus the question whether

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[93] [1961] 2 W.L.R. 716; [1961] 2 All E.R. 257.

[94] Sellers, Upjohn and Diplock, L.JJ.

[95] [1962] 2 Q.B. 26 at 60.

[96] *Id.* at 63. See also *Astley Industrial Trust* v. *Grimley* [1963] 1 W.L.R. 584 at 598 *per* Upjohn, L.J., and Lord Devlin, "The Treatment of Breach of Contract" [1966] *Camb. L.J.* 192 at 198.

[97] [1962] 2 Q.B. 26 at 66.

the breach occurring gives a right to repudiate cannot always be answered by an *à priori* classification of terms as either "conditions" or "warranties" in the sense in which these words are used on the Sale of Goods Act 1893 (U.K.). For Diplock, L.J. there were "many contractual undertakings of a more complex character which cannot be categorised as being 'conditions' or 'warranties' . . . . Of such terms all that can be predicted is that some breaches will, and others will not give rise to an event"[98] which results in a positive answer to the test in proposition (1). However, Diplock, L.J. did think that there were some terms which, by their very nature, gave rise to events requiring a positive answer to the test for *any* breach. And that there were some terms, the breach of which would never give rise to an event satisfying the test. The former were called "conditions", the latter "warranties".[99]

It can be seen that there is a difference,[100] albeit subtle, between the tests of Diplock, L.J. and Upjohn, L.J. Whereas Diplock, L.J. concentrated on the *events flowing from the breach,* Upjohn, L.J. concentrated on the *breach itself and its foreseeable consequences.* However, both the judgments can be seen as a reaction against the construction approach to the general law of contract fostered by the provisions of the Sale of Goods Act. It is clear that the Court of Appeal wished to avoid the problems of a complete dichotomy between conditions and warranties. This can be seen in the rejection of the *à priori* construction test and the recourse which the Court of Appeal made to decisions such as *Boone* v. *Eyre*, a case which Diplock, L.J. described as a "legal landmark".[101] Indeed, the decision of the Court of Appeal was so out of character with the bulk of cases decided in the previous hundred years that the decision appeared to some as novel.[102] The basic idea, however, of looking to the breach, was not novel though one aspect of the case was. The decision in the *Hongkong Fir Case* has been viewed by some commentators as having added a third category of terms intermediate[103] to conditions and warranties. The cases building on *Boone* v. *Eyre* did not create a third category of contractual terms. Those cases

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[98] *Id.* at 70.

[99] *Id.* at 69-70.

[100] Lord Devlin, *supra* n. 96 at 197. Diplock, L.J. reiterated his test based upon an analysis of the *events* flowing from the breach in *Hardwick Game Farm* v. *Suffolk Agricultural and Poultry Producers Association Ltd.* [1966] 1 All E.R. 309 at 346. Diplock, L.J.'s test was also followed by Lord Denning, M.R. in *Harbutt's "Plasticine" Ltd.* v. *Wayne Tank and Pump Co. Ltd.* [1970] 1 Q.B. 447 at 466. However, other judges have followed Upjohn, L.J.'s approach e.g., *Kenyon, Son & Craven Ltd.* v. *Baxter Hoare & Co. Ltd.* [1971] 1 W.L.R. 519 at 530 *per* Donaldson, J.

[101] [1962] 2 Q.B. 26 at 67-68. *Cf.* Upjohn, L.J.: "The great plantation case", *id.* at 63.

[102] For example, Lord Devlin, *supra* n. 96 at 192; T. Weir, "Contract—the Buyer's Right to Reject Defective Goods" (1976) 35 *Camb. L.J.* 33 at 35.

[103] *Cehave N.V.* v. *Bremer* [1976] 1 Q.B. 44 at 60 *per* Lord Denning, M.R. See also F.M.B. Reynolds, "Discharge of Contract By Breach" (1976) 92 *L.Q.R.* 17 at 17-18.

looked at the breach to answer the question whether a promise was dependent or independent. If the breach was minor it was no longer possible to insist that a term took effect as a condition precedent. It was not correct to say it had never been a condition precedent.[104] Thus it was the decision in the *Hongkong Fir Case* which added a third category to the list of contractual terms. Yet it was not necessary to do this. If the full force of the early cases had been utilized then the importance of any term could be gauged by its breach, unless the parties had clearly indicated what the consequences of the breach were to be. The emphasis being on the degree of the breach, as it affected the innocent party, and the extent to which the contract was executed.

The importance of the case cannot be overlooked; but it has been suggested that the decision did no more than assert "that in certain circumstances the breach of a non-essential term may indicate a refusal or inability to perform the contract and thus amount to a repudiation".[105] This suggestion results from a confusion of a particular instance of the general concept with the general concept itself. The general principle concerns the adjustment of rights independently of the conduct of either of the particular parties except insofar as conduct sheds light on the gravity of the breach: repudiation is merely a substantial breach of contract. The Sale of Goods Act 1893 (U.K.) s. 31(2) (N.S.W.: s. 34(2)) similarly draws upon the repudiation aspect present in *Mersey Iron and Steel Ltd.* v. *Naylor, Benzon & Co.*[106] and neglects that part of the case dealing with whether the breach went to a substantial part of the consideration. What is really involved is the extent of the breach, not whether the parties intend to keep the contract alive: the *emphasis* (as Diplock, L.J. points out) *is on breach not conduct.*

VI. THE CASES AFTER HONGKONG FIR

Cases decided in the United Kingdom after the *Hongkong Fir* decision show that the case did not bring clarity to the law of contractual terms. Indeed, text writers were confused not only as to terminology but also on the question whether to include the discussion of conditions and warranties in discussions of contractual formation or in a section on breach.[107]

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[104] *Graves* v. *Legg* (1854) 9 Exch. 709 at 717 *per* Parke, B.

[105] R. E. McGarvie, "The Common Law Discharge of Contracts Upon Breach" (1963) 4 *M.U.L.R.* 254 at 260; (1964) 4 *M.U.L.R.* 305. See *Tramways Advertising Pty. Ltd.* v. *Luna Park (N.S.W.) Ltd.* (1938) 38 S.R. (N.S.W.) 632 at 646; *Associated Newspapers* v. *Bancks* (1951) 83 C.L.R. 322 at 337-340 where some support can be found for the argument of R. E. McGarvie. See also *General Billposting Company Ltd.* v. *Atkinson* [1909] A.C. 118 at 121-22 *per* Lord Collins.

[106] (1884) 9 App. Cas. 434. The effects of s. 31(2) are explained by Cardozo, J. in *Helgar Corporation* v. *Warner's Features* (1918) 222 N.Y. 449; 119 N.E. 113.

[107] In *Chitty on Contracts* Vol. 1 (A. G. Guest ed., 23rd ed. 1968) para. 599 and paras. 1356-57 the learned editor tries to have it both ways.

The first important case is *The Mihalis Angelos,*[108] a decision of the Court of Appeal. It was held that a clause in a charterparty "expected ready to load" was a condition, the breach of which entitled the charterers to repudiate. Lord Denning, M.R. noted the division of the Sale of Goods Act of terms into conditions and warranties. However, in a passage reminiscent of Diplock, L.J. in *Hongkong Fir*, his Lordship said that it would "be a mistake . . . to look on that division as exhaustive. There are many terms . . . which cannot be fitted into either category".[109] He then restated the breach test of Upjohn, L.J.[110] but thought that the clause here should receive the same interpretation as it had in the sale of goods cases[111] where it had been held to be a condition.

Edmund Davies and Megaw, L.JJ. adopted a similar approach. Megaw, L.J. thought that in certain areas of commercial law there were "obvious and substantial advantages of having a firm and definite rule for a particular class of legal relationship".[112] In certain cases uniformity and predictability would favour a strict *à priori* classification rather than a more flexible breach test. Some authors have agreed: "much is to be said for a degree of rigidity in legal principle"[113] which could prevail against the decision in *Hongkong Fir*. But surely this is not an appropriate comment. One must agree with Professor Greig that the decision conflicts with the line of cases revived in *Hongkong Fir,* because the decision implies that the nature of a breach could not result in what was originally not a condition operating as if it were a condition from the outset.[114] What the *Mihalis Angelos* does is to assert that the mere choice of words can sometimes, in the interests of certainty be conclusive, a position refuted as far back as *Pordage* v. *Cole.*

A question left unanswered by the *Hongkong Fir* decision was the weight to be given to the choice of the term "condition" in a contract. The matter arose in a distributorship agreement considered by the Court of Appeal and by the House of Lords in *Wickman Machine Tool Sales Ltd.* v. *L. Schuler A.G.*[115] Schuler proposed to terminate a contract with Wickman on the basis that Wickman had broken clause 7(b), which made visits by Wickman a "condition" of the agreement. In a suit for wrongful dismissal, Mocatta, J. had

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[108] *Maredelanto Compania Naviera S.A.* v. *Bergbau Handel G.m.b.H.* [1971] 1 Q.B. 164; [1970] 3 W.L.R. 601; [1970] 3 All E.R. 125, Lord Denning, M.R., Edmund Davies and Megaw, L.JJ.

[109] [1971] 1 Q.B. 164 at 193.

[110] Note that Lord Denning, M.R. in *Harbutt's "Plasticine" Ltd.* v. *Wayne Tank and Pump Co. Ltd.* [1970] 1 Q.B. 447 at 466 adopted Diplock, L.J.'s test.

[111] [1971] 1 Q.B. 164 at 194 and see the cases there cited.

[112] *Id.* at 205. See also at 199 *per* Edmund Davies, L.J.

[113] G. C. Cheshire and C. H. S. Fifoot, *The Law of Contract* (J. G. Starke and P. F. P. Higgins), (3rd Aust. ed. 1974) p. 128. And see *Daulatram Rameshwarlall* v. *European Grain and Shipping Ltd.* [1971] 1 Lloyd's Rep. 368 at 372-73.

[114] D. W. Greig, "Condition—or Warranty?" (1973) 89 *L.Q.R.* 93 at 100.

[115] [1972] 1 W.L.R. 840; [1972] 2 All E.R. 1173 (C.A.); [1974] A.C. 235 (H.L.).

held that Schuler was entitled to repudiate, notwithstanding that the breaches were minor. Both the Court of Appeal and House of Lords disagreed with Mocatta, J.

Lord Denning, M.R. considered the various meanings of the word "condition". According to his Lordship, there were three main meanings:[116]

(1) *The proper meaning*: a provision on which the legal effect or force of an instrument depended as a prerequisite to the existence of the agreement or to the right to recover on the agreement.
(2) *The common meaning*: simply a term of an agreement.
(3) *The term of art*: that meaning present in the Sale of Goods Act. In that Act the word "condition" was defined to mean a term, the breach of which may give rise to a right to treat the contract as repudiated.

Schuler was arguing for the word's meaning as a term of art. Wickman argued that the common meaning of "condition" was the relevant meaning. In the opinion of Lord Denning, M.R. Schuler's argument was unreasonable in that it would mean that the slightest breach of the term would give rise to a right to repudiate. This, of course, involved a conflict and his Lordship resolved it in the following manner:

> Where a word like this word "condition" is capable of two meanings, one of which gives a reasonable result, and the other a most unreasonable one, the court should adopt the reasonable one. In addition, if one of the meanings is an ordinary meaning, and the other is a term of art, then it should be given its ordinary meaning, unless there is evidence from the surrounding circumstances that it was used by both parties as a term of art.[117]

The Court of Appeal also noted that the decision in the *Hongkong Fir Case* did not have the effect of altering the meaning of the word "condition" as a legal term of art.[118] In the present case, the court found that although the term was important the breach was not material enough to give a right to repudiate.

The House of Lords adopted a similar line of reasoning to that of the Court of Appeal. Some members of the House of Lords also noted that the fact that a particular construction gave an unreasonable result was a good reason for adopting an alternative interpretation because it would be unlikely for the parties to agree to an unreasonable construction.[119] The use of the word "condition" could be important but this would depend on the construction of the contract. Lord Reid thought that the word raised some sort of "presumption" in favour of its technical meaning. Lord Simon thought that the technical mean-

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[116] [1972] 1 W.L.R. 840 at 849-851. See also at 859-860 *per* Stephenson, L.J.
[117] *Id.* at 851. See also at 858 *per* Edmund Davies, L.J.
[118] *Id.* at 854-55 *per* Edmund Davies, L.J., and *id.* at 860 *per* Stephenson, L.J.
[119] [1974] A.C. 235 at 251 *per* Lord Reid; at 272 *per* Lord Kilbrandon.

ing was the word's "primary" meaning. However, it was necessary to find a material breach and there had been none in the present case.

A surprising aspect of the case is that in their dissenting judgments both[120] Stephenson, L.J. and Lord Wilberforce thought the use of the word "condition" was conclusive. To adopt so literal an approach to a commercial contract, though in line with the *Mihalis Angelos,* implies that the meaning of the word "condition" found in the Sale of Goods Act is applicable to all contracts. This proposition is not only unjustified, having regard to the scope of the Act, but also wrong; since the word "condition" does not always have the precise meaning found in the Sale of Goods Act. It could well have been argued that the parties, if they had intended to use the word condition as a "term of art" should have spelt this out by attaching the consequence of repudiation to any breach.[121]

Three things emerge from the cases following the *Hongkong Fir* decision. First, recognition was given to the fact that there are contractual terms other than conditions and warranties. Subsequent cases have also accepted the tests enunciated by Diplock, L.J. and by Upjohn, L.J. in the *Hongkong Fir Case.* However, with this has also come a failure to note the points of distinction between the two tests propounded in that decision.[122] Secondly, the decisions have been dominated by a restrictive literal approach. This was particularly true of the *Mihalis Angelos,* but it is also an explanation of why the courts found such great difficulty in solving the problem posed in *Wickman Machine Tool Sales Ltd.* v. *L. Schuler A.G.* by the use of the word "condition". The decisions have not seized the opportunity given by the *Hongkong Fir Case* to adopt a functional approach to the classification of express contractual terms. Indeed, the supposed doctrine of fundamental breach could be considered as a reaction against this literalism. In *Suisse Atlantique*[123] Lord Upjohn recognized the similarity between the doctrine of fundamental term (and breach) and the *Hongkong Fir* approach. Finally, it might be mentioned that the failure of Anglo-Australian law to develop a comprehensive doctrine of substantial performance quite

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[120] [1972] 1 W.L.R. 840 at 859-60 *per* Stephenson, L.J.; [1974] A.C. 235 at 262 *per* Lord Wilberforce. Note also the exclusion by the House of Lords of extrinsic evidence in the construction of the contract. *Id.* at 252 *per* Lord Reid; at 260 *per* Lord Morris; at 260-62 *per* Lord Wilberforce; at 265-270 *per* Lord Simon and at 272-73 *per* Lord Kilbrandon. See *James Miller Ltd.* v. *Whitworth Street Estates (Manchester) Ltd.* [1970] A.C. 583.

[121] [1972] 1 W.L.R. 840 at 853 *per* Edmund Davies, L.J.; [1974] A.C. 235 at 270-71 *per* Lord Kilbrandon. See also *Tarrabochia* v. *Hickie* (1856) 1 H. & N. 183 at 188 *per* Bramwell, B.; *London Guarantee Co.* v. *Fearnley* (1880) 5 App. Cas. 911 at 918 *per* Lord Watson; *Thomson* v. *Weems* (1884) 9 App. Cas. 671.

[122] See *supra* n. 106. The distinction was adverted to in *Harbutt's "Plasticine" Ltd.* v. *Wayne Tank and Pump Co. Ltd.* [1970] 1 Q.B. 447. *Cf. Decro-Wall International S.A.* v. *Practitioners in Marketing Ltd.* [1971] 1 W.L.R. 361 at 368 *per* Salmon, L.J.

[123] *Suisse Atlantique Société d'Armement Maritime S.A.* v. *N.V. Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361 at 421-22. See also Lord Devlin, *supra* n. 96 at 202-212.

possibly results from a failure to recognize the significance of the "breach approach" to the classification of express terms. The American[124] doctrine is based on *Boone* v. *Eyre,* a case central to the *Hongkong Fir* decision. However, our doctrine, such as it is, consists almost entirely of exceptions to the rule in *Cutter* v. *Powell.*[125] It is small wonder that one commentator has said that the English courts have lost sight of "basic principles".[126]

VII. CEHAVE N.V. v. BREMER

Although the decision in *Hongkong Fir* recognized that the classification of contractual terms into conditions and warranties was not exhaustive the question still remained[127] whether the Sale of Goods Act had created a statutory dichotomy. The English Court of Appeal in *Cehave N.V.* v. *Bremer*[128] has held that it did not.

The Facts

The dispute which gave rise to the case arose out of two contracts between Cehave N.V. (the buyers) and Bremer Handelsgesellschaft (the sellers). Under the first contract, the sellers agreed to sell 6,000 metric tons of U.S. citrus pulp pellets at $U.S.73.50 per metric ton to the buyers, c.i.f. Rotterdam. The second contract was for the same amount at the price of $U.S.73.75 per metric ton. Both contracts incorporated form No. 100 of the London Cattle Food Trade Association, clause 7 of which provided that shipment was to be made "in good condition".[129]

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[124] *Corbin on Contracts* Vol. 3A (1960) ss. 660, 700-712.

[125] (1795) 6 T.R. 320. Whether the exceptions have gone so far as to make the rule in *Cutter* v. *Powell* the exception is difficult to say. However, it is apparent that the Anglo-Australian cases have been as much concerned with an analysis of whether the contract permits a breach approach to be applied (e.g., whether the contract is entire or divisible) as with an analysis of the breach itself. See *Hoenig* v. *Isaacs* [1952] 2 All E.R. 176 (C.A.); *Corio Guarantee Corporation Ltd.* v. *McCallum* [1956] V.R. 755; *Morgan* v. *S. & S. Constructions Pty. Ltd.* [1967] V.R. 149 and (generally) Glanville Williams, "Partial Performance of Entire Contracts" (1941) 57 *L.Q.R.* 373, 490. The American approach puts much greater emphasis on the actual breach, see *supra* n. 124.

[126] Anthony Beck, *supra* n. 9 at 421. The confusion is probably traceable to Sergeant Williams' rules, appended to *Pordage* v. *Cole* (1669) 1 Wms. Saunders 319 at 320n; S. J. Stoljar, *op. cit.* (1957) 2 *Syd. L.R.* 217 at 245ff.

[127] Diplock, L.J. seems to have applied *Hongkong Fir Case* to a sale of goods case in *W. N. Lindsay & Co. Ltd.* v. *European Grain Shipping Agency Ltd.* [1963] 1 Lloyd's Rep. 437 at 443 but the question was neither fully argued nor fully considered in that case.

[128] [1976] 1 Q.B. 44; [1975] 3 W.L.R. 447; [1975] 3 All E.R. 739: Lord Denning, M.R., Roskill and Ormrod, L.JJ. This case has been noted by F. M. B. Reynolds, *op. cit. supra* n. 103, and by T. Weir, *op. cit. supra* n. 102.

[129] Clause 7 in full provides as follows: "SHIPMENT AND CLASSIFICATION —Shipment to be made in good condition, direct or indirect, with or without transhipment from . . . by first class steamer(s) and/or power engined ship(s) classed not lower than 100 Al or British Corporation B.S. or top classification in American, French, Italian, Norwegian, West German or other equal ranking Registers. In the event of less than 95 tons being tendered by any one vessel, Buyers shall be entitled to refund of any proved extra expenses for analysis, lighterage and sampling incurred thereby at port of discharge. In the event of more than one shipment being made, each shipment shall be considered a separate contract, but the margin on the mean quantity sold shall not be affected thereby".

In part performance of the contracts the German vessel *Hansa Nord* arrived in Rotterdam on 21 May, 1971; discharge into lighters began on the following day. The shipping documents had been tendered on 14 May and the buyer had paid the contract price which was (when converted into sterling) just over £100,000. When unloading began the cargo in No.1 hold was found to have been severely damaged. The cargo in No.2 hold had suffered only minor damage.[130] By this time the market price of the goods had fallen heavily and the goods were worth at that time about £86,000 in top condition.

On 24 May the buyers rejected the whole cargo. The buyers stated they were entitled to do so because there had been a breach of clause 7. The sellers refused to accept this and did not return the price. The cargo, which was still in lighters, was sold by order of the Rotterdam County Court. An astonishing sequence of events then followed. On 2 June, 1971 the goods were sold to a Mr. Baas for £33,720. On the same day Mr. Baas sold the goods to Cehave (i.e., the original buyers) for the same price. The buyers then used the goods in the same way as they had originally intended, although in slightly smaller quantities.[131]

Arbitration took place and the matter was referred to an umpire.[132] He found the damage to have been due "to the fault of the ship during the voyage",[133] and found for the sellers. The buyers appealed to the Board of Appeal of the Grain and Feed Trade Association which upheld the claim of the buyers that there had been a breach of clause 7 which entitled them to reject the goods. The Board gave its award in the form of a special case for the court.

Mocatta, J.[134] held that there had been a breach of clause 7 because not all the goods had been shipped in good condition and that the clause was a "condition" in the sense used by s. 11(1)(b) of the Sale of Goods Act (U.K.) 1893 (N.S.W.: s. 16(2)). Mocatta, J. specifically held that s. 11(1)(b) created a statutory dichotomy, and stated that the *Hongkong Fir Case* had no application to sale of goods. Mocatta, J. also stated that the question whether a term was a condition or warranty depended purely

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[130] The "out turn" weights of the holds were: Ex-hold Number 1: 1,260 metric tons; Ex-hold Number 2: 2,053 metric tons. The cargo in Number 1 hold had suffered severe damage, whereas the cargo in Number 2 hold contained a small proportion (about 2% to 5%) of carbonised pellets. [1974] 2 Lloyd's Rep. 216 at 219.

[131] However, F. M. B. Reynolds, *supra* n. 103 at 18 has suggested that some difference did exist between the original purpose for which the buyers bought the goods and the purpose for which they were ultimately used.

[132] Clause 29 of the standard form contract of the London Cattle Feed Trade Association contained a *Scott* v. *Avery* clause. Clause 28 provided that the courts of England would have exclusive jurisdiction over all disputes arising under the contract. Clause 28 also provided that the English law was to be the governing law of the contract.

[133] [1976] 1 Q.B. 44 at 65 *per* Roskill, L.J.

[134] [1974] 2 Lloyd's Rep. 216. The decision of the Board of Appeal is discussed *id.* at 216-22.

on the construction of the contract.[135] The sellers appealed. The Court of Appeal unanimously allowed the appeal, and held that the decision in *Hongkong Fir* could be applied to the sale of goods,[136] and that regard could be had to the extent of the breach in determining whether an innocent party could rescind for breach of contract.

The Decision of the Court of Appeal

In the Court of Appeal the sellers submitted:[137] first, that Mocatta, J. was wrong in holding that clause 7 was a condition. They urged that the courts should lean against construing a term as a condition unless it was clearly shown that that was what the parties had intended; secondly, that the definition in s. 11(1)(b) Sale of Goods Act (U.K.) 1893 (N.S.W.: s. 16(2)) was not clear enough to exclude a term which was neither a "condition" nor a "warranty"; thirdly, that the principles enunciated in the *Hongkong Fir Case* were of general application and hence could be applied to sale of goods cases, i.e., the condition/warranty distinction in the Sale of Goods Act did not constitute a complete dichotomy; finally, the sellers argued that clause 7 was an "intermediate" or "innominate" term and here the breach did *not* go to the root of the contract and thus the buyers were not entitled to rescind the contract.

The buyers submitted:[138] first, that clause 7 was a condition, the breach of which gave the buyers a right to reject the goods; secondly, that the *Hongkong Fir Case* did not apply to the sale of goods;[139] thirdly, that if the decision in *Hongkong Fir* did apply to the sale of goods then in the present case the breach went to the root of the contract and thus entitled the buyers to rescind.

Lord Denning, M.R.[140] analysed the cases on the general law of contract and concluded that the courts in the eighteenth and nineteenth centuries had developed an exhaustive division between dependent and independent promises based on the extent of the breach. Only if the breach went to the root of the contract would a term be considered to

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[135] *Id.* at 225.

[136] The question whether the goods were of "merchantable quality" within the meaning of s. 14(2) Sale of Goods Act (U.K.) 1893 (N.S.W.: s. 19(2)) was also decided against the buyers, the decision of Mocatta, J. being reversed on this point as well.

[137] The arguments of the sellers can be found in [1976] 1 Q.B. 44 at 47-50 and at 54.

[138] The arguments of the buyers can be found in [1976] 1 Q.B. 44 at 50-54.

[139] *Id.* at 50. The reasons given to support this argument were: (1) s. 11(1)(b) Sale of Goods Act 1893 (U.K.) contained a condition/warranty dichotomy. According to the buyers "There is no room without a distortion of language for any tertium quid, intermediate between 'condition' and 'warranty' in contracts for the sale of goods": *Id.* at 51; (2) the *Hongkong Fir Case* involved a "continuing relationship" which did not exist in a contract for the sale of goods; (3) there was nothing in the *Hongkong Fir Case* to suggest that the principle enunciated there applied to contracts for the sale of goods: *Id.* at 52.

[140] [1976] 1 Q.B. 44 at 57-58 citing *Boone* v. *Eyre* (1777) 1 H. Bl. 273n; *Davidson* v. *Gwynne* (1810) 12 East 381 at 389; *Ellen* v. *Topp* (1851) 6 Exch. 424 at 441. See *supra* at 34-38.

be a dependent covenant. If the breach was not so severe then the stipulation was only an independent covenant. However, with respect it is suggested that this analysis presents far too clear a picture of the old law, where it is impossible to discern a totally coherent doctrine. The cases in the eighteenth and nineteenth centuries had not developed the exhaustive division, noted by Lord Denning, M.R., based on the extent of the breach. It is true that *Davidson* v. *Gwynne,*[141] *Ellen* v. *Topp*[142] and *MacAndrew* v. *Chapple*[143] and other decisions are consistent with Lord Denning, M.R.'s proposition, but there were also many cases which determined the question of independency/dependency on the basis of the construction of the contract at the time of its formation, for example: *Glazebrook* v. *Woodrow*;[144] *Behn* v. *Burness.*[145] Moreover, *Graves* v. *Legg,*[146] one of the cases cited by Lord Denning, M.R., stated that the breach test for distinguishing independent and dependent covenants applied only to partially executed contracts, where the party seeking to rely on the covenant as a dependent covenant had taken some benefit under the contract so that the contract was partially executed from that party's point of view. In *Cehave N.V.* v. *Bremer* the buyers had not taken any benefit under the contract and, in the sense of the distinction in *Graves* v. *Legg*, the contract was still executory. Therefore, far from being authority in favour of the application of the breach test, *Graves* v. *Legg* was directly to the contrary.

His Lordship next superimposed the Sale of Goods Act upon this law and concluded that s.11(1)(b) did not contain a condition/warranty dichotomy in that the cases stretching from 1777 to 1884 on "intermediate"[147] stipulations were still applicable and that Parliament in 1893 had not intended to exclude these cases. It should here be pointed out, with respect, that Lord Denning, M.R. was not being historically accurate. It has been shown above[148] that the idea of a third class of terms was introduced by the decision in the *Hongkong Fir Case.* The early cases quoted by his Lordship only looked at the breach to see whether a promise was dependent or independent; the terms which Sir MacKenzie Chalmers stated to be equivalent to conditions and warranties. But it must be admitted that regard can never be had to the breach to see whether a term is a condition or a warranty. Nevertheless Lord Denning, M.R. thought that s. 61(2) Sale of Goods Act (U.K.) 1893 (N.S.W.: s. 4(2)) which preserved the "rules of the common law" allowed recourse to be had to the earlier cases. His

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141 (1810) 12 East 381.
142 (1851) 6 Exch. 424.
143 (1866) L.R. 1 C.P. 643.
144 (1799) 8 T.R. 366.
145 (1863) 3 B. & S. 751.
146 (1854) 9 Exch. 709 at 716.
147 [1976] 1 Q.B. 44 at 60. The year 1777 would seem to refer to *Boone* v. *Eyre* (1777) 1 H. Bl. 273n; and 1884 to *Mersey Steel and Iron Co.* v. *Naylor Benzon & Co.* (1884) 9 App. Cas. 434. See Section II, *supra.*
148 See *supra* at 49-50.

Lordship held that clause 7: "shipment to be made in good condition" was an intermediate stipulation.[149] Lord Denning, M.R. also found that the breach here did not go to the root of the contract and therefore the buyers were not entitled to rescind.

Roskill, L.J. first examined the contract between the buyers and sellers and found that clause 7 could not on principles of construction be construed as a condition and that a court should not be "over ready"[150] to construe a term as a condition.[151] His Lordship next turned to the provisions of the Sale of Goods Act and concluded that it was "desirable that the same legal principles should apply to the law of contract as a whole . . . ."[152] Roskill, L.J. then stated that there was nothing in the *Hongkong Fir Case* to say that the principles there enunciated were not of universal application.[153] However, the main argument against applying that decision in the present case was s.11(1)(b) Sale of Goods Act (U.K.) 1893 (N.S.W.: s. 16(2)) which states: "whether a stipulation in a contract of sale is a condition . . . or a warranty . . . depends in each case on the construction of the contract". However, Roskill, L.J. rejected this argument and held that the *antecedent* common law could be applied.[154] His Lordship noted that the Sale of Goods Act was intended to codify the common law and thus he felt that the court should lean towards construing the Act as not changing the law.[155]

Roskill, L.J. noted that in the nineteenth century cases before 1893 there was no distinction between the general law of contract and the law relating to contracts for the sale of goods. Therefore, he thought that the effect of the buyers' argument would be that Parliament had "effected a revolution in the law relating to sale of goods by establishing . . . a statutory dichotomy between conditions and warranties . . . ."[156] His Lordship did not think that this was possible. He therefore held that

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[149] [1976] 1 Q.B. 44 at 61. It should be noted that Lord Denning, M.R. would have felt himself bound by any previous decisions holding this particular term to be a condition. However, there were none. See *infra* and n. 151.

[150] *Id.* at 70. Roskill, L.J. was obviously influenced by the tendency of buyers to use any means to avoid a contract in a falling market; *Id.* at 71.

[151] Roskill, L.J. noted (*id.* at 70) that "No statutory provision comparable with sections 12, 13 or 14 of the Sale of Goods Act 1893 compels us to construe clause 7 as a 'condition' and there is no authority, binding or otherwise, which of necessity or as a matter of reasoning compels that result".

[152] *Id.* at 71. However, *contra* see T. Weir, *supra* n. 102 at 38.

[153] [1976] 1 Q.B. 44 at 71. See the arguments for the buyers especially *id.* at 52.

[154] *Id.* at 72. Roskill, L.J. stated that s. 61(2) preserved "the antecedent common law position save to the extent that any express provision of the Act is inconsistent with the common law". However, this section may prove to be a mere simulacrum since (1) as already noted (*supra* at 57) there were no cases before 1893 on "intermediate stipulations"; (2) an attempt to preserve the breach test by recourse to s. 61(2) may founder since as it has already been pointed out, (*supra* at 32-42) the cases before 1893 vacillated between the breach test and the construction test, and (3) an attempt to preserve the breach test by relying on s. 61 (2) may be futile since s. 11(1)(b) talks of a construction test and the importation of the breach test would thus seem to be inconsistent with s. 11(1)(b).

[155] [1976] 1 Q.B. 44 at 72.

[156] *Id.* at 73. See the references in Roskill, L.J.'s judgment to the works of Sir Mackenzie Chalmers (*id.* at 72-73).

there was no condition/warranty dichotomy in the Sale of Goods Act. Since he had held that clause 7 was not a condition, his Lordship's subsequent finding that the breach did not go to the root of the contract led him to find in favour of the sellers on this point.

Ormrod, L.J. stated that before 1893 the courts had tended to ask the question: was the buyer "bound to accept the goods"?[157] and that the answer depended on whether the breach went to the root of the contract. Today, however, he noted that the courts tended to ask: does the term constitute a condition or a warranty? For his Lordship this question tended "to put the cart before the horse".[158] Nevertheless, Ormrod, L.J. thought that s. 11(1)(b) preserved the essential dichotomy of the old law between the right to reject and the right to damages. His Lordship stated that s. 11(1)(b) did *not* create a statutory dichotomy, rather it was "essentially a definition section, defining 'condition' and 'warranty' in terms of remedies".[159] However, with respect, it can be argued that s. 11(1)(b) is mainly concerned with establishing that a *construction test* is to be applied to determine whether a term is a condition or a warranty rather than with a mere definition of the appropriate remedies available.

Ormrod, L.J. decided that the decision in the *Hongkong Fir Case* was applicable to the sale of goods: "[I]t is the events resulting from the breach . . . which may destroy the consideration for the buyer's promise and so enable him to treat the contract as repudiated".[160] This was, of course, the approach of Diplock, L.J. in the *Hongkong Fir Case* and Ormrod, L.J. may be criticized for failing to distinguish this test from that of Upjohn, L.J. which concentrated on the breach and its foreseeable consequences.[161] As did the other members of the Court of Appeal, Ormrod, L.J. thought that s. 61(2) permitted the *Hongkong Fir Case* to be applied to the sale of goods, although his Lordship doubted whether that case had created a third category of terms: "rather, it recognises another ground for holding that a buyer is entitled to reject, namely, that, de facto, the consideration for the whole promise has been destroyed".[162] His Lordship concluded that clause 7 was *not* a condition and that the extent of the breach did not give the buyers a right to rescind the contract. Alternatively, he held that clause 7 constituted a warranty, its breach giving the buyers a claim for damages.

The central unifying element in the judgments in the Court of Appeal was the view that s. 61(2) Sale of Goods Act (U.K.) 1893 (N.S.W.: s. 4(2)) allowed recourse to be had to the common law. The case, it is suggested, stands or falls on the validity of this proposition.

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[157] *Id.* at 82.
[158] *Ibid.*
[159] *Id.* at 83.
[160] *Ibid.*
[161] *Supra* at 49 and see nn. 100 and 110.
[162] [1976] 1 Q.B. 44 at 83-84.

The first question to be answered is how far it is possible to have recourse to the common law bearing in mind that the Sale of Goods Act was a codifying enactment. In *Bank of England* v. *Vagliano Bros.*,[163] Lord Herschell, in a classic statement of the law, said:

> I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view . . . . I am of course far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code. If, for example, a provision be of doubtful import, such resort would be perfectly legitimate . . . . What, however, I am venturing to insist upon is, that the first step taken should be to interpret the language of the statute, and that an appeal to earlier decisions can only be justified on some special ground.

Although this case was concerned with the Bills of Exchange Act 1882 (U.K.), the principles enunciated by Lord Herschell are equally applicable to the Sale of Goods Act.[164] In *Robinson* v. *Canadian Pacific Railway Co.*[165] the Privy Council said that recourse could be had to previous decisions where the statute had used words which had previously acquired a "technical meaning". Thus, the Court of Appeal in *Cehave N.V.* v. *Bremer* must have taken the view that s. 11(1)(b) contained words of "doubtful import" or contained words with "technical meanings", i.e., that there was some special ground for referring to the cases *before* the Sale of Goods Act. But the words of s. 11(1)(b) do, on their face, seem manifestly clear. With respect, it is submitted that the Court of Appeal assumed too easily that the Act did not change the law. The correct approach would have been "to treat the statute as making a new departure and to disregard what it replaced".[166]

Even if one accepts the view that recourse may be had to the common law further criticism can still be levelled at the decision of the Court of Appeal in *Cehave N.V.* v. *Bremer*. Section 61(2) of the Sale of Goods Act (U.K.) 1893 (N.S.W.: s. 4(2)) provides that "The

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[163] [1891] A.C. 107 at 144-45.

[164] *Robinson* v. *Canadian Pacific Railway Co.* [1892] A.C. 481 at 487, *Abbott & Co.* v. *Wolsey* [1895] 2 Q.B. 97 at 99-100 *per* Lord Esher, M.R.; *Bristol Tramways and Carriage Company Ltd.* v. *Fiat Motors Ltd.* [1910] 2 K.B. 831 at 836 *per* Cozens-Hardy, M.R.; *Niblett Ltd.* v. *Confectioners' Materials Company Ltd.* [1921] 3 K.B. 387 at 402-03 *per* Atkin, L.J.; *Manchester Liners* v. *Rea Ltd.* [1922] 2 A.C. 74 at 87 *per* Lord Atkinson. For the Australian position see *Kidman* v. *Fisken, Bunning & Co.* [1907] S.A.L.R. 101 at 105-06 *per* Way, C.J.; *Sorley & Stirling* v. *Surawski* [1953] Q.S.R. 110 at 116 *per* Stanley, J. See also D. C. Pearce, *Statutory Interpretation in Australia* (1974) paras. 158-160.

[165] [1892] A.C. 481 at 487.

[166] *Benjamin's Sale of Goods, op. cit. supra* n. 44, para. 2.

rules of the common law . . . save in so far as they are inconsistent with the express provisions of this Act . . . shall continue to apply to contracts for the sale of goods . . . ." Although there is a dearth of authority on the matter, it appears that s. 61(2) only allows recourse to the law in cases decided *before* the enactment of the Sale of Goods Act,[167] at least where the Act purported to codify that law. It has already been noted[168] that there were no cases before 1893 which dealt with "innominate terms" and thus it is impossible to apply the principles of the *Hongkong Fir Case* to the sale of goods without a distortion of the language in s. 61(2).

Moreover, it is of fundamental importance that the rules of the common law which one seeks to preserve (by reference to s. 61(2)) should not be inconsistent with the Act. However, there are three reasons for saying that there is conflict. First, as has been shown in Section III (*supra*), Sir Mackenzie Chalmers did not faithfully reproduce the common law in drafting the Sale of Goods Act. Section 11(1)(b) on its face requires that terms be evaluated at the date of the formation of the contract by means of a construction test and not at breach. If a term cannot at the outset be classified as a condition then *ex hypothesi* it must be a warranty. It is clear that the breach of a warranty does not give a right to repudiate. However, in the general law of contract the common law position (since the decision in the *Hongkong Fir Case*) is that a breach of a term (being neither a condition nor a warranty) may give a right to rescind if the breach goes to the root of the contract. To this extent the law of sale of goods and the general law of contract differ. Secondly, it could be argued that the Sale of Goods Act had a form of breach test "built in". In situations where the contract is partially executed the property in the goods will have passed to the buyer, or he will have "accepted" the goods within the meaning of the Act. In these situations a plea of breach of condition will cease to be available and the buyer's remedies will be reduced to those available for a breach of warranty. It was pointed out above that the breach test has not been applied by the courts in all executory situations and the courts have sometimes (as in *Graves* v. *Legg*) distinguished the breach test on this very basis. However, the draftsman of the Act abandoned the breach test even in situations where the property had passed and the contract was partially executed. Of course, this had the effect of restricting the relevance of

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[167] See *Cehave N.V.* v. *Bremer* [1976] 1 Q.B. 44 at 72 *per* Roskill, L.J.; ". . . section 61(2) preserves the antecedent common law position save to the extent that any express provision of the Act is inconsistent with the common law". See also *Riddiford* v. *Warren* (1901) 20 N.Z.L.R. 572 at 576-77 *per* Williams, J.; *Watt* v. *Westhaven* [1933] V.L.R. 458 at 467-68 *per* Gavan Duffy, J. The phrase "the rules of the common law" in s. 61(2) has received some interpretation on the question whether the phrase "common law" includes the rules of equity: *Riddiford* v. *Warren* (1901) 20 N.Z.L.R. 572; *King* v. *Greig* [1931] V.L.R. 413; *Watt* v. *Westhaven* [1933] V.L.R. 458. Also note Sale of Goods Act 1923 (N.S.W.) s. 56 which saves equitable remedies in respect of a breach of contract.

[168] See *supra* at 57, 58 and n. 154.

the breach approach to determining the *extent* of the breach of warranty. Hence the gravity of the breach could not be a reason for rescinding the contract but could determine the extent of the loss incurred. In any event this shows that the Act could well achieve results consistent with the law in *Hongkong Fir* where the contract was partially executed but inconsistent with those cases such as the *Duke of St. Albans* v. *Shore* where the contract was executory.

Thirdly, a third class of terms would *not* be consistent with the Sale of Goods Act which speaks only in terms of two classes: conditions and warranties.[169]

It is therefore suggested, with respect, that Mocatta, J.[170] was correct in his refusal to apply the *Hongkong Fir Case* to the sale of goods. However, this should not be taken to suggest that there were not very sound policy reasons behind the decision of the Court of Appeal.[171] First, a buyer should not be entitled to reject for very minor deviations simply because he had bought in a falling market. Secondly, the court in *Cehave N.V.* v. *Bremer* was conscious of the fact that a decision on clause 7 of the contract (which was a standard form contract) would bind other courts. This may have been the reason why Ormrod, L.J. found (as an alternative ground for his decision) that clause 7 was a warranty. However, this merely shows how absurd the present state of the law is. By calling clause 7 a warranty, Ormrod, L.J. in effect held that no matter what condition the goods were in the buyers could not rely on clause 7 to rescind the contract.

It must be admitted that if the decision in *Cehave N.V.* v. *Bremer* was correct, it would have the beneficial result that it would "no longer be necessary to place so much emphasis on the potential effects of a breach".[172] It is suggested, with respect, however, that this result should

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[169] It should be noted that there is considerable academic support for the view that the Sale of Goods Act contains a condition/warranty dichotomy. See G. C. Cheshire and C. H. S. Fifoot, *op. cit. supra* n. 113, p. 122; D. W. Greig, *Sale of Goods* (1974) p. 156; F. M. B. Reynolds, "Warranty, Condition and Fundamental Term" (1963) 79 *L.Q.R.* 534 at 535-36; J. L. Montrose, "Some Problems About Fundamental Terms" [1964] *Camb. L.J.* 60, 254 at 75; K. C. T. Sutton, "Sales Warranties Under the Sale of Goods Act and the Uniform Commercial Code" (1967) 6 *M.U.L.R.* 150 at 152-53, esp. at n. 12; and Law Reform Commission of N.S.W., *Working Paper on the Sale of Goods* (1975) paras. 3.19, 13.18. The last two references expressly state that the *Hongkong Fir Case* [1962] 2 Q.B. 26 is not applicable to the sale of goods. But *cf. Chalmers' Sale of Goods* (M. Mark ed., 19th ed. 1975) p. 20. See also P. S. Atiyah, *An Introduction to the Law of Contract* (2nd ed. 1971) p. 123.

[170] It is interesting to note the part played by Sir Alan Mocatta in this branch of the law. He was judge at first instance in the *The Mihalis Angelos* [1971] 1 Q.B. 164 (C.A.); *Wickman Machine Tool Sales Ltd.* v. *L. Schuler A.G.* [1974] A.C. 235 (H.L.); and also in *Cehave N.V.* v. *Bremer* [1976] 1 Q.B. 44 (C.A.). It is an indictment of the uncertainty in this area of the law that such an eminent commercial law judge was reversed on appeal in each of the above cases.

[171] See *Cehave N.V.* v. *Bremer* [1976] 1 Q.B. 44 at 82-83 *per* Ormrod, L.J. for an indication of various important matters of policy.

[172] *Id.* at 83 *per* Ormrod, L.J.

be achieved by statutory reform, and not by what can only be termed a doubtful decision.

When one takes into consideration the unlikelihood of an appeal to the House of Lords in *Cehave N.V.* v. *Bremer*[173] and the fact that the question which arose in that case will usually only occur in the context of c.i.f. contracts (where the payment of price and the passing of property in the goods are not simultaneous) it becomes manifestly clear that the legislature must give urgent consideration to reform in this area of contract law. If the legislature fails to do so it could be justly criticized for allowing law reform to depend upon the fortuitous re-occurrence of a set of facts which would allow the issues in *Cehave N.V.* v. *Bremer* to be re-examined.

VIII. REFORM OF THE LAW

The law relating to conditions and warranties is in such a state of confusion that the time is ripe for statutory reform. Classification of terms as conditions and warranties has failed to produce the certainty required by the commercial contract.[174] The addition of a breach test to the traditional construction approach would merely result in further confusion especially in view of its possible inconsistency with the terms of the Sale of Goods Act. Moreover, the Act has been the subject of considerable criticism.[175] Abolition of the dichotomy between conditions and warranties has been advocated (extra-judicially) by Lord Denning,[176] by Professor Allan,[177] and most recently by the Law Reform Commission of New South Wales.[178]

The abolition of the dichotomy involves the adoption of a single contractual term. Two alternatives have provoked the most discussion: (1) Any breach of such a term would *automatically* give a right to the innocent party to terminate the contract and claim damages. This alternative has statutory recognition in the United States and its adoption in English law has been advocated, for example, by Reynolds.[179] The most serious problem facing the court here is the obvious harshness of the rule in its absolute operation. The effect of this alternative is to raise

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[173] From the correspondence which the authors of this article have had with the buyers' solicitors, it appears that the buyers do not intend to appeal to the House of Lords.

[174] F. M. Burdick, "Conditions and Warranties in the Sale of Goods" (1901) 1 *Col. L.R.* 71; G. C. Cheshire and C. H. S. Fifoot, *op. cit. supra* n. 113, pp 122-23.

[175] The failure of the Act to distinguish promises from conditions has been the subject of much of the criticism: *Williston on Contracts* Vol. 5 (1961) s. 665; F. M. B. Reynolds, *supra* n. 169 at 537-38. See Uniform Sales Act (1906) s. 11 and *supra* n. 169.

[176] (1967) 41 *A.L.J.* 293.

[177] D. E. Allan, "The Scope of the Contract" (1967) 41 *A.L.J.* 274 at 276.

[178] *Working Paper on the Sale of Goods* (1975) para. 3.21. The reference of the Commission was, of course, much wider than a consideration of conditions and warranties.

[179] F. M. B. Reynolds, *supra* n. 169 at 553; Uniform Commercial Code (1962) s. 2-601; but see s. 2-606.

all contractual terms to the status presently occupied by terms designated conditions. In the United States this has resulted in the creation of exceptions and exclusions which have had the effect of abrogating the certainty sought by the adoption of this absolute concept.[180] It is likely that a similar process would result if our Sale of Goods Act was amended in this way. Moreover, this concept is contrary to the trend of decisions such as the *Hongkong Fir Case* because English courts have shown a distinct dislike for terms operating as "conditions". Thus this alternative does not represent a viable position and should be rejected in favour of a more relative concept.

(2) Under the second approach only a *substantial* breach of the term would give a right to rescind the contract and claim damages. Lesser breaches would sound only in damages. This is the approach of the Court of Appeal in *Cehave N.V.* v. *Bremer*; but with one substantial difference: it is not necessary to ask, on an *à priori* construction, whether a term is a condition or a warranty. There is therefore no artificial concept of presumed intention. Each term of the contract would then be a *neutral term* the breach of which would be analysed in terms of a relative concept. Adoption of this approach has the significant advantage (over the present system) of resolving the issue of remedies at the time of contractual breach and not at the time of contractual formation. This is a logical improvement and it has received the tentative approval of the Law Reform Commission of New South Wales. It is significant that the Commission took the view that a statutory reform of the law was required, indeed their *Working Paper* speaks in terms of a statutory dichotomy and clearly puts forward the view that the Commission did not regard the Act as amenable to the construction later placed on it by the English Court of Appeal in *Cehave N.V.* v. *Bremer*. Although this second approach seems the better of the two, the relative concept containing an inherent flexibility lacking in the first alternative, one problem looms large: how will certainty be obtained when a party to a contract will not know the full extent of his rights under it until the magnitude of the breach is known? It is to this question that most attention should be directed.

The Commission has suggested that the single contractual term be called a "warranty"[181] and that a "material" breach of the warranty will give the buyer a right to either "terminate" or "affirm" the contract. The proposed s. 54A of the Sale of Goods Act (clause 8 of the Draft Bill) will govern "materiality". It is to be a question of fact whether

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[180] John Honnold, "A Buyer's Right of Rejection: A Study in the Impact of Codification Upon a Commercial Problem" (1949) 97 *University of Pennsylvania Law Review* 457 at 461-66.

[181] *Working Paper on the Sale of Goods* (1975) para. 3.21. The term "condition" would be restricted to the fact or event which limits or qualifies either the seller's promise to deliver or the buyer's right to reject. The Commission has also used the term warranty to include every statement which induces entry into a contract: *id.* para. 13.1.

or not a breach is material: s. 54A(2); and a breach is material when it goes to the "root" of the contract: s. 54A(3). The considerations relevant to materiality are: the terms and nature of the warranty: s. 54A(4)(a); the consequences to the buyer: s. 54A(4)(b); and the other terms of the contract: s. 54A(4)(c). It will be noticed that the Commission has approached the problem of contractual terms primarily from the point of view of the buyer.[182] The rationale here is that the seller commits most breaches of contract. The requirement of a "material" breach is designed to overcome the problems posed by the over-zealous buyer in times of commodity price fluctuations.[183] This is reinforced by the right given to the seller to remedy a breach when a buyer has given notice of termination of the contract: proposed s. 54D.

The Commission's proposals represent, in our respectful opinion, the most realistic way to deal with the problems of conditions and warranties. However, there are some points which require further consideration. *First*, the Commission has chosen the label "warranty"[184] for its single contractual term. This is unfortunate. The word already has varying meanings in different branches of contract law; for example, in insurance law the term has that meaning presently occupied by "conditions" in the Sale of Goods Act. Moreover, the judiciary is likely to be influenced by previous law on the meaning of warranty. It would be far more satisfactory to have a neutral word such as the "term" of the contract. Similar problems surround the phrase "root of the contract"; metaphors, even if given statutory authority are still no more than colourful phrases without content.[185] It is suggested that what is more important (in this relative concept) is the value to each party of the actual performance, or projected performance where the contract is executory.

Secondly, the factors actually governing the buyer's right to terminate should be clear. The Commission has relied on the *Hongkong Fir Case* but the burden of that decision lies in evaluating the different approaches of Upjohn and Diplock, L.JJ. This will become crucial when dealing with the question of whether or not the buyer has "affirmed" the contract and therefore lost his right to terminate it.[186] A breach will be material when

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[182] *Id.* para 13.2. *Cf. Motor Dealers Act* 1974 (N.S.W.) s. 38(1).

[183] *Id.* paras. 13.5-13.6. See the discussion in *Arcos* v. *Ronaasen and Son* [1933] A.C. 470 at 480 and G.H. Treitel, "Some Problems of Breach of Contract" (1967) 30 *M.L.R.* 139 at 153-54. It is as well the basic rationale of *Cehave N.V.* v. *Bremer* [1976] 1 Q.B. 44.

[184] The Commission thought that this would return the concept of warranty to its original position at common law, see *supra* at 41-42.

[185] See the discussion in *Bank Line Ltd.* v. *Arthur Capel and Co.* [1919] A.C. 435 at 459 *per* Lord Sumner.

[186] See *supra* at 49. Also see Lord Devlin, *supra* n. 96 at 197 and proposed ss. 54A(9)-(13). Note the way the Commission has dealt with the present (N.S.W.) s. 16(3): *Working Paper on the Sale of Goods* (1975) paras. 13.1, 13.19; the section will have no rôle to play. And *cf.* Misrepresentation Act 1967 (U.K.), s. 4; Misrepresentation Act 1971-1972 (S.A.), ss. 11 and 12, and s. 15 of the Consumer Transactions Act 1972 (S.A.).

it goes to the root of the contract; however, it may be events flowing from the breach (and not the breach itself) which go to the root. If the buyer actually waits for these events to occur he may find that he has affirmed the contract. Under s. 38 of the Sale of Goods Act 1923 (N.S.W.) a buyer is deemed to have accepted the goods when: (1) he intimates to the seller that he has accepted them; or (2) he does any act in relation to the goods inconsistent with the seller's ownership; or (3) when, after a reasonable time, the buyer retains the goods. Affirmation is not exactly synonymous with acceptance under s. 38: the buyer will have an opportunity to ensure that the goods are in conformity with the contract; and the proposed s. 54A(12) retains for the buyer the right to terminate the contract after the goods have been delivered. What is required is a proviso stating that a buyer shall retain the right to terminate the contract (subject to s. 38) where unforeseen events flowing directly from the breach result in a substantial detriment to the buyer.

Thirdly, the relevance of the actual terms of the contract must be considered. Difficulties primarily arise where the parties have indicated the importance of particular terms at the time of formation. The Commission's proposals here are eminently sensible:

> Where the parties have expressly designated those terms breach of which would justify rejection and rescission, i.e., they have specified what is a material breach, the matter should be one for decision by the court, with the expression of the opinion of the parties as to what is material being only one factor to be taken into account in reaching that decision. The court should decide whether or not a breach is material in the light of all the circumstances of the case, including the stipulations by the parties. The question of whether the breach of a term justifies rescission is not to be answered by postulating an agreement or "intention" on the part of the parties at the time of entry into the contract.[187]

This functional approach will prevent the courts reverting to the literalism which permeated the nineteenth century decisions. The difficulty presented by the use of terms such as "condition" and encountered by the courts in *Wickman Machine Tool Sales Ltd.* v. *L. Schuler A.G.* will thus disappear. The court will then be free to give a term such weight as it thinks fit: proposed s. 54A(6). Clauses governing rejection are to be void "unless it is shown as a fact that it is fair or reasonable to rely on the stipulation": proposed s. 54A(7). This is important because, whilst preserving the autonomy of the parties, this section will put standard form contracts in their place by requiring not only that the terms of the contract have direct relevance to the particular transaction but also have

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[187] *Id.* para. 13.40(a).

relevance to the actual contractual breach. The provision is, of course, not limited to standard form contracts.

IX. CONCLUSION

An analysis of the decision in *Cehave N.V.* v. *Bremer* in the context of the *Hongkong Fir Case* and its historical antecedents (including of course the Sale of Goods Act) reveals that the decision rests on reasoning the validity of which must be open to considerable doubt. Within *Cehave N.V.* v. *Bremer* itself the court's reasoning served the desirable function of allowing the gravity of the breach to determine the incidence of the loss between the parties. However, it is by reform of the Sale of Goods Act, and not by a re-interpretation of history, that the breach approach should become part of the law of the Sale of Goods. The problem of *ad hoc* judicial law reform is that it is apt to impose doctrines that, although performing well in the case before the court, pose difficult problems when considered in the context of the surrounding law. Surely it is more realistic to recognize that the Sale of Goods Act reproduced a literal nineteenth century approach to the classification of contractual terms and, being a codification of the law, stultified the law. We need a twentieth century Act, not just a twentieth century court.